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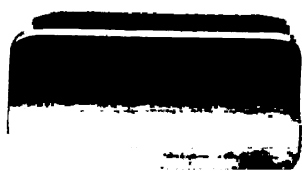
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NATIONAL REPORTER SYSTEM—STATE SERIES

THE PACIFIC REPORTER

VOLUME 198

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

JUNE 27 — AUGUST 15, 1921

ST. PAUL
WEST PUBLISHING CO.
1921

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(198 PAGES)

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FRED H. BLUME⁵¹ Resigned, effective May 1, 1921.² Qualified as Presiding Judge May 2, 1921.³ Appointed April 6, 1921.⁴ Died April 17, 1921.⁵ Appointed April 23, 1921.

COURT RULES

SUPREME COURT OF THE STATE OF NEW MEXICO

January Term, 1919

The following rules are hereby adopted as the rules of this court, effective September 1, 1919:

Rule I. DUTIES OF CLERK.

1. *Residence—Practicing Law.* The clerk of this court shall reside and keep his office at the seat of state government. He shall not practice law in any of the courts of the state.

2. *Original Papers.* The clerk shall not permit original papers or records to be taken from his office, or from the court room, without a court order.

3. *Calendar—Notice.* The clerk will make up the calendars for oral argument of cases, giving attorneys at least five days notice of the setting of cases in which they appear as record counsel.

4. *Decision—Notice.* Unless otherwise directed by counsel, the clerk will wire, collect, one attorney of record on each side of a case of the result of the decision of the court therein.

5. *Opinions—Attorney's Copy.* Immediately after an opinion is rendered in a case, the clerk will transmit one copy thereof to one counsel of record on each side of the case, without charge.

6. *Docketing Cases.* The clerk will enter cases on the docket in the order in which the transcripts on appeal and the order granting writs in cases of writs of error are filed in his office. The date of the allowance of the appeal or the issuance of the writ of error, together with the name of the judge who tried the case, will also be entered on the docket by the clerk.

7. *Binding Record—Costs.* The record in all cases in this court will be bound after final disposition has been made of such cases, and the clerk shall tax as costs in every case a sum not in excess of \$2.00 for the purpose of defraying the expenses incident to the proper binding of such records.

Rule II. DOCKET FEE.

1. *Advanced Costs.* Upon filing the transcript in appeal cases and the *præcipe* in cases of writs of error, the appellant or plaintiff in error shall deposit with the clerk the sum of twenty dollars as advance costs, the same to be applied to the payment of costs as they accrue. Additional sums shall

be paid by said party, upon request of the clerk, as the money on deposit for costs becomes exhausted. Upon the final determination of cases the balance of the deposits not consumed as costs shall be refunded to the party depositing the same together with the sum collected for the accrued costs from unsuccessful party.

Rule III. APPEARANCES.

1. *Filing.* Upon the filing of the transcripts in appeal cases and the order granting the writ in cases of error, counsel for the appellant or plaintiff in error must file with the clerk his written appearance. Counsel for the appellee or defendant in error must file his written appearance before he shall be entitled to be heard on the merits in this court.

2. *Foreign Counsel.* Counsel not admitted to practice law in this state shall not be heard in this court in any matter, unless resident counsel shall be associated with him or them.

Rule IV. TRANSCRIPTS.

1. *Typewritten—Preparation.* Typewritten transcripts must be prepared in accordance with the requirements specified in section 4 of rule 6 for briefs.

2. *Printed—Preparation.* When a party elects to print the transcript, the same must be prepared in accordance with the requirements specified in section 2 of rule 6 for printed briefs.

3. *Abbreviation of.* After once setting out in full the title of the case and the names of the parties, titles, headings and verifications in full shall thereafter be omitted. In lieu of full statement of the verification of pleadings the transcript shall show where the paper was verified and that it was verified in the usual form, naming the person verifying the same and the date of the verification, unless the *præcipe* shall direct that the record be not abbreviated in this manner.

4. *Violation of Rule.* No charge shall be made by the clerks of the district courts for the insertion of matter in the record required to be abbreviated as provided in the foregoing section, unless the *præcipe* requests the clerk not to so abbreviate said matters, and any such unnecessary matter embraced within a

transcript shall not be charged for by said clerks nor the cost thereof taxed in this court, or the district court, as costs against the unsuccessful party.

5. *Cross-Appeals.* When an appeal or writ of error is taken by both parties to the cause, a transcript of record filed by either party may be used in both cases and the cases shall be heard in the same manner as though separate transcripts had been filed in each case.

6. *Opinions.* The clerk of the district court shall include in all transcripts a copy of the written opinion of the district court in the case, whether called for by the *præcipe* or not.

7. *Translations.* Whenever any record transmitted to this court shall contain any matter in a foreign language, translations thereof, in English, made under the direction of the judge of the district court, shall be included in such record; otherwise the clerk of this court will return such record for correction in this respect.

8. *Original Papers.* Whenever a judge of the district court shall determine that original papers, or exhibits of any kind, in a cause should be inspected by this court, he shall make an order for the safe-keeping, transportation and return thereof as to him may seem proper, and this court will receive and consider such papers or exhibits in connection with the record of said case: Provided, however, that this section shall not be construed to dispense with the necessity of incorporating in the transcript copies of such papers.

9. *Voluminous Exhibits.* Voluminous exhibits and exhibits which are important only as to the fact of their existence, or as to portions of their subject matter, or as establishing a negative fact, shall not be included in full in the record, unless the trial judge otherwise orders; but a statement of their existence or substance, with so much of their contents as shall be necessary to a proper presentation of the point at issue shall be agreed upon by the parties, or settled by the trial judge, and included in record in lieu of exhibits in full.

Rule V. ASSIGNMENTS OF ERRORS.

1. *Filing.* Only one copy of typewritten assignments of errors shall be filed in the office of the clerk of the supreme court, except by leave of the court.

2. *Cross-Assignments.* Cross-assignments of error shall be governed in all respects as are assignments of errors generally.

3. *Amendments.* Assignments of errors shall not be amended after the same are filed, except by leave of the court, unless the amendment is to correct mere clerical errors.

Rule VI. BRIEFS.

1. *Printed or Typewritten—Optional.* Briefs may be printed or typewritten at the option of the party filing the same.

2. *When Printed—Requirements.* When a party elects to file printed briefs the same shall be legibly printed in black ink, in ten point type, on good unglazed paper thirteen and a quarter inches long and eight and one-half inches wide, with inside margin not less than one inch wide and with double leaded text and single leaded quotations. Quotations may be unindented in eight point type or indented in ten point type. The pages shall be consecutively numbered. Each printed brief shall be bound with paper of heavier weight than the stock, upon the cover of which shall be printed the title of the court and the cause, the number of the case, the designation of the brief and the name and residence of counsel for the party filing the same, and shall be printed on one side of paper only and bound at the top.

3. *Printed—Filing—Service.* When briefs are printed ten copies thereof shall be filed with the clerk and two copies shall be served upon adverse counsel within ten days after filing the same, and proof of service thereof shall be filed with the clerk.

4. *When Typewritten—Requirements.* Typewritten briefs must be written upon paper thirteen and a quarter inches long and eight and one-half inches wide and weighing not less than sixteen pounds to the ream, folio base seventeen by twenty-two inches, with left hand margin not less than one and one-half inches wide, the text to be double spaced, the quotations to be single spaced. Each copy shall have a cover page entitled, in typewriting, in manner specified for printed briefs, be typed on one side only and bound at the top.

5. *Typewritten—Filing—Service.* When briefs are typewritten four copies thereof shall be filed with the clerk and one copy shall be served upon adverse counsel within ten days after filing the same, and proof of service thereof filed with the clerk.

6. *Briefs in Chief—Filing.* Briefs in chief of appellant or plaintiff in error, in civil cases, including civil and criminal contempts, shall be filed with the clerk within thirty days after the filing of the assignments of error. In all other cases brief in chief of appellant or plaintiff in error shall be filed within thirty days after the filing of the transcript of record in this court.

7. *Briefs in Chief—Form.* Briefs in chief of appellant or plaintiff in error shall be prepared in substantially the following form:

- (1) Statement of the case.
- (2) Statement of facts.
- (3) Assignments of errors, where required.
- (4) Points, authorities and argument.

8. *Default in Filing Brief in Chief.* Where the appellant or plaintiff in error fails to file his brief in the time required by these rules, the adverse party, upon written motion therefor, may have the appeal dismissed or the judgment or decree of the trial court affirmed, unless good cause for such default be shown.

(193 P.)

9. *Brief in Chief—Defaults—Penalty.* Where record shows a default in filing of brief in chief thirty days, or more, the cause will stand submitted and independent of action on part of adverse party the appeal will be dismissed, and such dismissal shall not be set aside except for good cause shown and upon application made within twenty days of date of such dismissal.

10. *Answer Brief.* Answer briefs in civil and criminal cases shall be filed with the clerk within thirty days after service of brief in chief on adverse counsel.

11. *Preparation.* Answer briefs shall follow the same general manner of preparation as prescribed herein for briefs in chief.

12. *Defaults by Appellee.* Where the appellee, or defendant in error, fails to file his briefs as required herein, the appellant or plaintiff in error may submit the cause upon his brief and the appellee or defendant in error shall not be heard. For the purpose of enforcing this rule cases will be considered by the court any time after jurisdiction attaches.

13. *Reply Briefs.* Appellant or plaintiff in error may file a reply brief any time within ten days after being served with brief of appellee or defendant in error.

14. *Reference to Transcript.* A proposition urged in the briefs by counsel for either party to a cause, depending in whole or in part upon matter in the record, will be disregarded by the court where the brief does not specifically refer to the page upon which such matter appears in the transcript.

15. *Extension—Notice.* No extension of time to file briefs will be granted except upon reasonable notice to the adverse party. When extensions are granted the attorney securing the same shall notify the adverse counsel of such extension within five days after the same is granted.

16. *Extensions—Granting—Application—Protest.* Extensions of time to file briefs will not be granted as of course or of right, but only when supported by written motion setting forth good cause for the extension. No more than two extensions of time to file a designated brief will be granted to a party, unless exceptional good cause is shown. The adverse party may contest granting of application for extension, by appearing in person or by written protest, any time before extension is granted.

17. *Stipulations—Extensions—No Record.* Stipulations and understandings between counsel covering subject of extending time to file briefs, not of record and approved by the order of the court, shall be without force or effect.

18. *Tolling Time.* Filing motion to dismiss case or appeal and all motions or pleadings of a dilatory nature will toll time for filing briefs or pleadings, or taking other action in the case, until disposition is made of such motions or pleadings. Time to file briefs or

take other action, in such events, shall begin to run from date of disposition of such motions or pleadings and proceedings shall thereafter be governed as other cases under these rules.

Rule VII. ORAL ARGUMENTS.

1. *Sessions.* Sessions of court for purpose of hearing oral arguments will be held at such times as court shall direct.

2. *Ordering Argument.* The court will order oral arguments, without application therefor, in such cases as it deems such arguments essential.

3. *Application for.* Request for oral argument must be made by the appellant or plaintiff in error not later than the time his first brief on the merits is filed, and by the adverse party not later than when his first brief on the merits is filed. The request must be in writing. In absence of such request, in the time and manner provided for herein, a party will be deemed to have waived oral argument and the case will immediately stand submitted to the court for its decision on the briefs filed, unless the court shall otherwise direct.

4. *Identical Questions.* Two or more cases involving the same question may be heard together, by leave of the court.

5. *Advancing Cases.* Criminal cases and cases involving matters of general public interest or policy may be advanced for oral argument or decision by leave of the court and upon the motion of either party.

6. *Time of Argument.* Oral argument of one hour will be allowed to each side, unless the time shall be extended by the court. Not more than two counsel on each side shall be permitted to speak.

7. *Opening and Closing.* Appellant or plaintiff in error shall open and close the argument. Where there are cross appeals, the plaintiff in the court below will open and close the argument.

Rule VIII. REHEARINGS.

1. *Grounds.* A motion for rehearing must briefly and distinctly state its grounds, and will not be granted or permitted to be argued orally, unless a justice who concurred in the judgment desires it and a majority of the court so determines.

2. *Filing—Preparation.* A motion for rehearing may be filed any time within twenty days after the date of the rendition of the opinion of the court. The motion may be printed or typewritten and one copy thereof shall be filed with the clerk. One copy shall be served upon the adverse party or counsel in the time and manner required for the service of briefs.

3. *Briefs on.* At the time the motion for rehearing is filed, a separate brief supporting the same must be filed. Such brief may be printed or typewritten. Four copies thereof shall be filed with the clerk and one

copy served on adverse counsel or party in the time and matter required for briefs generally.

4. *Adverse Brief.* Within five days after the service of such motion and brief on the adverse party, the latter may file a printed or typewritten brief questioning the sufficiency of motion or meeting the merits of the motion. Four copies thereof shall be filed with the clerk and one copy served on the adverse party in the time and manner required for the service of briefs generally.

5. *Oral Argument.* Oral argument on motions for rehearing will be granted only by special application to and leave of the court.

6. *Procedure—When Granted.* When a motion for rehearing is granted the court will set a time for oral argument or filing briefs, or both, as the court may determine.

7. *Second Motion.* No second motion for rehearing filed by one party to the cause will be entertained, unless the court grants special leave to file the same.

Rule IX. MANDATE.

1. *Issue of.* When final disposition shall have been made of a civil case, mandate will issue upon the payment by either party of the costs in this court. Issuance thereof will not be withheld, unless good cause be shown therefor.

Rule X. MOTIONS.

1. *Typewritten.* Motions shall be typewritten and one copy shall be filed with the clerk.

2. *Briefs.* Whenever a motion filed in a case is directed to matter which may substantially effect the disposition of the case, the same must be supported by separate brief. Four copies of such brief and answer brief, if adverse party elects to file an answer brief, must be filed in cause and one copy thereof served on the adverse party within five days after the same has been filed. A motion of such a nature, not supported by a brief as aforesaid will not be considered by the court.

Rule XI. PROOF OF SERVICE OF PAPERS.

1. *Manner.* Proof of service of briefs and papers shall be made by a statement in writing of the attorney, or other competent evidence thereof in writing and shall be filed in this court.

Rule XII. WRITS OF ERROR.

1. *Supersedeas.* After praecipe for writ of error is filed, if the plaintiff in error, within the time limited by law after rendition of judgment in the court below, shall file the bond required for supersedeas or stay of execution, the clerk of this court shall, upon approving such bond, immediately certify the fact of his having received and approved said bond to the clerk of the district court wherein the judgment was rendered, and thereafter

execution of the judgment shall be stayed until the decision of this court is had in the premises. If execution shall have issued from the district court upon its judgment before the said certificate of the clerk of this court is received, the judge of such district court shall supersede the execution of such judgment upon application of any interested party, but such party shall be required to lodge the writ of error in the district court and to produce the said certificate of the clerk of this court before he shall have any supersedeas.

Rule XIII. CASES PROSECUTED FOR DELAY.

1. *Delay—Damages.* Where it shall appear that appeal was taken or writ of error sued out merely for delay and that same has delayed proceedings on judgment of trial court, damages shall be awarded to appellee or defendant in error in sum not in excess of ten per cent of amount of judgment of trial court.

Rule XIV. REMOVAL FROM STATE CORPORATION COMMISSION.

1. *Briefs.* When any cause is removed from the State Corporation Commission to this court and docketed, the party against whom the order has been entered, shall file four copies of a typewritten or printed brief with the clerk of this court and serve a copy of the same upon the opposite party or his attorney within thirty days from the date of filing of such order of removal in the clerk's office. The opposite party shall file and serve briefs in like manner within thirty days thereafter. Reply briefs shall be filed and served within ten days thereafter, whereupon said cause shall be placed upon the calendar for hearing.

Rule XV. PREROGATIVE WRITS.

1. *Application—Contents of.* In any application made to the court for a writ of habeas corpus mandamus, quo warranto, or for any prerogative writ to be issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it necessary or proper that the writ should issue originally from this court, and not from such other court, and the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, justice or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the petition shall also disclose the name or names of the real party or parties,

If any, in interest or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest, a true copy of the petition and of the writ issued thereon, and to file in the office of the clerk of this court evidence of such service.

2. *Petitions—Contents.* Writs of prohibition shall be applied for upon petition duly verified in the manner required for the verification of petitions in other cases. Such petition shall state in concise form the grounds upon which the application is made and shall be presented to the court, or a justice thereof. If the cause shown appears to the court or justice to be sufficient, a writ shall thereupon issue, which shall command the respondent to desist and refrain from further proceedings in the action or matter specified therein until further order of the court thereon, and to show cause on some day to be fixed in the writ, why he should not be absolutely restrained and prohibited from any further proceedings in such action or matter.

3. *Answer-Day.* The court or justice shall in said writ designate the answer-day and direct the manner of service thereof: Provided, however, the day fixed for the answer of the party to whom the writ is directed shall not be less than ten days after service shall be made; and provided, further, such service shall be by copy of the writ.

4. *Pleading to writ.* To the writ issued in accordance with section 3 of this rule, an

answer shall be made by the party against whom the writ issues: Provided, however, that in lieu of such answer such party may by demurrer or motion question the sufficiency of the petition filed, subject to the rules of pleading governing other proceedings under the Code of Civil Procedure.

5. *Hearing.* Upon the filing of the answer of the respondent, the court shall set a day for the hearing of the application for the writ and also fix a day for pleading to such answer, if such pleading is not already filed. Upon such hearing, the parties may introduce such evidence by affidavits, original files of the trial court or otherwise as they may desire or as may be required by this court.

6. *Judgment of the Court.* The court, after hearing the proofs and allegations of the parties, shall render judgment, either that a writ of prohibition absolute, restraining the respondent, shall issue, or that such writ be denied, and may make and enforce such order in relation to costs and charges as may be deemed just.

7. *Certiorari—Application—Service and Return.* Writs of certiorari shall be allowed upon application therefor, in writing, duly verified, unless the facts be admitted by the opposite party. Such writ shall be served and made returnable in such manner and within such time as the court shall order.

FRANK W. PARKER,

Chief Justice.

CLARENCE J. ROBERTS,

Justice.

HERBERT F. RAYNOLDS,

Justice.

*

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THE PACIFIC REPORTER

VOLUME 198

(185 Cal. 565)

SNIVELY v. RECORD PUB. CO. et al.
(L. A. 5787.)

(Supreme Court of California. April 25, 1921.
Rehearing Denied May 23, 1921.)

1. Libel and slander §48(2)—Newspaper privileged as to communications regarding public officers.

Under Civ. Code, § 47, subd. 3, declaring privileged a communication without malice, to a person interested therein, by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for communication innocent, a newspaper stands in "such relation" to the people of its community, with regard to publications therein concerning local public officers, as to afford "a reasonable ground for supposing its motive to be innocent," if the matter published has the other characteristics of a privileged communication; but this rule arises from the fact, not that the publication is made in a newspaper, but that the official conduct of public officers is a matter of public concern of which every citizen may speak in good faith and without malice.

2. Libel and slander §48(2)—Communication concerning a public officer may be privileged, although made to the public only.

A communication concerning a public officer, to be privileged, need not necessarily be made only to those having the power of removal or of appointment, but may be made to the public generally.

3. Libel and slander §48(2)—Privilege as to communication concerning public officer not destroyed because charge is false or charges commission of crime; "libel."

The qualified privilege, under Civ. Code, § 47, subd. 3, protecting communications concerning the acts of a public officer, is not lost merely because the charge complained of is false or because the communication charges the public officer with the commission of a crime, in view of section 45, defining a libel as a "false and unprivileged communication."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

4. Libel and slander §5—"Malice" may be inferred from falsity of charge.

The word "malice" in the provisions of the Civil Code upon the subject of libel and slan-

der means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as "a wrongful act done intentionally without just cause or excuse," or as "the absence of legal excuse"; and actual malice may be inferred from the publication of a defamatory charge that is false in fact and not within the realm of absolute privilege, defined in section 47, subds. 1, 2, and actual malice may also be inferred where the charge is false and is libelous per se, and the defendant publishes it without having probable cause for believing it to be true and such inference is sufficient to defeat the defense of qualified privilege.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

5. Libel and slander §5—Malice may be inferred from exaggerated manner of statement.

The manner of statement is material upon the question of malice, and if the facts believed by defendant to be true are exaggerated, overdrawn, or colored to plaintiff's detriment, or are not stated fully and fairly with respect to plaintiff, malice may be inferred from such circumstances alone.

6. Libel and slander §101(4)—Defendant, pleading qualified privilege, has burden of proving absence of actual malice, an essential thereof.

As absence of actual malice is an essential part of the defense of qualified privilege under Civ. Code, § 47, subd. 3, it is necessary, for a defendant pleading such privilege, to prove such absence of actual malice to sustain his defense.

7. Libel and slander §16—Cartoon held equivalent to a charge that plaintiff as chief of police had been guilty of accepting bribes or was ready to do so.

In an action against a newspaper for libel by chief of police a cartoon, depicting the chief as holding with his right hand a halo above his head and extending behind him his left hand, in which is apparently being deposited a sum of money tied to the end of a stick, held clearly a libel as having the natural effect to expose him to contempt, ridicule, and obloquy at the least, and as readily to be understood as charging that plaintiff had been guilty of accepting bribes or was ready to do so.

8. Libel and slander §110(3)—Plaintiff's bad reputation admissible in evidence.

In action by chief of police against a newspaper for a libelous cartoon, defendants had a right to prove that plaintiff's general reputation for efficiency and competency as chief of police was bad, such trait of his character being put in issue by the pleadings, and the cartoon being susceptible of an interpretation to the effect that he was inefficient and incompetent, and his general bad reputation upon any trait of character in issue being a proper subject of proof by defendants in mitigation of damages.

9. Libel and slander §110(3)—Proof of dereliction of duty of special policemen inadmissible in libel action by chief of police against newspaper.

In action by chief of police against newspaper for libelous cartoon, proof by defendants of offenses and dereliction of duty on the part of certain special policemen would not be relevant or competent, unless it was also shown that plaintiff had some knowledge thereof at the time, or that, after being informed thereof, he failed to take the proper action in regard thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by C. E. Snively against the Record Publishing Company and another. From judgment for plaintiff, defendants appeal. Reversed.

John H. Perry, of New York City, and Leon R. Yankwich, of Los Angeles, for appellants.

E. H. Allen, Vincent Morgan, and Porter, Morgan & Parrot, all of Los Angeles, for respondent.

SHAW, J. The defendants appeal from the judgment. The complaint purports to state a cause of action in damages for a libel published by defendants of and concerning the plaintiff. The alleged libel consisted of a cartoon published in a daily newspaper in Los Angeles, known as the "Los Angeles Record." The Record Publishing Company was the publisher, and Dana Sleeth was the editor of said paper. The complaint averred that the plaintiff was chief of police of Los Angeles at the time of said publication, and that said cartoon was "meant and intended by the said defendants, and each of them, to make the plaintiff appear ridiculous, dishonest, and unfit for public office"; that it was intended by the defendants to mean, and did mean, that the plaintiff, personally and as chief of police was posing and pretending to be honest and upright, whereas he was actually, personally, and as chief of police, dishonest, "and was receiving money secretly and surreptitiously * * * for unlawful

purposes and in violation of his oath of office"; and that it was intended to mean and did mean, and was understood by all persons who saw the cartoon and read the language therein to mean, that "the plaintiff was a grafter, to wit, a dishonest public official."

The answer admitted the publication of the cartoon by the defendants, as alleged, and that the plaintiff was then the chief of police aforesaid. It denied that the cartoon was meant or was intended by the defendants to make the plaintiff appear ridiculous or dishonest and unfit for public office, or that it was so understood by those who saw the cartoon and read the language therein. It also denies that defendants intended to or did mean that the plaintiff, as chief of police or personally, was posing or pretending to be honest, whereas he was personally and as chief of police dishonest and unfit to be chief of police, or that he was receiving money secretly or surreptitiously for unlawful purposes and in violation of his oath of office, or that the cartoon was so understood by those who saw and read it.

The answer further alleged as affirmative defenses: First, that the facts represented in said cartoon, so far as they relate to the plaintiff, were and are true in several particulars which it is unnecessary to state in detail, because this defense is not involved in this appeal; and, second, that the facts on which the cartoon was based were matters of public interest, because the plaintiff was then chief of police as aforesaid, that the Los Angeles Record was then a newspaper of general circulation, wherefore it was the right and duty of the defendants, as publishers and editor thereof, to inform the people of facts concerning the official conduct of the plaintiff and to draw inferences from such facts, and that the cartoon concerned the plaintiff solely in his official capacity and was published without malice.

At the time the case came on for trial the complaint contained allegations to the effect that the defendants acted with express malice toward the plaintiff in making the said publication concerning him, and claimed a large sum of money as punitive damages. At the opening of the trial the plaintiff by leave of the court struck out of the complaint the allegations relating to malice and the prayer for punitive damages. The trial was thereafter conducted upon the theory that no express malice was alleged, and that no punitive damages were prayed for.

The main contention of the defendants is that, since the charge of malice was thus wholly withdrawn from the case, and since the cartoon complained of related solely to the plaintiff in his capacity as chief of police, the publication was privileged. A libel is defined in the Civil Code as:

(193 P.)

"A false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45.

Section 47 of the Civil Code defines five classes of publications which are declared to be privileged. The present case, if it is privileged, falls within subdivision 3 of that section. This declares that—

A privileged publication is one made "in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Section 48 declares that in privileged communications coming within this class, "malice is not inferred from the communication or publication."

An important question arising from this definition of privilege as applied to the present case is whether or not the defendants, as publishers of the Los Angeles Record, a newspaper of general circulation in Los Angeles, in making the publication concerning the chief of police of that city, occupied the position of "one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent"; the persons "interested" in this case being the citizens of Los Angeles. We will discuss the law on the subject of privileged communications before taking up the question of the meaning and effect of the cartoon in question. It is apparent from these sections of the Code that if the cartoon complained of constituted a privileged communication by the defendants to the citizens of Los Angeles and was published without malice it was not libelous.

[1] It is apparently conceded by both parties that a newspaper stands in such relation to the people of the community in which it is published and circulated that, with regard to publications therein concerning local public officers, it comes within the scope of that part of subdivision 3, requiring "a reasonable ground for supposing the motive of the communication innocent," if the matter published has the other characteristics of a privileged communication. This is the correct rule, but it does not arise from the fact that the publication is made in a newspaper. It is based on the fact that the official conduct of public officers, especially in a government by the people, is a matter of public concern of which every citizen may speak in good faith and without malice. The privilege of the newspaper is in no wise different from that of any citizen of the community. *Palmer v. Concord*, 48 N. H. 216, 97 Am. Dec. 605. This is not

the universal rule, and in some jurisdictions it is not accepted, but we think the prevailing and better opinion is in accordance with what we have just said. *Walsh v. Pulitzer P. Co.*, 250 Mo. 153, 157 S. W. 328, Ann. Cas. 1914C, 985; *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; *Scripps v. Foster*, 41 Mich. 745, 3 N. W. 216; *Palmer v. Concord*, supra; *Mott v. Dawson*, 46 Iowa, 537; *Express P. Co. v. Copeland*, 64 Tex. 358; *Newell on Slander and Libel* (3d Ed.) § 633; *Odgers on Slander and Libel*, p. 193; *Folkard on Slander and Libel*, pp. 149, 171; 25 Cyc. 400, 403; 18 Am. & Eng. Ency. of Law, 1041; *Schomberg v. Walker*, 132 Cal. 229, 64 Pac. 290.

Since the conduct of public officers in the administration of their offices is a matter in which every citizen of the community which they serve is interested, the publication in question, if otherwise privileged, must be considered as one made to persons interested, and on an occasion which would ordinarily afford reasonable grounds for supposing that it was made from innocent motives. The publication, therefore, appears to come within this part of the definition of privilege as given in subdivision 3 aforesaid.

[2] It appears that the chief of police is not an elective officer, but is appointed by the Mayor of Los Angeles, and is not subject to recall, but may be removed by the mayor. There are some decisions which hold that a communication concerning a public officer which is not made to those having the power of removal or of appointment, but is made to the public generally, is not privileged. We are of the opinion, however, that this rule should not be followed. It is the result of ancient decisions made before the effect of popular government became fully appreciated. Every citizen has the right to apply to the mayor in such a case for the removal of an unfit or corrupt officer, and we are of the opinion that communications made in good faith and without malice to the public generally respecting the conduct of such officer, come within the spirit and purpose of the statute regarding privileged communications. They tend to promote knowledge concerning such officers, and give citizens a basis for their petitions to the mayor.

[3] The plaintiff contends that the privilege does not protect one in making a false charge against a public officer, however innocent the motive, and especially that it does not protect one who charges a public officer with the commission of crime.

There are many cases in this state and elsewhere which support this claim. The plaintiff relies on the decisions of this court in *Dauphiny v. Buhne*, 153 Cal. 759, 96 Pac. 880, 126 Am. St. Rep. 136, and *Jarman v. Rea*, 137 Cal. 350, 70 Pac. 216.

Jarman v. Rea, supra, was decided in 1902. The court below had instructed the jury that—

"A candidate for office is as much entitled to protection from defamation as any other citizen. Whoever charges him falsely with the commission of a crime, * * * must make good the injury thereby occasioned. He may not avoid this just responsibility by the claim that he acted in good faith without malice."

The opinion in the case states that "where a crime is imputed malice is presumed"; that the presumption is not rebutted by showing that the words were uttered in the belief that they were true, and that "nothing short of alleging and proving their truth will rebut the inference of malice." In support of these statements the court cited and quoted from *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757, *Seeley v. Blair*, *Wright* (Ohio) 358, 686, *Root v. King*, 7 Cow. (N. Y.) 613, *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102, *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329, *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212, and *Rearick v. Wilcox*, 81 Ill. 77. Each of these cases supports the opinion. The instruction was held to be a correct interpretation of subdivision 3 of section 47 of the Civil Code.

In *Dauphiny v. Buhne*, supra, the plaintiff was a member of the council of Eureka and a candidate for re-election. The publication complained of in effect charged the plaintiff with soliciting a bribe as a member of such council. The answer alleged that the publication was made without malice and for the promotion of the public interest and welfare. The evidence on the subject was, in effect, that the publication was made without malice, in the belief that it was true and for the information of the public. The trial court instructed the jury substantially in the language of subdivision 3 aforesaid, that if the publication was made as the above evidence indicated it was privileged. This was held to be error, and the opinion states that when a false charge of criminal misconduct is made against an officer, or a candidate for office, the publisher thereof cannot "escape liability on the ground that the charge was made with good intentions and for justifiable ends without malice, and under even an honest belief that the charge is true, and that the occasion of his candidacy called for its publication"; that "there is no privilege of publication under the Code, or general law, which will exempt one from responsibility for falsehood," and that "one can justify the publication of a libel against a candidate for office upon privilege only by proof that the accusation is true."

We are unable to reconcile these decisions with the aforesaid provisions of the Code on the subject. In denying a rehearing from the District Court of Appeal in *Adams v. Cameron*, 27 Cal. App. 641, 150 Pac. 1005, 151 Pac. 286, we refused approval of the doctrine stated in the above-mentioned cases, which

that court had followed. We take this opportunity of stating our reasons for holding those decisions erroneous.

Since a libel is "a false and unprivileged communication" (section 45), it follows that the publication must be both false and unprivileged in order that it shall constitute an actionable libel. The allegation and proof that it is true in the sense intended constitutes one defense. Allegations and proof that it was privileged upon any of the grounds set forth in section 47 also constitute a defense. The defense of privilege under subdivision 3 of section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the Code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the Code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and defense of privilege, and would render the defense of privilege entirely useless, since the proof that it was true would be a complete defense without proof of any other facts, and without proving the absence of actual malice.

Furthermore, the proposition that one is not liable for damage if, without malice, he states something to another which under the circumstances he is lawfully authorized to tell him, necessarily implies that the statement made may not be accurate; that is to say, that it may be untrue, but that under such circumstances the plaintiff cannot recover damages. This is the established law in many cases of privilege, and no question is ever made about it. For example, if one is about to employ a servant and inquires of a former employer about his character, the former employer is excused for any information he may give in answer to such inquiry, providing he makes the statement in good faith, believing it to be true, and without malice, although the statements may in fact be untrue. This is true in almost any relation where one person is under a duty to give information to another, and does so in good faith and without malice. The failure to give accurate statements does not of itself render him liable for damages in an action for libel or slander. Almost all the cases holding that the statement must be true are cases involving public actions in newspapers regarding public officers or candidates for public office. There is no just ground for any distinction between that class of cases and those above mentioned. The Code places them all under the same rule.

While there are many decisions in other

states which support the rule laid down in *Dauphiny v. Buhne* and *Jarman v. Rea*, there are others holding the contrary. In *Coleman v. MacLennan*, 78 Kan. 729, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390, the court said:

"We think a person may in good faith publish whatever he may honestly believe to be true and essential to the protection of his own interests, or the interests of the person or persons to whom he makes the publication, without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others."

In *Palmer v. Concord*, supra, the court says that one who makes a publication in a newspaper upon a privileged occasion "is not guilty of libel if the facts alleged were true, or if he had probable cause to believe, and did believe, that they were true." In *Mott v. Dawson*, supra, the words were spoken on a privileged occasion, and the court said that if they were spoken without malice, believing them to be true, and having reasonable cause so to believe, the defendant was not liable. This implies that they may have been false. In *Express P. Co. v. Copeland*, 64 Tex. 358, the court said respecting privileged publications, that they "must be confined to the truth, or what in good faith and upon probable cause is believed to be true" and that if the statements were false the defendant could only defeat the action by showing that they were made in good faith in the belief of their truth, and upon just and reasonable grounds for that belief. There are many other cases of similar import, and we need not multiply citations on the point. These decisions cannot be reconciled with the theory that it is always necessary to prove the truth of a publication in order to bring it within the defense that it was privileged. We are satisfied that *Dauphiny v. Buhne* and *Jarman v. Rea* went too far in declaring that a privileged communication must be true in order to make it privileged, and that they should be overruled so far as they so declare.

With regard to this form of qualified privilege, no logical distinction can be made between a false charge of crime and a false charge of any other fact of a defamatory character. The occasion and the relations between the one making the charge and those to whom it is made being such that the communication would be privileged, the right of the publisher to speak or write is complete and unqualified, under the Code, except that he must speak or write "without malice." When under these conditions he honestly believes that the person of whom he speaks or writes is guilty of a crime of a nature that makes the fact material to the interests of those whom he addresses, it is as much his right and duty to declare to them that fact as it would be to tell them any other fact

pertinent to the occasion and material to their interests. If the publisher of a newspaper honestly believes that a public officer has committed crime of a nature which would indicate that he is unfit for the office he holds, we think he is not liable for damages under the Code in a civil action for libel when, without malice, and so believing, he publishes a statement to that effect to the community served by the officer.

[4] The word "malice" in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as "a wrongful act done intentionally without just cause or excuse," or as "the absence of legal excuse." This was decided upon a very elaborate discussion of the subject in *Davis v. Hearst*, 160 Cal. 155-168, 116 Pac. 530. The court there held that—

"A full recovery in compensatory damages may be had under our civil law of libel without the pleading of malice, without the proof of malice, and without the existence of malice."

The court was careful to say that it was here speaking of express malice or actual malice, and not of the fictional malice referred to, which, in some jurisdictions, but not in this state, is held to be a necessary ingredient of libel. With regard to actual or express malice, it was decided that it was material only where the plaintiff alleged it in the complaint as the foundation of a claim for punitive damages, or where the defendant in his answer alleged the absence of such malice as one of the necessary conditions of the defense that it was a privileged communication under one or more of the three varieties of qualified privilege described in subdivisions 3, 4, or 5 of section 47 of the Civil Code. Actual malice was there defined as:

"A state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person," and * * * "the motive and willingness to vex, harass, annoy, or injure."

It was said that—

Such actual malice could be established either by direct proof of the state of mind of the person, or by indirect evidence so satisfying to the jury that they may from it infer and find the existence of this malice in fact; that the evidence "may be direct * * * going to declarations, acts, and conduct of the defendant, showing personal ill will toward the plaintiff, but it will more usually be indirect or inferred, * * * and to this end of proving malice inferentially all legitimate evidence is admissible bearing upon the general course of conduct of the defendant toward the plaintiff, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but

from which the existence may be logically inferred, herein including the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights."

It is further said that actual malice may be inferred from the publication of a defamatory charge that is false in fact and not within the realm of absolute privilege defined in subdivisions 1 and 2 of section 47. Actual malice may be inferred by the court or jury where the charge is false and is libelous per se and the defendant publishes it without having probable cause for believing it to be true, and such inference is sufficient to defeat the defense of qualified privilege. *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63; *Quinn v. Scott*, 22 Minn. 456; *Carpenter v. Bailey*, 53 N. H. 590.

[5] On the subject of actual malice it is important to note further that, while one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if he honestly believes it to be true, he is not by this rule given a license to overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject.

[6] Upon the trial there appeared to be some confusion concerning the issues involved, and in view of the necessity for a new trial it is proper to state our understanding on the subject. The plaintiff, as we have said, struck out of his complaint the allegations that the publication was made with actual malice, and the prayer for punitive damages. So far as the plaintiff's case was concerned, this eliminated the issue of malice, and he could recover without introducing any evidence on that subject. But by averring in their answer that the publication was on a privileged occasion and was made without malice, the defendants directly put in issue the question of actual malice. As absence of actual malice was an essential part of that defense, it was necessary for the defendants to prove such absence in order to sustain this defense. The withdrawal by the plaintiff of his claim for punitive damages and the striking out of the averments of actual malice from the complaint did not establish the fact that defendants published the cartoon without actual malice, nor excuse them from the necessity of proving absence of such malice, if they desired to establish that defense. Neither party appears to have understood this; the plaintiff's attorney an-

nounced that plaintiff "waived all malice", and the court said to the jury at the beginning of the trial that "malice has nothing to do with the case." The defendants introduced no evidence to show the absence of actual malice on their part in publishing the cartoon. The effect of the proceedings and remarks during the trial was equivalent to an admission that the publication was made without malice. If it had not been for this admission and the instructions of the court about to be stated, the jury would have been at liberty to have inferred actual malice from the cartoon itself.

[7] The court instructed the jury to the effect that it was for it to determine the meaning and effect of the cartoon, and that if it was reasonably susceptible of conveying to the ordinary person the meaning that the plaintiff was officially dishonest, or that he was guilty of accepting a bribe, or was ready to accept a bribe, then the publication was not privileged, and the plaintiff was entitled to recover compensatory damages. The answer did not attempt to state as a defense that the cartoon was true if it was susceptible of the meaning just stated, and no evidence was given to that effect. The court in giving these instructions took cognizance of the admission of the plaintiff that the publication was without malice, but assumed, on the authority of *Dauphiny v. Buhne*, supra, and *Jarman v. Rea*, supra, that there could be no privilege unless the charge made by the cartoon in the sense above stated was true, and that it was incumbent upon the defendants to prove such truth. Our conclusion in regard to this point demonstrates that the court erred in this instruction, and for this reason it is necessary to reverse the judgment.

The court further instructed the jury in effect that it could not consider the publication as privileged, and that it had nothing to do with that defense. This was evidently also based on the authority of the two cases last cited, and it was erroneous for the reasons above given.

The defendants earnestly insist that the cartoon is not susceptible of the meaning contended for by the plaintiff, and suggested by the court in the instructions above referred to, and claim that it did not refer to the plaintiff personally or officially except to suggest that he was incompetent and inefficient, and that so far as it suggested dishonesty or crime, it referred exclusively to a number of special policemen appointed by the plaintiff and detailed to attend upon certain places in the city during the nighttime, and that it was so understood by those who saw and read it. Upon this theory, the answer set up in justification that these special policemen were guilty of dishonesty and bribery, but it did not aver that the plaintiff participated there-

in or had any guilty knowledge thereof. Since we must order a new trial, it is proper to consider these claims and other objections to rulings made upon the trial.

The cartoon was as follows:

NEW HEADLINER IN HIS PROTEAN ACT



On its face this picture is clearly a libel upon the plaintiff as chief of police. Its natural effect would be to expose him to contempt, ridicule, and obloquy at the least. It is also obvious that it might readily be understood by any person who saw it as the equivalent of a charge that plaintiff had been guilty of accepting bribes or was ready to do so. We do not perceive how it could be otherwise understood by any person who had no knowledge of the alleged offenses of the special policemen mentioned in the answer, and we think that even a person who had some knowledge thereof would understand the cartoon to suggest that the plaintiff was a participant in or had a guilty knowledge of those offenses. It is unnecessary to dilate upon this point. A look at the cartoon is sufficient.

[8] The defendants had a right to prove that the plaintiff's general reputation for efficiency and competency as chief of police was bad. That trait of his character was put in issue by the pleadings, and the cartoon was susceptible of an interpretation to the effect that he was inefficient and incompetent. His general bad reputation upon any trait of character in issue was a proper subject of proof by the defendants in mitigation of damages. *Newell on Slander and Libel*, 3d Ed., p. 1068; *Hearne v. DeYoung*, 132 Cal. 362, 64 Pac. 576. We are not certain from the transcript whether this kind of evidence was excluded absolutely by the court below, or whether it was excluded because of the

fact that it was not understood that it was offered in mitigation of damages.

[9] Proof by the defendants of offenses and dereliction of duty on the part of the special policeman aforesaid would not be relevant or competent unless it was also shown that the plaintiff had some knowledge thereof at the time, or that, after being informed thereof, he failed to take the proper action in regard thereto. The court did not err in rejecting such evidence where it was admitted by counsel that they had no intention of following it up by proof connecting the plaintiff therewith.

As it may be necessary prior to a new trial for both plaintiff and defendants to amend their pleadings, it is unnecessary to consider here the objections made to the refusal of the court to allow the defendants to file a fourth amended answer.

A number of other rulings are objected to and presented in the briefs, but we do not find them of sufficient importance to justify a discussion thereof.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

(185 Cal. 621)

SAN FRANCISCO BAR ASS'N v. SULLIVAN. (Cr. 2347.)

(Supreme Court of California. May 5, 1921.)

1. Attorney and client §52—Accused called upon to meet only specific charges in proceeding for disbarment.

In a proceeding in the Supreme Court to disbar an attorney under Code Civ. Proc. § 287, subd. 5, the accused is called upon to meet only the specific charges made against him by the accusation, and the court is confined to the specific charges.

2. Attorney and client §49—Proceeding to disbar not criminal prosecution.

A disbarment proceeding is not a prosecution for crime.

3. Attorney and client §53(2)—Guilt must be clearly established in disbarment proceeding.

In disbarment proceedings, while it may not be necessary as in strictly criminal prosecutions that guilt be established beyond all reasonable doubt, a finding of guilt should be made only upon such proof as clearly and satisfactorily establishes guilt in the minds of the judges, and in such a proceeding all intentions should be in favor of innocence, and where two or more equally reasonable inferences may be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted rather than one leading to a conclusion of guilt, especially where the charge is accepting a bribe, a charge constituting

ing a felony involving the grossest of moral turpitude and subjecting offender to imprisonment in state prison and disqualifying him from holding any office in the state, under Pen. Code, § 98, and Code Civ. Proc. § 287, subd. 5.

4. Attorney and client — 53(2)—Evidence insufficient to show acceptance of bribe by a police judge in disbarment proceeding.

In a proceeding to disbar a police judge as an attorney and counselor for conduct involving moral turpitude consisting of accepting bribes, under Code Civ. Proc. § 287, subd. 5, evidence held insufficient to satisfy the court of the truth of the charges against accused.

Sloane and Lawlor, JJ., dissenting.

In Bank.

In the matter of the accusation of the San Francisco Bar Association for disbarment of John J. Sullivan, an attorney and counselor. Proceeding dismissed.

Max J. Kuhl, M. O. Sloss, John O'Gara, and Jos. J. Webb, all of San Francisco, for plaintiff.

Walter H. Linforth, Bert Schlesinger, and Lewis F. Byington, all of San Francisco, for defendant.

ANGELLIOTTI, C. J. This is a proceeding instituted in this court for the disbarment of John J. Sullivan, an attorney and counselor, for conduct involving moral turpitude. Defendant was at all the times mentioned in the accusation one of the police judges of the city and county of San Francisco, and all the charges against him are for acts and conduct on his part with relation to matters coming before him as such police judge; our law providing that an attorney and counselor may be removed "for the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise." Subdivision 5, § 287, Code Civ. Proc. Three separate, specific charges against the accused are made by the accusation. Each charge involves the most serious accusation that can be made against a judicial officer, viz. that of agreeing to receive and receiving money upon the corrupt understanding and agreement that his official conduct shall be thereby influenced. All of the charges were denied by the accused by verified answer filed herein. This court retained jurisdiction of the matter instead of transferring it to a District Court of Appeal, because of the seriousness of the charges and the official station of the accused. By order of the court, the evidence in support of and against the charges was taken by the Chief Justice, and the transcript of the evidence so taken has received the careful consideration of each member of the court.

[1-3] No serious question of law is present-

ed. It is conceded, of course, that by this accusation the accused was called upon to meet only the specific charges made against him therein, and that we are confined to those specific charges, viz. agreeing to receive and receiving money upon the corrupt understanding alleged, in the matters and proceedings specified in the accusation. No other misconduct is alleged in the accusation or included in the charges filed. On the other hand, it is clear that, if it is satisfactorily shown that with regard to any of the proceedings specified in the accusation the accused either agreed to receive or received any money upon any such corrupt understanding as is alleged, the accusation should be held to be sustained and the accused disbarred. Some question is raised as to the degree of proof essential to warrant a conviction; i. e., whether the rule applicable in criminal prosecutions that guilt must be shown beyond all reasonable doubt obtains in such a proceeding as this. So far as appears, this precise question has never been determined by this court. A disbarment proceeding is not a prosecution for crime. In some states, however, it has been held that the charges must be proved beyond a reasonable doubt to warrant disbarment. In discussing a question of the sufficiency of an accusation this court has said:

"This accusation is in the nature of a criminal charge, and all intendments are in favor of the accused. The accusation is not sufficient if, all its statements being true, the accused could be innocent." *Matter of Haymond*, 121 Cal. 385, 388, 53 Pac. 899, 900.

And again:

"A judgment against the respondent will deprive him of personal and property rights. Unless we are clearly satisfied of respondent's guilt, we ought not to remove or suspend him from the practice of his profession. As we are not so satisfied, we decline to strike his name from the roll." *Disbarment of Houghton*, 67 Cal. 511, 517, 8 Pac. 52, 57.

This, of course, means that something more than the mere preponderance of proof that will suffice in the ordinary civil cause is essential. While we may concede that it may not be necessary, as in strictly criminal prosecutions, that guilt be established beyond all reasonable doubt, we are satisfied that a finding of guilt should be made only upon such proof as clearly and satisfactorily establishes guilt in the minds of the judges. It seems, furthermore, clear that in such a proceeding all intendments should be in favor of innocence, and that, where two or more equally reasonable inferences may be drawn from a fact shown, that inference leading to a conclusion of innocence should be accepted rather than one leading to a conclusion of guilt. In re Application of Alame-

da County Bar Association, 35 Cal. App. 534, 538, 170 Pac. 432. Especially does this seem true where the charge is of acts constituting a felony involving the grossest of moral turpitude, and a conviction of which in a strictly criminal prosecution not only subjects the offender to imprisonment in the state prison, but also forever disqualifies him from holding any office in this state. Section 98, Pen. Code.

The specific charges contained in the accusation are as follows:

First. That in two felony matters pending before him as a committing magistrate, each against one Bernardino Catterini, charged with assault with a deadly weapon with intent to commit murder, the accused, on or about January 12, 1918, did agree to receive and did receive \$150 in money, "as a bribe, from one Peter P. McDonough, upon the corrupt understanding and agreement" between him and said McDonough that he, as such police judge, should thereby be corruptly and unlawfully influenced in his decision of said two cases, and that he was thereby corruptly and unlawfully influenced and dismissed said cases corruptly and unlawfully. This matter will hereinafter be referred to as the Catterini matter.

Second. That on or about September 23, 1918, while one Tony Spinelli was in custody on a charge of assault with intent to commit murder, the accused agreed to receive and did receive \$50 in money from one C. Vincent Riccardi upon the corrupt understanding and agreement between himself and Riccardi that his action and decision in the matter of the approval of a certain bail bond for \$5,000 signed by Angelo Cosenza and Malina Cosenza then presented should thereby be corruptly influenced, and that he should in return for said money approve said bond and order the release of Spinelli from custody, and that he was thereby corruptly influenced to do so, and did approve said bond and make said order for release. This matter will be hereafter referred to as the Spinelli matter.

Third. That in a misdemeanor prosecution against one Pastiangio, who was charged with violating the provisions of an ordinance prohibiting lewd and lascivious acts, the accused, on or about November 28, 1919, agreed to receive and did receive \$40 money as a bribe from said Riccardi, upon the corrupt and unlawful agreement between them that in return for said money he would discharge said Pastiangio from custody upon his own recognizance immediately after finding him guilty and sentencing him to 90 days' imprisonment in the county jail, all of which he did. This matter will be hereinafter referred to as the Pastiangio matter.

At the outset it should be stated that as to all the charges the only direct evidence of

guilt of the accused is that of one C. Vincent Riccardi, who was at all the times referred to in this proceeding a duly admitted attorney and counselor at law. Probably no witness has ever appeared before a judicial tribunal who was shown to be less worthy of credit in the absence of substantial corroboration than this witness. According to his own testimony, he was for many months a voluntary and active participant, for his own private and personal financial gain, in a system of disposing of matters in the police courts of San Francisco by the bribery of judges thereof, and he was the instigator and prime mover in the particular corruption charged against the accused in this proceeding. That his reputation for truth, honesty, and integrity in the community in which he lived is bad is established by many reputable witnesses, and not denied. Moreover, a motive for the giving by him of sensational evidence relating to conditions in the police courts is most clearly apparent. Early in the year 1920 he was convicted of felony embezzlement in the superior court of San Francisco, and on such conviction adjudged to suffer imprisonment in the state prison. His activities in the matter of disclosures relative to police court conditions immediately followed such conviction. His imprisonment on such conviction was postponed by an appeal, and he has been at large on bail. At the time he testified before this court the judgment had not become final. It had been affirmed by the District Court of Appeal, but the matter was still pending on application for hearing in this court. In all his activities in the matter of disclosures he has known that in the event of the affirmation of the judgment against him his only chance of escape from imprisonment was the granting of executive clemency. His own testimony on this matter showed very clearly that he fully realized that by giving the character of sensational evidence relative to corruption in the police courts that he was giving before the grand jury, the bar association committee, and in this proceeding he might create the feeling that he was rendering so great and impressive a public service as to make a pardon in his own matter a proper recognition and reward. That he had such a hope he freely admitted, as well as that, by reason of his disclosures, he had already received some assurances of friendly interest. Of course, these were given him in view of a belief on the part of those giving them that he was telling only the truth. But it is obvious that he fully realized that no movement for executive clemency in his own behalf could be inspired by a story on his part that was devoid of sensational exposure of official corruption. Hence we find here the strongest kind of a motive for false accusation against the police judges. We think it is self-evident that no statement of

this witness can be accepted as true simply because he testifies to its truth. It may or may not be true, but, uncorroborated, it cannot produce conviction in an unprejudiced mind.

With these observations we proceed to discuss the evidence relative to the various charges, taking up first the Pastiangio matter.

Pastiangio was first charged with a felony in having violated section 288 of the Penal Code. The matter was pending before accused as a committing magistrate, and Riccardi was acting as his attorney. The matter was heard on November 13, 1919, Mr. Maundrell, assistant district attorney, appearing for the people, and Riccardi for the defendant. But one witness was presented by the prosecution, the girl upon whose body the alleged acts were charged to have been committed. According to her testimony, she was 3 months and 2 days short of being 14 years of age at the time of the commission of the alleged crime. Her testimony being concluded, further hearing was continued until November 17, 1919. On that day when the matter came on for further hearing, Mr. Maundrell said:

"From the testimony of the complaining witness in this case the prosecution fails as far as section 288 of the Penal Code is concerned. And at this time I will recommend that the defendant be arrested under Ordinance 1059," an ordinance prohibiting any lewd, indecent, or obscene act or conduct, and making a violation of its terms a misdemeanor.

The accused then announced that the felony charge would be dismissed, and continued the matter for dismissal to the next day, presumably to give time for the institution of the misdemeanor prosecution. On the next day the dismissal was made by the accused. A prosecution under the ordinance was instituted, and it was in relation to the disposition of this prosecution that the bribe was alleged to have been agreed to be given and accepted. The only direct evidence as to this is that of Riccardi. He is rather vague and indefinite as to the time when the agreement was made, except that he said several times it was before "the dismissal," by which he must mean the dismissal of the felony charge, for this was the only "dismissal" in that matter. In fact, Riccardi testified on direct examination here that the agreement between him and the accused included the dismissal of the felony charge, but subsequent testimony on cross-examination would indicate that his alleged talk with the accused about the matter was during the pendency of the misdemeanor prosecution. This dismissal, we have seen, was recommended by the prosecuting officer for failure of evidence to establish the crime alleged under section 288, Penal Code. Substantially the alleged agreement was that in return for \$40 to be paid to the accused judge Pastiangio was to

be given what was called "a suspended sentence," meaning that, although he was to be found guilty and sentenced, execution of that sentence was to be suspended. The misdemeanor case was subsequently submitted to the accused judge upon evidence conceded to be the same as that given upon the felony charge, a transcript of which is in evidence here. The accused found the defendant guilty, sentenced him to 90 days' imprisonment in the county jail, and suspended execution of sentence. Riccardi says that while the case was pending he agreed to give the accused \$40 in this matter in payment for such action on his part, and that on the day the matter was disposed of he gave him the money. The accused denies absolutely any arrangement whatever with Riccardi in the matter, and denies that he was paid any money by Riccardi.

The only pretense of corroboration of Riccardi's evidence which is here claimed is the action of the accused in the Pastiangio case in view of the evidence given therein, and his statements on cross-examination here as to his reasons for suspending execution of the judgment. Of course, it is not claimed that mistakes in acts and decisions of a judge that may reasonably be attributed simply to bad judgment or even gross carelessness in the discharge of official duty constitute evidence of bribery of the judge. And yet, at best, we have no more here in regard to the disposition of the Pastiangio matters. The dismissal of the felony charge was asked by the prosecuting attorney, as to whom there is no insinuation of misconduct. There was room for an honest difference of opinion as to whether the special offense defined by section 288, Penal Code, was sufficiently shown by the only evidence produced, presumably the only evidence obtainable, to warrant holding the defendant for trial thereon in the superior court, and the situation was such that not even a suspicion of corrupt influence arises from the mere act of the accused in acceding to the request of the prosecuting attorney.

As to the suspension of execution of the judgment in the misdemeanor matter, the law of this state authorizes such action, and we know that it is a course very frequently, perhaps too frequently, followed. Whether or not in any particular case the circumstances are such as to warrant such a disposition is peculiarly one for the trial judge. Personally we should feel that, if Pastiangio was guilty of soliciting this girl by word or act to engage in lewd, indecent, or obscene conduct with him, the case was not one for suspension of execution of the judgment. But we cannot say from the evidence before us that the accused did not in good faith consider it a proper case for such action. Some of his reasons for his action in this case given in justification when being pressed by able counsel on cross-examination in this

court certainly do not appeal to us as being good reasons. It is, however, only fair to the accused to say that among his reasons given for suspending execution of the judgment was that in view of the testimony of the girl, and the manner of her testifying and the circumstances of the case generally, he was not satisfied of the guilt of the defendant, and further that neither the prosecuting officer nor the arresting officer objected to the course followed. We cannot find in either his conduct in the case or in his testimony any corroboration of Riccardi's evidence with relation to a bribe. As we look at the matter, in so far as agreeing to accept or accepting a bribe is concerned, it is simply Riccardi's word against that of the accused, with the result that we are not satisfied of the guilt of accused of the offense charged.

As to the Spinelli matter: Spinelli had been arrested on a charge of assault with intent to commit murder. The matter had been assigned to Police Judge Brady's department, and application was made by Riccardi to the accused at his residence during the evening of September 23, 1918, to approve a \$5,000 bond offered for the release of Spinelli. Riccardi testified that during the day he had arranged with accused to meet him at his home that evening, both to fix the bail at \$5,000 and to approve the bond offered, and that he was to pay him \$50 for so doing. The accused testified that he had heard nothing about the case until Riccardi with others called at his house that evening and requested approval of the bond. He further testified that according to his recollection Judge Brady had fixed the bail at \$5,000. There is no evidence other than Riccardi's as to the fixing of the bail by accused, or as to any previous arrangement with accused for the approval of the bond. It is a common occurrence for police judges to approve bail bonds out of office hours at their homes. Riccardi, who had the bond prepared at his office, even to the signatures of the sureties, went with the sureties to the home of the accused and proffered the bond to the accused with a request for its approval. It was approved by accused, who affixed his signature either then or the next day to the jurat on the affidavit of each surety, and also to the certificate of acknowledgment and approval, signed an order for release, which he gave to Riccardi, and retained the bond. Riccardi testified that in pursuance of his agreement he then gave the accused \$50, and the accused testified that there was no arrangement for any payment and that no money was paid. As to this it is simply Riccardi's word against that of the accused. The only alleged corroboration of Riccardi's testimony is in the circumstances attendant on the approval of the bond. Riccardi testified that the accused did not examine or swear the sureties, and one of the sureties, Angelo Cosenza, whose

knowledge of the English language was so defective that he was compelled to testify through an interpreter, testified that the accused said nothing to him and talked only to Riccardi. The accused testified that he must have sworn the sureties, as this was his universal custom. We are not prepared to hold that he did not purport to do this in the informal way that unfortunately is adopted very often by careless officials, so informal in fact in some cases as to fail to bring to the knowledge of the witness the fact that an oath is being administered. It is admitted by the accused, however, that he did not examine the sureties as to their sufficiency, confining his questioning to Riccardi and relying wholly upon Riccardi's assurances as to their sufficiency and qualification. He apparently believed that he was fully justified in so doing. In thus doing he was guilty, of course, of gross neglect of duty. Nor could he have carefully examined the bond, for a reading of the affidavits of the sureties, who were husband and wife, disclosed that the property described in the affidavit of each as "his property" that "stands of record in his name," and stated to be of the value of \$9,000, was the same identical property, a lot in San Jose. Cosenza testified here that this property was worth only \$2,000, and an examination by the accused of the sureties would doubtless have disclosed that fact. But this is not a proceeding against accused based upon a charge of neglect of official duty. The question is whether, in view of Riccardi's testimony, it sufficiently warrants an inference of the alleged bribery. We are perfectly satisfied that it does not. It may much more reasonably be attributed to a careless method of transacting official business, in acting solely upon the assurance of another in lieu of the personal investigation that a proper conception of official duty and responsibility requires. To our minds it affords no evidence whatever of the specific charge of bribery, with the result that as to the bribery charge we have nothing but Riccardi's word, and are not satisfied of the guilt of the accused thereof.

As to the Catterini matter: The charge here is that accused agreed to receive and did receive \$150 from one Peter P. McDonough, upon the corrupt agreement between them (McDonough and accused) that his conduct in such matter should be influenced thereby. Riccardi was the attorney for Catterini. His dealings in the matter of the alleged corrupt arrangement were with McDonough alone, his testimony being to the effect that, there being \$1,500 obtainable from Catterini, he arranged with McDonough that the latter should have the bail fixed at \$1,000 cash, and the case subsequently dismissed, and that the \$1,500 should be divided, \$500 to McDonough, \$500 to the accused, and \$500 for himself. McDonough testified that there

was no arrangement relative to the case between himself and Riccardi, except that in the course of his business as a bail bond broker he at the request of Riccardi, and for the usual commission of 10 per cent., furnished the bail money. He further testified that he never spoke to the accused about the case and never paid him any money on account thereof. The accused testified that McDonough never spoke to or communicated with him about the case and never paid him any money on account thereof. According to his own testimony, Riccardi's only talk with the accused about the matter was some time after the dismissal, when he asked him how much McDonough gave him in the Catterini matter, and the accused, on being told by Riccardi that he was to receive \$500, said that McDonough gave him only \$150. The accused denied that any such conversation occurred.

Catterini was arrested the evening of January 1, 1918, voluntarily surrendering himself into the custody of an officer on learning that he was being looked for on two charges of assault with intent to commit murder, alleged to have been committed between 12 and 1 a. m. of the same day.

On January 2, 1918, bail was fixed by accused on the two charges at a total of \$2,000, or \$1,000 cash, and, the cash being deposited, Catterini was released from custody at 11:55 a. m. According to Riccardi's uncorroborated word, he had asked the accused to fix the bail, and accused had declined to do so at the moment, in view, as he stated, of the seriousness of the charge, and Riccardi had then gone to McDonough and solicited his assistance, with the result that the bail was fixed. The order fixing bail was filled in, except for the amount, in the handwriting of the clerk of the court, a Mr. Hagan, who testified that he had never made out an order fixing bail unless the court was in session. The amount and signature of the judge are in red ink, and the accused testified that he knew the signing was done in court for the reason that all signatures while on the bench were made in red ink, and all while off the bench in black ink. He further testified that he fixed the bail at Riccardi's request. There is absolutely nothing to show any communication, direct or indirect, from McDonough to accused prior to the making of such order, except in so far as one may speculate in view of the intimate relations existing between accused and McDonough and the amount of bail fixed. To hold that there was such communication would be to indulge in the purest of guesswork. Certainly we may not in a judicial proceeding fairly infer therefrom any arrangement between them for a bribe. It is as reasonable to infer in view of the circumstances we have stated that the bail was fixed in court solely at Riccardi's request, as testified to by the accused, as it is to infer

that this action was had because of some possible communication from McDonough.

Riccardi's testimony as to the amount of money paid by Catterini is flatly contradicted by that of Catterini, who impressed the court as honestly endeavoring to tell the truth. He said that he paid \$225 in cash and Liberty bonds, and \$800 on a note that he signed on January 12, 1918, being \$1,025 in all. He also contradicted Riccardi as to ever having been taken to McDonough's place of business, testifying that he never saw McDonough until long after the dismissal of the charges against him. There is some corroboration of Riccardi's testimony as to having some sort of arrangement with McDonough to be found in the fact that the \$800 note signed by Catterini was payable to Mrs. Riccardi (the mother of Riccardi) and McDonough jointly, although McDonough testified that his connection with the matter was solely for the purpose of accommodating Riccardi in obtaining cash for his fee, and that he received \$80 for his indorsement of the note and the giving of his name as security. This was in addition to the \$100 which he received for furnishing the \$1,000 cash bail on which Catterini was released. But, whatever the arrangement between Riccardi and McDonough, no conclusion adverse to the accused can be based thereon in the absence of evidence connecting him with the matter.

Catterini having been released on bail, the hearing on the charges was continued from time to time, testimony being taken on several of the days on which the matter came on for hearing, until finally, in April, 1918, the charges were dismissed by the accused. At these various hearings the people were represented by an assistant district attorney, Mr. Maundrell. The case was fully heard, and nothing out of the ordinary course of procedure appears in the transcript of the proceedings. Some point is made of the fact that the accused, with the attorneys, went to the hospital to take the evidence of the woman who, it was alleged, was shot by Catterini. To our minds there is absolutely nothing, except the testimony of Riccardi, to indicate that this was done at the instance of McDonough, or otherwise than in regular course. When the taking of testimony was fully concluded, the matter was submitted to the accused for decision. The transcript of the proceedings is before us, and it shows that at that time the following occurred:

"Mr. Riccardi: We have not any further evidence, your honor.

"Mr. Maundrell (assistant district attorney): The case of the people is in this matter.

"The Court: How do you feel about it yourself, Mr. District Attorney?

"Mr. Maundrell: There is a question in my mind that there might be a probable cause for a holding. I will submit the matter to the court.

"The Court: There is a question in my mind, and it is reinforced by the fact that the de-

fendant surrendered himself. That isn't ordinarily the act of a guilty man, nor is it indicative of a consciousness of guilt. The identification by the complaining witness, or the injured person, is entirely unsatisfactory, and the identification of a necktie and pin and a pair of shoes. It seems that a person who was present committing an act of that character would have rendered some other mark of identification which could have been made more complete and satisfactory.

"Mr. Maundrell: I understand there is a \$10,000 damage suit upon file against the man three weeks ago.

"Mr. Riccardi: He has property. He will pay if he loses. That is what they wanted in the first place.

"The Court: Dismissed."

It appears from the foregoing that the assistant district attorney was doubtful as to the advisability of holding the defendant for trial in the superior court, and certainly did not urge or request a holding. It appears from his evidence given in this proceeding that he, as prosecuting officer, talked with the accused in his chambers that morning before the case was dismissed as to what should be done with it, and a fair reading of his evidence here indicates that it was his recollection that he then expressed to the accused his doubts as to the propriety of a holding for trial. The question in the cases was as to the identity of the man who in fact made the assaults; the defendant denying that he was that man. There was positive identification by the woman assaulted and her little daughter, the other person assaulted, but this was somewhat weakened by matters educed on cross-examination, and there were also one or two other circumstances pointing to defendant as the guilty party. On the other hand, there was an apparent absence of motive on the part of defendant, good evidence as to his reputation for honesty, integrity, industry, peace, and quiet, his absolute denial of the charge, and some evidence in support of his claim that he was elsewhere when the assault was committed. It also appeared that a civil action for damages on account of this assault had been instituted against him and was then pending. From the cold record of the evidence given on the preliminary examination it would seem to us that a committing magistrate might well have concluded that there was probable cause for holding defendant for trial before a jury. But the record of proceedings before accused is not such as to satisfy us that the accused did not in good faith think otherwise. It seems that the assistant district attorney who conducted the case, and who consulted during the course of the proceeding with a private attorney interested in the prosecution who attended the proceedings, thought otherwise, and the police court transcript in the case is not such as to warrant the inference of improper influence upon the accused in the matter, and

much less the conclusion that his action was due to an agreement for a bribe.

But one other alleged item of corroboration remains to be noticed. The evidence does disclose an unfortunate and deplorable intimacy between accused and McDonough, one certainly calculated to bring the accused and his court into disrepute. The two had been friends for many years; the friendship dating from a time long prior to the accession of the accused to the police bench. McDonough has been for many years engaged in the business of furnishing cash bail for persons charged with public offenses, especially in the police courts, and his volume of business in the police courts was very large. By reason of the character of his business he was necessarily much interested in the fixing of bail for defendants, and also likely to be interested on occasions in the final disposition of their cases. The friendship of earlier years continued after accused became police judge, something as to which, of course, no one can justly complain, but it was accompanied by an intimacy which, in view of the nature of the business of McDonough and its association with the matters with which the accused was called upon as a judicial officer to deal, was almost bound to create suspicion of improper influence. Indeed, the intimacy was of such a character that, according to the evidence of both McDonough and accused, McDonough had occasionally presumed to speak to accused about some "misdemeanor" case pending before him, never a "felony" case, they said, but occasionally some small misdemeanor case, involving some friend, such, for instance, as an alleged violation of the law regulating traffic on public highways. In so far as the matter of gross impropriety is concerned, we must confess we can see no distinction between such conversations with relation to misdemeanor cases and conversations with relation to felony cases, and we doubt if the line between the two classes would be sacredly observed by a judge and another person whose relations were such that they discussed any matter at all pending before the judge. The confessed showing in regard to this is such that we may feel that in the Catterini matter, or, indeed, in any other matter coming before the accused that might be under inquiry, McDonough may have spoken to the accused with a view to influencing his action. There is nothing in the record, however, upon which to found such an inference with reference specifically to the Catterini matter except the possible interest of McDonough therein, in view of the testimony of Riccardi and the testimony concerning the note given to Mrs. Riccardi and McDonough. In any event, with nothing tangible in the conduct of accused with relation to the case to indicate the presence or effect of improper influence, we are not warranted in inferring anything in the nature of an agreement on

his part to accept a bribe or the acceptance by him of a bribe in that matter, or even that he was in any way improperly influenced therein. In so far as he is concerned, the only evidence to connect him with any misconduct in that matter is the absolutely uncorroborated evidence of Riccardi as to an admission by him that he received \$150. That uncorroborated evidence absolutely fails to produce even the slightest measure of conviction in our minds. The specific charge against accused with relation to the Catterini matter must be held to be not proved.

[4] None of the specific charges against accused having been sustained by evidence sufficient to satisfy us of its truth, it follows that the order to show cause must be discharged, and the proceeding dismissed, and it is so ordered.

We concur: SHAW, J.; LENNON, J.; WILBUR, J.

OLNEY, J. I concur in the judgment and the majority opinion, but, in order to prevent so far as possible any misunderstanding, I would epitomize what, as I understand it, is the final attitude toward the cause of the majority of the court and what is certainly my own attitude.

The question involved is, of course, purely one of fact, and is to be determined by each of us in accordance with the final impression made upon his mind by the evidence. The impression made upon my mind is one of very strong suspicion that the defendant was guilty in the Catterini case, at least of the act of corruption with which he was charged. But mere suspicion, even a strong one, is not enough to warrant a positive finding of guilt, and I find that, in spite of the strength of the circumstance to which Justice LAWLOR adverts, the dismissal by the defendant of the charge against Catterini in the face of the direct evidence against him presented to the defendant, I have not that certainty of conviction which would justify me in affirmatively finding the defendant guilty of corruption. Though this is my final conclusion, I feel free to voice my suspicion of the defendant in view of the wholly inexcusable manner in which he performed his judicial duties in general and conducted himself in particular in his relations with McDonough, who from the very nature of his business must have constantly appeared before the defendant, directly, and indirectly, as an applicant in matters of bail where it was so easy for the defendant to dispense, not impartial justice, but judicial favors with or without a monetary consideration.

SLOANE, J. I dissent. If satisfactory proof of the specific offense of accepting a bribe is necessary to the disbarment of the accused under the charges in this proceeding, I would be compelled to concur in the majority opinion. The only direct evidence

of such bribe-taking rests on the testimony of Riccardi, and his unsupported word can carry little or no weight, and, as to the actual passing of any money between the parties here there is no corroborating evidence.

But the gist of this accusation for disbarment is not the crime of bribery, but the commission of an act of moral turpitude in the manner of disposition of certain criminal cases pending in the court over which the accused presided, and if the acts complained of are shown to have been influenced by some other corrupt motive than that of bribery, the variance in the proof in that respect ought not to defeat a judgment.

The substance of the charges here, taking the Catterini case as an example, is that in certain felony matters pending before him as a committing magistrate the respondent was corruptly and unlawfully influenced by a bribe in his decision and disposition of said cases.

Now, bribery is not the crux of the matter, but rather the gravamen of the offense is the moral turpitude of disposing of these cases under the influence of some corrupt motive. Bribery is merely an incident of the charge, which is fully met by the proof, if it is satisfactorily established, of some motive for the wrongful act not in itself unlawful. The accused might, for instance, have been charged with favoring the defendants as a simple act of personal friendship to them or their attorneys or sureties. Friendship is a very commendable trait in itself, but as a motive for disposing of criminal prosecutions by a magistrate it would involve an act of moral turpitude. The motive charged here happens to be bribery, a criminal act in itself, but that is not the controlling element of the accusation.

The purpose of the proceeding here is not to convict the respondent of bribery, or of any other specific criminal act, but of wrongfully administering his official duties in the particular matters charged, under some corrupt influence involving moral turpitude.

I have no question under the evidence that the respondent under some or all of the charges filed disposed of the matters before him in conscious disregard of his duties as a magistrate. The array of incriminating circumstances is too strong and convincing to be disposed of on the mere ground of coincidence. They strongly tend to corroborate Riccardi's testimony in support of some sort of a prearranged program, and, when thus supported, Riccardi's testimony, although that of a self-confessed criminal, may not be wholly disregarded.

Whether this program for the discharge of the various defendants was influenced by bribery, or politics, or favoritism, or friendship, is entirely immaterial. With any motive other than a purpose to faithfully discharge official duty it involved moral turpitude.

We do not even need to resort here to the analogy of the criminal procedure which incorporates the lesser offense within an information charging the greater. If the defendant were on trial for murder alleged to have been committed for pay, could it be held a fatal variance if the proof showed the act was committed for revenge? At any rate, there can be no room for such technicality in a proceeding of this nature.

It may be conceded at once that the rules of criminal procedure apply here to the extent that the respondent cannot be charged with one offense, and be convicted of another, but when we consider that the vital element of the accusation is the corrupt and wrongful disposition of certain cases pending in his court, and not the particular means by which the official action of the accused was influenced, it becomes apparent that the salutary rule referred to is not violated by accepting the proof as showing some other wrongful influence than that of bribery. The test of materiality of variance in an information or indictment is whether the pleading so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense. *People v. Freeman*, 29 Cal. App. 543, 156 Pac. 994; *Harrison v. U. S.*, 200 Fed. 662, 119 C. C. A. 78.

The respondent here was fully notified by the accusation of the entire subject-matter of investigation involving his relations with Riccardi and McDonough in connection with these criminal prosecutions.

It may be urged that, if the evidence does not establish bribery, it does not disclose specific wrongful inducement. I do not think that such is the fact. The circumstances are convincing to my mind that there was some prearranged and agreed plan to dispose of these cases in a certain manner, which agreement was acted upon by the respondent. Such a state of facts establishes moral turpitude without giving the moving cause a specific name.

There is nothing in the Code provisions or the decisions in this state relating to disbarment to invest this proceeding with such a degree of technicality that should prevent a judgment against respondent if the evidence is such as to clearly prove that the acts complained of were influenced by any corrupt and dishonest motive, whether amounting to bribery or not.

I think the majority opinion tends too much to minimize the effect of the evidence against the accused. Under each of the three separate counts of the accusation the action taken by the respondent was such as to shock the sense of judicial integrity. His own explanation of his conduct is far from satisfactory, and in the *Pastlango* case almost incriminating, and the fact that the program

was substantially carried out in the manner that Riccardi had announced tends strongly to corroborate the testimony of the latter that it was all in accordance with a prearranged agreement, whether influenced by a bribe or some other ulterior inducement.

LAWLOR, J. I dissent. I am convinced from the evidence, tested by the rules of law declared in the main opinion, that the direct testimony of Riccardi as to the three acts of bribery are sufficiently supported by the other evidence to warrant the disbarment of the accused.

Speaking from the impressions I received from the record, I cannot, upon any theory consistent with his innocence, account for the refusal of the accused to hold Catterini for trial upon the evidence presented. In connection with all the other circumstances, considering the grave condition of Mrs. Nanni, and the evidence that bail was to have been denied in the beginning, the fixing of the bail at \$500 cash on each of the two charges is not without significance. The gist of the crime of assault with intent to commit murder is the specific intent to take life, since the only element of murder which is lacking is the failure to execute the deadly intention. The perpetrator of such an offense is as much possessed of a malignant and abandoned heart as if he had not shown bad marksmanship, and, keeping in view the hour of the assault, that the woman and child were left to die, and the other surrounding circumstances, it does not appear that those essentials of murder were lacking in this instance.

Two questions are presented on a preliminary examination: Has a crime been committed, and is there sufficient cause to believe the defendant guilty thereof? Section 872, Pen. Code. "Sufficient cause" has been held to have the same meaning as "probable cause" as used in section 1487 of the Penal Code. *Ex Parte Heacock*, 8 Cal. App. 420, 97 Pac. 77. It was declared in *Yaner v. People*, 34 Mich. 286, 289:

"The examining magistrate is not to be required to nicely weigh evidence as a petit jury would, nor to discharge the prisoner where there is a conflict of evidence, or in case of a mere reasonable doubt of his guilt."

Upon the facts in this case the corpus delicti proved itself, so that the only question to be determined from the evidence was whether there was sufficient cause for believing Catterini was the assailant. In determining this question, the committing magistrate is not to finally determine the weight of the evidence, nor to resolve conflicts therein, but only to decide whether there is sufficient cause to hold the defendant for trial. In judging the state of mind of the accused in this matter it is inconceivable to me that he, an experienced practitioner and judge of the

police court successively for nearly 20 years, did not know and understand it was his plain duty to hold the defendant so that a jury, under the sanctions of a trial on the merits, where all the evidence is presented, could determine whether he was the guilty party. Of course, a mere mistake of judgment, or gross carelessness, yielding to influence, sympathy, or the like, on the part of the magistrate, would not constitute bribery as charged herein, but in the presence of evidence such as was adduced in this case the weightiest consideration should be given to the failure of the accused to hold Catterini so that he could be tried in the superior court.

A brief reference to some of the salient features of the evidence will, I think, demonstrate this. Catterini had lived in the Nanni household, eating at the same table with the family for several months. While the room where the shooting occurred was dark, in the struggle both the woman and the child were given an opportunity to determine the identity of the assailant. Light came through a crack in the window shade. The woman tore from the throat of the assailant a necktie which was identified as belonging to Catterini. One of his shoes was afterwards found in the room. Catterini's defense, in addition to proof of good character, was an alibi. The crimes were committed in a house in the Mission district. The alibi witness was the keeper of a dance hall on the Barbary Coast, where Catterini testified he was at the hour of the shooting and during the rest of the night. When first interrogated he said he was in a room a block away when the bells announced the new year. He admitted that a revolver with three empty barrels and showing recent bloodstains, which was found in his trunk by an officer, belonged to him. He first admitted he was out in the Mission about 7:30 or 8 o'clock, but denied he was at the Nanni house on that day or night. Detective Officer Thomas Fuhrman testified Catterini told him he was in the Nanni home for a few minutes about 8 o'clock. Mrs. Nanni testified that about a month before the shooting Catterini had threatened to take her life, and while admitting the incident, his version of what took place is that she requested him to kill her. When questioned about the tie and pin, Catterini said they were in his trunk, whereupon he was shown these articles by the officer. Then he said he did not know how the officer got the pin, but stated he left the tie at the Nanni household some time before.

The principal reason assigned by the accused for discharging Catterini was that he voluntarily surrendered. The surrender took place some 17 hours after the shooting and about the same length of time before the services of the facile Riccardi were engaged, and the work of blocking justice began.

Catterini's action in surrendering may have comported either with his guilt or his innocence; for, if he were guilty, going into hiding or seeking flight would be strong evidence against him, and the question ought to have been left to a jury to decide. The accused also remarked when he discharged Catterini:

"It seems that a person who was present committing an act of that character would have rendered some other mark of identification which could have been made more satisfactory."

Is not the reason given by the accused for going out of his province as a committing magistrate and passing upon the merits of this case strongly indicative of an intention to exonerate the defendant for some reason other than a lack of evidence?

Riccardi testified that the reason the preliminary examination was opened at the hospital was because of two conversations he had with McDonough, the latter saying in the first he would speak to the accused about the case, and the second that he had done so; the point being that, as the case would be heard in the "woman's court," which the accused would preside over during the current month (each judge, it seems, holds the court for a month alternately), he would "lose jurisdiction of that case, and once he loses jurisdiction we are in a nice hole." As to the \$800 promissory note: McDonough admits that he received \$80 commission out of a transaction he testifies was a mere accommodation to Riccardi, in addition to the \$100 commission he obtained from the ball money. To my mind the entire story of McDonough as to how he came to indorse the note is palpably improbable and not entitled to credence. Assuming this testimony to be fabricated, it must be taken as inferential proof that the entire ball transaction was tainted with corruption. Why resort to an invention if the note transaction was as McDonough testified? Why was there need for McDonough furnishing security to the bank? Mrs. Riccardi had about \$4,000 on deposit there. According to McDonough, he had known Riccardi the three or four months the latter had been practicing in the San Francisco police courts. The accused also knew Riccardi. Riccardi tells of meeting the accused in saloons, including McDonough's, and in his court chambers, and talking over cases with him. It may be inferred that Riccardi's identity with the "system" about which he has testified was becoming known, and, of course, even an honest judge on that bench would not fail to appreciate that the due administration of justice was imperiled by the nefarious methods of so gifted a crook as Riccardi. It may also be inferred that Catterini was not in ignorance of the system. The evi-

dence impresses me that Catterini was neither frank nor unsophisticated. He had property, and he evidently knew what to do and where to go in order to get results. Riccardi and McDonough were soon seen in action, the judicial machinery appeared to function harmoniously, and everything moved rapidly except the decision itself. Must we shut our minds to the plain import of the evidence simply because one of the guilty participants has chosen for reasons of his own to reveal the shameful conditions shown to hedge the administration of justice in the police courts?

Riccardi has been attacked as a witness in all the modes known to the law. His testimony gives me the impression that he has no scruples which would induce him to tell the truth in a matter of importance to himself if it seemed to his detriment to do so. He probably hoped, because of his willingness to expose the system, that some concession might be made to him by the public authorities. But, notwithstanding that witnesses such as Riccardi are to be distrusted, it is nevertheless the solemn duty of courts of justice in weighing their evidence, and especially where matters affecting the public good are at stake, to endeavor to extract from their testimony as much of the truth as is possible—to sift the false from the true, for we learn as judicial officers that justice is often served from the lips of guilty participants in great public wrongs.

Now, I do not accept the reasoning of the majority opinion as to how Riccardi expected to be benefited by the testimony he gave. He is presented in this proceeding by a committee of the Bar Association of San Francisco, composed of earnest and sincere members of the bar faithfully endeavoring to vindicate the ethics of the profession and purge it of disreputable members, and the bench of venal judges. But it is plain to me that Riccardi realized he could only help himself by satisfying the committee that he had told the truth. According to the evidence, the committee refused to make any promises of help to Riccardi, and certainly, since the Bar Association had taken up the work of cleansing the police courts, the committee would neither advocate nor tolerate any leniency being shown him if it believed he had given false testimony against a judicial officer. Moreover, the effect of sensational disclosures on the public mind is so diffused I do not think as shrewd a man as Riccardi would expect any tangible results from that source. In my opinion, Riccardi testified under circumstances peculiarly calculated to induce him to tell the truth. He was in the toils of the law with a long term of imprisonment ahead of him. There is no evidence of personal hostility on his part toward the accused. And, considering all that there is at stake to the accused and to McDonough in this proceeding, I think there is strong reason for closely

scrutinizing their testimony, and especially that of the former, whose denials of the acts of bribery are couched in stereotyped and colorless phrase. I do not understand that my learned Associates who have signed the majority opinion entertain any doubt that the conditions Riccardi described as the "system" did not in fact exist. But apparently because he, an admitted actor in the system, comes before us to tell the miserable story, his testimony must be practically discarded when it comes to the question whether the accused was a factor in the system. If Riccardi's story of the system is true, it follows, of course, that judges in the police courts have been debauched. I apprehend that once it is believed the accused was a part of the system there could be no hesitation in finding sufficient support for Riccardi's testimony that he acted corruptly in this particular case.

In cases of criminal confederation evidence of close relationship between the members of the enterprise is always regarded as of a most persuasive character. That an intimate relationship existed between McDonough and the accused, and that they discussed cases which came before the latter, is admitted by them. I shall not pause to dwell on what is urged upon us in extenuation of their indiscretions. For 15 years McDonough was a professional bail bond broker, conducting the business in his saloon, which was in the neighborhood of the criminal courts. In my view, this constituted a menace to the administration of justice. It must be so regarded by every right-thinking person, whether a judicial officer or a private citizen. As a bail bond broker McDonough did a very large business and was daily brought into contact with judges and other officials who had to act on the bail he furnished. Such contact is very apt to breed contamination, and for that reason, in my judgment, professional bondsmen should not be accepted by courts of justice. McDonough kept track of the volume of his bail brokerage business for income tax purposes, but otherwise preserved no record of bail transactions. In this proceeding he was not able to fortify his testimony by books of account of any sort. It is not difficult to understand why he kept no records. When bail has been declared forfeited the sureties may seek to have the order of forfeiture discharged. Sections 1306-1307, Pen. Code. Is it not inherently probable that in such matters McDonough would use every means within his power to avoid the loss of his money? His bail bond business is as much on trial in this proceeding as is Riccardi's credibility or the integrity of the accused. In view of all the surrounding circumstances it is against every rule of probability that the relationship between the accused and McDonough was of the character they have both described. It must shock the sense of propriety of every

one that a relationship could exist between a judge and a bail bond broker under the circumstances shown, for it would tend to scandalize the administration of justice, create suspicion, forfeit public confidence and respect, invite corruption, and be directly responsible for the very conditions described in the evidence in this proceeding.

I am of the opinion that there is sufficient evidence which is not "purely guesswork" to support the testimony of Riccardi that the accused was bribed in this case through the medium of McDonough, and that the conversation between Riccardi and the accused as to the amount of the bribe did take place. This, in itself, would constitute an admission of guilt. I have not attempted to reconcile with the evidence in the Catterini case the action of the prosecuting officer as to the sufficiency of the evidence to hold Catterini for trial, and I shall therefore leave him to his own explanations.

Under the evidence in the Pastiangio case every reason is shown for and no reason against holding the defendant for trial. The accused testified he believed the defendant was guilty of the act, but that it was not done with an "impure motive." But, notwithstanding this, after the felony charge was dismissed, the defendant was prosecuted and convicted under ordinance 1059 upon the identical evidence offered under the felony charge. This ordinance prescribes an offense where any lewd, indecent or obscene act is committed. The meaning of section 288 (the felony statute) is "lewd and lascivious" conduct, when accompanied by a certain specific intent. But, even if we assume the accused dismissed the felony charge for the reasons given, upon what theory can his action in suspending the sentence of 3 months on the misdemeanor charge, thereby permitting the defendant to go unwhipped of justice for tampering with a girl under 14 years of age, be explained or defended? I think this case also furnishes corroborating evidence.

Even assuming in the Spinelli matter that the accused did not fix the bail, do not the surrounding circumstances tend to corroborate the testimony of Riccardi? No satisfactory explanation is given by the accused for taking up the question of bail in this case. This fact, however, standing by itself, might not be significant. But it does not seem likely that Riccardi would go to the home of

the accused with the sureties in the absence of some understanding or arrangement. Besides, the accused admitted that he "depended on Riccardi" as to the sufficiency of the undertaking. This admission certainly shows something more serious than "a gross neglect of duty." The transaction occurred in November, 1918, and by this time, of course, the accused knew of Riccardi's character and activities. It was stated Riccardi's gross yearly earnings from his practice in the Hall of Justice were between \$40,000 and \$60,000, out of which he claimed he only netted \$12,000. Moreover, if Riccardi's story was an invention, it is not likely he would have placed the amount of the bribe at the insignificant sum of \$50. In my opinion, the evidence in this matter is corroborative of Riccardi's testimony and explains why the accused "depended" upon him in the acceptance of the undertaking.

I have given my appraisal of the evidence. I am unable to believe that in the Catterini and Pastiangio cases the accused, an experienced judge, did not reach the conclusion there was sufficient cause to hold the defendants for trial. Human life has been forfeited and the liberty of the individual taken under the forms of law upon less convincing evidence than that presented in these cases—upon a preliminary examination. But a failure by the accused to find there was sufficient cause would not, of course, call for disbarment if his action upon any hypothesis of innocence could be attributed to a mistaken conception of the law or the evidence, or an erroneous or otherwise unwarranted exercise of discretion. In none of these transactions is it claimed or suggested the accused was moved by personal appeal, sympathy, or compassion, for, if he was so influenced, his conduct would not be corrupt within the meaning of the accusation, however inexcusable it may have been. But in my study of the evidence I could not accept the conclusion announced in the prevailing opinion, for I reached a point where neither the self-confessed criminality of Riccardi nor the presumptions of innocence and that his official duty was regularly performed with which the accused stood clothed could avail against the plain import and inherent probabilities of the evidence indicative of guilt.

I am of the opinion that the accused should be disbarred.

(185 Cal. 608)

WHITE v. SCHADER et al. (L. A. 5561.)

(Supreme Court of California. May 4, 1921.
Rehearing Denied June 2, 1921.)

1. Evidence \S 419(4)—Agreement to assume mortgage may be shown, notwithstanding deed recital that property is granted subject thereto.

An agreement to assume and pay a mortgage not being inconsistent with a deed reciting that the property is granted subject to the mortgage, such an agreement may be shown by parol evidence, as showing the consideration for the deed.

2. Mortgages \S 281 — Where payment of a mortgage forms part of the consideration, grantee must discharge it.

Where the payment of a mortgage forms part of the consideration for a conveyance, the grantee is bound to pay the same.

3. Judgment \S 744—Finding that defendants assumed payment of a mortgage held a conclusive adjudication.

Where, in a previous action for rescission of a contract, whereby plaintiff and defendants exchanged incumbered property, plaintiff, the defendant in that action, filed a cross-bill seeking specific performance which set up the adequacy of consideration, a judgment finding that the contract obligated each party to discharge the mortgage on the property received, and that the consideration was adequate, was a conclusive adjudication, binding in an action by plaintiff to compel defendants to pay deficiency resulting on foreclosure sale of the mortgage on the property which had belonged to plaintiff.

4. Mortgages \S 292(3)—Where foreclosure sale results in deficiency, mortgagor, without first paying deficiency, may sue grantee who assumed payment.

Where foreclosure of a mortgage resulted in a deficiency, the mortgagor, without first paying the deficiency, could bring action against his grantee, who assumed payment of the mortgage, for the mortgagor's right to reimbursement had then accrued.

5. Mortgages \S 292(1)—That mortgagor was not personally served in foreclosure action does not preclude relief where deficiency resulted so that mortgagor's payment was not voluntary as respects recovery from grantee primarily liable.

Though the mortgagor was not personally served in foreclosure proceedings, service being had by publication, the mortgagee did not, where deficiency resulted on sale, lose his rights against the mortgagor; hence the mortgagor's subsequent payment of the amount of the deficiency was not voluntary, so as to preclude relief against a grantee to assumed payment.

6. Mortgages \S 280(4)—Agreement to pay attorney's fees included in agreement to assume mortgage.

An agreement by the grantee to assume and pay a mortgage on the property conveyed includes an agreement to pay attorney's fees, which were included in mortgage foreclosure.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by A. Stanley White against Carl F. Schader and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Oscar C. Mueller and Alfred Wright, both of Los Angeles, for respondent.

WILBUR, J. The parties herein had exchanged two pieces of real estate, each subject to mortgage. The mortgage upon the property of the plaintiff was afterwards foreclosed by the mortgagee, and sold in satisfaction thereof, leaving a deficiency of \$2,264.90. The mortgagee thereupon brought suit against the plaintiff for the amount of the deficiency, and the plaintiff in turn brought suit against the defendants, alleging that the defendants in the transaction for the exchange of properties had assumed and agreed to pay the mortgage, and were therefore liable to him for such deficiency. Subsequent to the beginning of the suit, the plaintiff paid the amount of the deficiency, and, by way of supplemental complaint, set up the fact of such payment. Judgment was rendered for plaintiff, and defendants appeal. Defendants' main contention on the appeal is that the written agreement for the exchange of the real properties of plaintiff and defendants, and the deeds which were exchanged in pursuance thereof, provided that each party should take the property transferred to it subject to the mortgage thereon. That, as there was no agreement either in the deeds or in the written contract for exchange by which the defendants agreed to assume the mortgage upon the property transferred to them, oral evidence that such an agreement was entered into is inadmissible, for the reason that the writing between the parties must be considered conclusive as to the agreement between them.

[1] It is well settled by the authorities that an agreement to assume and pay a mortgage is not inconsistent with a deed reciting that the property is granted subject to a mortgage. Consequently, such an agreement may be shown by parol evidence. *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Hibernia Savings & Loan Society v. Dickinson*, 167 Cal. 616, 140 Pac. 265; *Dodds v. Spring*, 174 Cal. 412, 163 Pac. 351; *Arp v. Ferguson*, 175 Cal. 646, 166 Pac. 803; *Jones on Mortgages*, §§ 748, 750; 27 Cyc. 1344,D; *Swarthout v. Shields*, 185 Mich. 427, 152 N. W. 202; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; see note, page 84, 78 Am. Dec.; *McDill v. Gunn*, 43 Ind. 315, 319; *Drury v. Tremont Improvement Co.*, 95 Mass. (13 Allen) 168; *Moore v. Book-*

er, 4 N. D. 543, 62 N. W. 607. As this court stated in *Hopkins v. Warner*, supra:

"It is not necessary that there should be a formal promise, on the part of the grantees, to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument; it may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement."

See, also, *Andrews v. Robertson*, 177 Cal. 434, 438, 170 Pac. 1129.

The theory on which such oral evidence is permitted, notwithstanding the contents of the deed, is that the purpose of such evidence is to show the consideration for the transfer, and that this may be done by parol evidence. In *McDill v. Gunn*, supra, the Supreme Court of Indiana thus stated the rule:

"Parol evidence may be given to show the real consideration of a deed, and that the purchaser took the conveyance subject to incumbrances and agreed to discharge them in addition to the consideration stated in the deed. *Allen v. Lee*, 1 Ind. 58; *Rockhill v. Spraggs*, 9 Ind. 30; *Pitman v. Conner*, 27 Ind. 337; *Robinius v. Lister*, 30 Ind. 142."

Upon the same subject, the Supreme Court of Massachusetts, in *Drury v. Tremont Improvement Co.*, supra, stated:

"The plaintiff contends that the deed is conclusive evidence of the contract between the parties, and that no other evidence is admissible on the subject. But as to the consideration which was paid, the deed is not conclusive. The acknowledgment of payment may be controlled by parol evidence of an additional or a different consideration. *Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Gray, 542."

Further authorities will be found in the note, 25 L. R. A. (N. S.) 1202. The following cases therein cited may be referred to as particularly applicable to the facts in the case at bar: *Herrin v. Abbe*, 55 Fla. 769, 46 South. 183, 18 L. R. A. (N. S.) 907; *Perkins v. McAuliffe*, 105 Wis. 582, 81 N. W. 645; *Johnson v. Elmen*, 94 Tex. 168, 59 S. W. 253, 52 L. R. A. 162, 86 Am. St. Rep. 845; *Morgan v. South Milwaukee Lake View Co.*, 97 Wis. 275, 72 N. W. 872; *Langan v. Iverson*, 78 Minn. 299, 80 N. W. 1051.

It is clear from the foregoing authorities that, if the rights of the parties are determined with relation to the deed and the oral testimony concerning the assumption of the mortgage, the parol evidence with reference to the assumption of the mortgage was admissible, and the judgment of the trial court must be sustained.

The foregoing, however, is not entirely decisive of the case, for the reason that the deed in question was based upon a previous written agreement of exchange, which agreement was subsequently enforced by a decree

of specific performance wherein the parties hereto litigated their respective rights under said agreement. In determining the rights of the parties in this action, we have to take into consideration the effect of such contract and such decree. It is therefore necessary to state additional facts in order to arrive at a conclusion upon that subject. The parties entered into an agreement for exchange of real estate on the 23d of November, 1911. Under the terms of this agreement, the Schaders agreed to deliver to White a grant deed, on or before the 23d of December, to three lots in Santa Monica, with a certificate of title—

'showing the title of said property to be free and clear of all incumbrances in Nellie M. Schader, except a mortgage for \$7,500 payable to Mrs. Mary B. Hook, due approximately two years from date, and also subject to the restrictions of said Carl F. Schader 'Seaside Terrace' tract above referred to, as follows. * * *

They also agreed to deliver to White a bill of sale of all the furniture contained in the residence erected thereon, and to deliver possession December 22, 1911, on payment of \$4,000. White agreed to deliver to the Schaders on or before December 23, 1911, a warranty deed to certain real property in the city of Seattle, Wash., and to deliver a certificate of title showing the title of the premises to be in White, "free and clear of all incumbrances, except a certain mortgage for \$7,000 dated April 20, 1910, running for five years, at 7 per cent. interest per annum, in favor of Margaret A. Campbell" and excepting also certain assessments, etc. It was further agreed that the Schaders should pay the interest on the note and mortgage of \$7,500 in favor of said Mary B. Hook to date (November 23, 1911), and that White should pay the interest on the \$7,500 mortgage in favor of Margaret A. Campbell to date. It was further agreed that White should pay the Schaders \$4,500. It should be observed that this contract calls for a grant deed from the Schaders and a warranty deed from White, the effect of which deeds would be that each grantor should discharge the incumbrances upon his own property. It is to be further observed, however, that each grantor was to furnish evidence of title showing the property subject to the particular incumbrances referred to in the agreement.

Subsequent to the delivery of possession of Schaders' property to White, they brought a suit to recover possession and for rescission of the contract of exchange. White, by cross-complaint, sought to specifically enforce the contract, and the Schaders, in their answer to the cross-complaint, sought to reform the agreement of exchange. In the complaint for a specific performance, it was necessary that the cross-complainant allege, as he did, that the consideration was adequate. This allegation was denied, and formed one of the issues

in the case. The finding of the court upon that subject is as follows:

"That said agreement hereinbefore referred to was and is a just and reasonable agreement as between the plaintiff and the defendant, and at the time said agreement was made the said property of the defendant in the city of Seattle, and the sum of \$4,500 paid by the defendant to the plaintiff, together with the difference in plaintiff's favor in the mortgages assumed by the plaintiff and the defendant respectively, constituted, and were, a fair, just, and adequate consideration for the said property of the plaintiff in said city of Santa Monica."

It was in pursuance of this finding as to the entire transaction between the parties and the effect of the deed tendered by White to Campbell that the decree was rendered requiring the Schaders to specifically perform the agreement by the delivery to White of their deed to the property in Santa Monica.

[2, 3] This action between the parties was pending at the time of the bringing of the action at bar, the former action having been tried, and judgment rendered, and the case was on appeal. In defendants' answer, they stood upon the pendency of that case as a ground of abatement, but previous to the trial the former action had been terminated by an affirmance of the judgment. Schader v. White, 173 Cal. 441, 160 Pac. 557. The judgment roll in the prior case was introduced in evidence. Inasmuch as the question of the consideration passing between the parties in the transaction was involved in the previous action, and was determined by the findings and judgment in that case, the proposition that the assumption of the mortgage in question was part of the consideration running to respondent is *res adjudicata*, and it is well settled that, where the payment of a mortgage forms part of the consideration of a conveyance, the grantee is bound to pay the same. The rule is thus stated in *Brosseau v. Lowy*, 209 Ill. 405, 70 N. E. 901:

"It is well established that when a party purchases premises which are incumbered to secure the payment of indebtedness, and assumes the payment of the indebtedness as a part of the purchase money, the premises purchased are in his hands a primary fund for the payment of the debt, and it is his duty to pay it. *Lilly v. Palmer*, 51 Ill. 331; *Russell v. Pistor*, 3 Seld. 171. And the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the incumbrance, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance. *Lilly v. Palmer*, *supra*; *Comstock v. Hitt*, 37 Ill. 542; *Fowler v. Fay*, 62 Ill. 375; *Russell v. Pistor*, *supra*; *Ferris v. Crawford*, 2 Denio, 598."

See, also, *Tichenor v. Dodd*, 4 N. J. Eq. 454.

In considering the question as to whether the findings and judgment in the prior action between the parties are conclusive upon the question of the assumption of the mortgage

in question, it should be stated that the appellants rely upon the statement contained in the findings that " * * * said contract contains the whole agreement of the parties thereto. * * * " This clause is a part of the sentence in the findings disposing of Schader's contention in that case that there could have been a mutual mistake in the drafting of the contract in omitting the following words: "That said A. Stanley White is to pay the taxes on the premises in the city of Seattle for the years 1911-12," and it was in that connection that the court found that these words were not omitted by mistake, and, incidentally, that the contract contained the whole agreement of the parties. This general statement, of course, is modified, in so far as the assumption of the mortgage in question is concerned, by the express finding that the parties agreed to assume the mortgages upon the properties deeded to them respectively.

In view of the fact that the question of the assumption of the mortgage is *res adjudicata* under the circumstances of this case, it is unnecessary to consider whether the parol evidence introduced with reference to the assumption of the mortgage was properly receivable, or sufficient in legal effect to establish such assumption.

[4] Defendants claim that the action was prematurely filed, for the reason that the plaintiff had not at that time paid the deficiency; that therefore the order permitting the filing of the supplemental complaint was erroneous, and that proof thereunder should not have been received. There is no merit in the contention, for the reason that the right of the plaintiff to reimbursement had accrued when suit was brought. At that time the mortgaged property had been applied to the debts by the mortgage foreclosure sale, and there was an unpaid balance. *Stichter v. Cox*, 52 Neb. 532, 72 N. W. 848; *Callender v. Edmison*, 8 S. D. 81, 65 N. W. 425; *Adams v. Symon*, 6 N. Y. Supp. 652; *Merriam v. Lumber Co.*, 23 Minn. 314; *Burbank v. Roots*, 4 Colo. App. 197, 35 Pac. 275; *Williams v. Fowle*, 132 Mass. 385; *Sparkman v. Gove*, 44 N. J. Law, 252; *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546; *Jones on Mortgages*, vol. 1, § 769. The case of *O'Neal v. W. H. H. Hart*, 116 Cal. 69, 47 Pac. 926, is cited as authority for an opposite conclusion. It is merely held in that case that the grantor was not entitled to a judgment against the grantee in the mortgage foreclosure case where the mortgagee had asked no relief against the grantee, and that the vendor and grantor could only be entitled to such judgment upon the payment of the deficiency, if any. This does not purport to determine the rights of the vendor and grantor in a separate action against the grantee and vendee, who has assumed and agreed to pay a mortgage upon the premises transferred.

[5] Appellants contend that the mortgagee

waived her rights against the mortgagor, the plaintiff herein, by failing to secure a deficiency judgment in the mortgage foreclosure case. In that case service was obtained by publication. Jurisdiction was not acquired over the person of the plaintiff, and the effect of the decree was to apply the property to satisfaction of the mortgage. It was in no sense a waiver of the rights of the mortgagee against the mortgagor. The payment by the plaintiff to the mortgagee was therefore not voluntary.

[6] Appellants claim that the judgment is excessive, at least to the extent of the attorney's fees which were included in the mortgage foreclosure. The agreement to pay these attorney's fees was included in the agreement to assume and to pay the mortgage debt. *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30; *Johnson v. Harder*, 45 Iowa, 677. Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

(185 Cal. 614)

WHITE v. HENDLEY. (Sac. 2981.)

(Supreme Court of California. May 4, 1921.)

1. Deeds §56(2)—Intent to transfer title is essential to conveyance.

To constitute a valid transfer of real property by deed, the delivery of the instrument of conveyance must be attended by an intent to transfer the title and the existence of such intent is to be determined by a consideration of all the evidence bearing on that issue.

2. Deeds §206—Evidence held not to sustain court's finding that parties did not intend conveyance of title.

In a suit to set aside an absolute conveyance of mining property which was accompanied by a contract manifesting an intention that the grantee should have the title subject only to the right of the grantor to support and that the property should be reconveyed to the grantor if he survived the grantee, evidence held insufficient to warrant an inference that the conveyance of the title was not intended by the parties, so that the trial court's finding against the conveyance was so clearly against the preponderance of the evidence that it must be reversed.

In Bank.

Appeal from Superior Court, Butte County; Ernest Weyand, Judge.

Action by Joseph Hendley against Joseph W. Hendley to set aside a deed to mining property, in which Richard White, as executor of the last will of Joseph Hendley, was substituted as plaintiff after the death of the original plaintiff. From a judgment for plaintiff, defendant appeals. Reversed.

See. also. 35 Cal. App. 267, 169 Pac. 710.

George F. Jones, of Oroville, for appellant.
W. H. Carlin, of Marysville, for respondent.

LENNON, J. This action, instituted for the purpose of setting aside and canceling a deed to certain mining property in Butte county, Cal., arose from the following facts: The plaintiff's testate, Joseph Hendley, like other adventurous spirits, came to San Francisco as a sailor in the year 1847. He remained in California and later began traveling the trails to the different mining camps in the interior, eventually locating in Morris ravine, a few miles from Oroville, in the county of Butte. Here he spent the rest of his life, living in a cabin by himself, after the custom of so many of the early mining pioneers, and procuring title to the mining land referred to in the pleadings in this action.

In 1910 Joseph W. Hendley, a nephew of the pioneer Joseph Hendley, came to California from Illinois and visited his uncle. Desiring that his mine remain in the Hendley family and also wishing to see the mine developed in his own lifetime, the uncle went with his nephew, on April 26, 1910, to the office of an attorney in Oroville and executed the papers which are the source of the present controversy. These papers consisted of a deed and an agreement. The deed was executed by the uncle and purported to convey to the nephew the uncle's one-half interest in the mining land in question; it appears that in 1896 the uncle had transferred a one-half interest in the land to a Mrs. McIntyre. The agreement, wherein the nephew is referred to as the party of the first part and the uncle as the party of the second part, provides as follows:

"Whereas the said party of the second part has this day granted and conveyed unto the said party of the first part by deed absolute and without condition all the real estate of said party of the second part situated in the county of Butte, state of California, consisting of all the right, title and interest of the party of the second part in and to that certain mining property situate in Morris ravine, in said Butte county, and commonly known as the 'Joe Hendley mine and mining property,' and

"Whereas, it is understood that the said party of the second part shall during his lifetime occupy said premises as a place of residence, and shall obtain therefrom such income as may be necessary to afford him a comfortable livelihood and living in accordance with his desire and condition in life, and that during his lifetime said property shall be advantageously developed in a proper and systematic manner as a mining claim for the benefit of said party of the first part, and also for the benefit of the party of the second part for the purpose hereinabove stated:

"Now therefore it is hereby mutually agreed that the party of the first part will undertake the opening up and developing of said property

as a mining claim at his own expense and free of cost and expense to the party of the second part, and in case, either before or after the full development of said property as a mining claim, in the judgment of the party of the second part it shall be advantageous to sell and dispose of said property for a valuable consideration and at a sum in excess of the amount expended thereon by the party of the first part, then and in that event the party of the first part will consent to such sale and join in executing any conveyance necessary therefor, provided that in case of such sale said party of the first part shall be reimbursed from the proceeds thereof for all moneys expended by him or expenses which he may have incurred in connection with the development of said property and a reasonable rate of interest thereon, it being further understood and agreed that the party of the first part is to have and receive the whole of the proceeds from the sale of said property except such amount thereof as may be necessary to provide for the care and maintenance of said party of the second part during his lifetime.

"It is fully understood and agreed that the intention of the parties herein is to give to the party of the first part the full and entire benefit of all the property of the party of the second part this day conveyed, with the right to proceed with the opening up and development thereof, and to obtain the full benefit to be derived therefrom, save and except that the party of the second part is to be provided for during his lifetime.

"It is further understood and agreed that in case said party of the first part shall not survive the party of the second part, then and in that event the property described in said deed is to be reconveyed to the party of the second part, subject, however, to the reimbursement of the party of the first part for the amounts expended by him in the development of said property as hereinbefore agreed.

"The terms of this agreement are to be binding upon the heirs, successors or assigns of both parties hereto."

The agreement was deposited in a bank in Oroville, with escrow instructions to the effect that, upon the death of either the uncle or nephew, the agreement should be delivered to the survivor.

In 1914 the uncle commenced an action against the nephew to set aside the deed, claiming that the clauses in the agreement relating to the development of the mine by the nephew constituted conditions subsequent, the failure of the performance of which entitled plaintiff to a cancellation of the deed. Judgment was rendered in favor of the plaintiff, but was reversed by the District Court of Appeal, which held the clauses in question to be mere covenants. *White v. Hendley*, 35 Cal. App. 267, 169 Pac. 710. Plaintiff thereupon amended his complaint and proceeded upon the theory that there was no intention on the part of the uncle at the time of the signing and acknowledgment of the deed, or at any time, to divest himself of title to any of the lands described in the deed or to vest title thereto in the nephew. The plaintiff

again prevailed in the trial court, and this is the second appeal by the defendant. Pending the litigation, the uncle died, and his executor was substituted as plaintiff.

Fraud is not charged in this case and no evidence of fraud was presented; no question is raised on this trial as to the effect of a failure to comply with the provisions of the agreement in regard to the development of the mine during the lifetime of the uncle, for that point was determined on the first appeal. Intention was the sole issue of fact on the second trial, and we are of the opinion that appellant is correct in his contention that there is no substantial evidence to sustain the finding of the trial court on that issue.

[1, 2] To constitute a valid transfer of real property by deed, the delivery of the instrument of conveyance must be attended by an intent to transfer title, and the question of the existence of such an intent is determined by a consideration of all the evidence in a given case bearing upon that issue. *Williams v. Kidd*, 170 Cal. 631, 638, 151 Pac. 1, Ann. Cas. 1916E, 703. Therefore the question to be determined in the instant case is whether the parties intended to effect a transfer of title or whether it was contemplated that no such transfer should take place and that the uncle should continue to be the owner thereof until his death. The written instruments embodying the transaction of the parties, namely, the deed and agreement, are the most potent evidence of intention. The uncle testified that he voluntarily executed the deed to the nephew. This deed, which was in form an absolute conveyance, was not retained in the possession or control of the grantor, but was recorded and then mailed to the grantee with the knowledge and consent of the grantor. The agreement accompanying the deed begins with a recital that all of the interest of the uncle in the property has been conveyed to the nephew by deed "absolute and without condition," and, after setting forth an understanding that the nephew will open and develop the mine at his own expense, provides that the uncle shall, during his lifetime, be entitled to a sufficient amount of the income from the property or proceeds thereof, in the event of a sale, to afford him a comfortable livelihood. It then states that the intention is to give the nephew the full and entire benefit of all the property "conveyed," except only that the uncle is to be provided for during his lifetime, and closes with the provision that, in case the nephew should die before the uncle, then the property should be "reconveyed" to the latter. The provision in the event that the uncle should survive the nephew is relied upon by respondent in support of the argument that it was the intention that title should pass to the nephew only upon the death of the uncle. However, this provision itself and the entire agreement

clearly negative the existence of any intention to postpone the taking effect of the deed. The only permissible construction of the agreement is that the salient objects in the mind of the uncle were the immediate passing of title to the nephew subject only to the life interest of the uncle. The very language of the provision for the return of the property in the event that the nephew predeceased the uncle recognized title as having vested in the nephew, for the agreement was that the property should be "reconveyed," thus acknowledging that a legal transfer would be necessary to vest title in the uncle. The efficacy of such a provision is of no import in the present case and we do not pass upon the validity of the provision, but consider it merely for the purpose of ascertaining intent. Despite respondent's disparagement of the agreement as "a gem in the way of camouflage," it furnishes incontestable proof that the parties contemplated a passing of title at the time of the execution of the deed.

The circumstances, concurrent and subsequent to the execution of the deed, point conclusively to the fact that there was no intent to postpone the vesting of title. The deed was not withheld, but was delivered to the grantee and recorded. Moreover, on August 1, 1911, sixteen months after the signing of the deed which is the subject of this action, Joseph Hendley, the uncle, executed and delivered to his nephew a deed conveying to him .112 of an acre, referred to in the testimony as the outlet to the mine, which was adjacent to the property described in the previous deed and which was inadvertently omitted from that instrument. Seven days later he executed and delivered to his nephew a deed to the water rights, there being some doubt in the minds of the parties as to whether or not the original deed covered the water rights. The execution, delivery, and recording of these supplementary conveyances furnishes additional proof of the intention of the grantor to divest himself of title to all of the property in question.

Further glimpses of this intention are revealed by the correspondence which ensued between the parties after the execution of the deed and agreement. That the uncle understood the general legal effect of a deed is evidenced by the following statement, in reference to another matter, contained in a letter to his nephew, "A deed, my dear nephew, is absolute title." In a letter from the uncle to the nephew, dated December 16, 1913, is the statement: "You are the owner of the property." Numerous references and passages in the correspondence indicate that the parties regarded the title as having passed to the nephew on the execution of the deed.

The evidence relied upon by respondent in support of the judgment of the trial court consists mainly of so-called inferences from

the evidence adduced. Thus, it is claimed that the placing of the agreement in escrow, with instructions to deliver it to the survivor, demonstrates that no title had passed, but that, upon the mere return of the agreement, the whole transaction would be wiped out. Such cannot reasonably be deemed the purpose of the escrow. It will be noted that the agreement did not provide for the mere redelivery of the deed or agreement, but recognized the necessity of a reconveyance of the property in the event that the nephew predeceased the uncle. Clearly, the only purpose of the escrow was to provide the uncle with evidence of the agreement of the nephew in the event of the prior death of the latter. Respondent also points out that the nephew in one or two letters reminds the uncle that he had spoken of making a "will" and that the evidence shows that the uncle possessed no real property other than that in controversy. From these facts, it is argued, the inference is permissible that it was understood by the parties that the uncle should transmit the property to the nephew by will. In view of the conduct of the parties these facts are, in and of themselves, insufficient to support the inference contended for. The vague references to the execution of a will cannot be permitted to overturn the previous unequivocal acts of the parties. It is entirely reasonable to assume that the uncle had in mind the disposition of his personal belongings by will.

Counsel for respondent also relies upon the following testimony of the nephew upon cross-examination:

"Q. And he and you (uncle and nephew) talked it over and went to Mr. Jones' office for the purpose of having the papers drawn up so that in case you should die before he would, that he would still own the property? A. Yes, sir."

It is claimed that, by admitting that it was the understanding that the uncle was "still" to be the owner of the property in the event that the nephew died first, the nephew practically admitted that the intent was that title was to pass to the nephew only upon the uncle's death. This particular excerpt from the testimony, taken alone, might support such an inference, but not so when viewed in the light of all of the facts of the case and the other testimony of this witness.

The inferences attempted to be drawn from the evidence in support of the findings upon which the judgment rests are unreasonable, illogical, and strained, and cannot, therefore, avail to overcome the effect of the delivery of the deed, which the circumstances show to have been made with full knowledge of the legal consequences thereof. Therefore the finding of the trial court on the question of intent, and the judgment based thereon, cannot stand, for "the evidence is so clearly preponderating against the finding as made that it can be said that there is no substan-

tial evidence to sustain it." Williams v. Kidd, *supra*.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

(52 Cal. App. 1)

PETERSON v. WAGNER et al.
(Civ. 2263, 2264.)

(District Court of Appeal, Third District, California. March 21, 1921. Hearing Denied by Supreme Court May 19, 1921.)

1. Cancellation of Instruments ¶24(1)—Where plaintiff was damaged by defendant's breach in excess of the amount defendant paid, no restoration is necessary.

The general rule that, in all actions either to rescind or cancel a contract, the party seeking relief must restore to the defendant whatever of value he has paid or given under it, is subject to exception where plaintiff, seeking cancellation of contract for the sale of three seasons' hop crops, was damaged by the defendant's breach in excess of the amount defendant had paid.

2. Equity ¶86—Maxim that he who seeks equity must do equity does not require offer to do equity by restoring consideration where defendant has caused plaintiff loss greater than amount received.

Although plaintiff's suit to cancel the contract for the sale of hops was neither in tort nor for damages for breach, nevertheless the allegation in the complaint of damages caused by defendant's breach may be considered, and the maxim that he who seeks equity must do equity will be held not applicable where it clearly appears that in the transaction plaintiff has suffered a loss equal to, if not in excess of, any loss defendant has suffered from payments under the contract.

3. Evidence ¶416—Parol evidence is admissible to prove that three writings constituted one contract.

In view of Code Civ. Proc. §§ 1856, 1625, 1698, 1642, 1647, relating to varying the terms of a written contract by parol testimony, it may be shown by parol evidence that three written contracts for three different seasons' crops were one and the same agreement, where such evidence was not in conflict with the writings.

4. Sales ¶87(3)—Evidence held to show that three writings for sale of three different years' hop crops constituted but a single contract.

In action to cancel a sale of three seasons' hops, parol evidence held sufficient to support the trial court's finding that the separate contracts for sale of each year's crops constituted but a single indivisible contract for the sale and purchase of hops for three years.

5. Sales ¶110(2)—Evidence held to show plaintiff damaged in the sum of \$9,000 by breach of contract.

In an action to cancel a sale contract for three years' hop crops, evidence held to show that plaintiff seller was damaged in the amount of \$9,000 by the defendant's breach of contract for the first year.

6. Sales ¶92—Evidence held sufficient to show that sale contract was canceled by mutual agreement.

In an action to cancel a contract of sale of crops for three years, evidence including defendant's refusal and failure to make advances as required by the contract held sufficient to support the trial court's finding that the contract was mutually canceled.

7. Sales ¶174—Buyer's failure to make advancements held not excused.

Where defendant buyer, contracting with plaintiff for purchase of crops of hops for three years, agreed to make advances for the purpose of harvesting the crops, knowing of plaintiff's prior contract with another party for a certain amount of the first year's crop, refused to make an advancement as required, defendant cannot successfully urge that such failure did not violate the contract on the ground that the money might be used to harvest crops for the other buyer, where the contract did not limit the use of advances to crops harvested for defendant.

8. Estoppel ¶110—Must be pleaded.

In an action to cancel agreement for sale of three years' hop crops, an objection by the assignee of the contract for the two last years that the maxim that, when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must suffer, Civ. Code, § 3543, is inapplicable, where estoppel is not pleaded.

9. Estoppel ¶58—Assignee claiming estoppel held not peculiarly prejudiced.

In seller's action to cancel a sale agreement which amounted to a mortgage on the crops sold, where an assignment from buyer recites a consideration of \$1, the presumption is that that amount was the actual sum paid by the assignee for the assignment, so that the defendant assignee cannot be said to have been pecuniarily prejudiced by the transaction so as to justify estoppel as against seller.

10. Estoppel ¶118—Acts of seller held not to have misled buyer's assignees so as to create estoppel.

In seller's action to cancel a contract for sale of three seasons' hop crops, which contract was a mortgage thereon, where buyer assigned the contract to other defendants, record held not to show that the assignees had been misled to their prejudice by any act or conduct of the plaintiff, so as to estop plaintiff.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Paul E. Peterson against C. A. Wagner and others. Judgment for plaintiff.

and the defendants C. A. Wagner and A. A. Merkeley and Ben F. Hall appeal. Affirmed.

Driver & Driver, of Sacramento, and G. W. Bedeau, of Marysville, for appellants.

Thomas B. Leeper, of Sacramento, for respondent.

HART, J. This is an appeal by separate defendants (C. A. Wagner and A. A. Merkeley) and defendant B. F. Hall from a judgment terminating, invalidating, and voiding three written instruments for the purchase of hops for the years 1918, 1919, and 1920, and also for injunctive relief, enjoining and restraining defendants, their agents, attorneys, and assignees from doing any act which would prevent plaintiff from having peaceful possession and enjoyment of the property mentioned in said instruments.

There are two appeals growing out of the same transaction, and presented here upon two separate and distinct records. The appeal in the case we are now considering (No. 2263) is by the defendants Wagner and Merkeley, from the judgment in favor of the plaintiff, and is supported by a transcript of the testimony and proceedings taken at the trial, as authorized by section 953a of the Code of Civil Procedure. The other appeal (No. 2264) is by defendant Ben F. Hall, from the judgment rendered and entered against him in favor of plaintiff, and is brought to this court upon a bill of exceptions.

The parties have stipulated that, inasmuch as the legal points involved in both cases are identical, the two appeals may, for the purposes of convenience, be heard together, and that the briefs filed by the respective parties in both cases may be considered in disposing of both appeals.

The agreement between the parties called for the delivery by plaintiff to Wagner of 40,000 pounds of hops for each of the years 1918, 1919, and 1920. The three written instruments evidencing said agreements are identical in form, with the exception that the price agreed to be paid for the hops for the years 1918 and 1919 was 16 cents per pound, while for the 1920 crop of hops 15 cents per pound was the stipulated price. Omitting the preliminary or explanatory provisions of the instruments, we here present the following as the salient terms of the agreement:

"In consideration of the covenants of said seller herein contained, the said buyer agrees to pay to said seller for said hops that are up to the requirements of this contract the sum of 16 cents per pound net upon delivery thereof.

"Should there be any dispute between the parties hereto respecting the quality or condition of any hops tendered hereunder, or as to any fact involved in the performance of this contract, such fact in dispute shall be determined by two competent arbitrators, one of whom shall be selected by each party hereto, and if such arbitrators are unable to agree,

they shall select an umpire, and the decision of any two so chosen, as to such fact, shall be conclusive and final. Such arbitrators shall be men experienced in the cultivation, growing, and curing of hops.

"And to assist said seller to cultivate, harvest, and prepare said hops for delivery, as aforesaid, said buyer further agrees to advance to said seller during the year of this agreement, if said seller shall so request, the following sums of money, to wit: \$800 on or about the 1st day of March, 1918, \$800 on or about the 1st day of May, 1918, for cultivating purposes, and \$1,600 on or about the 15th day of August, 1918, for harvesting, curing, and baling purposes.

"All of said moneys so advanced shall, at the time of the delivery of said hops, constitute and be deemed as part payment upon the purchase price thereof. And said sums of money, so advanced as aforesaid, and all other sums that may be advanced, shall bear interest from the date when the same are made, and up to the time of delivery of said hops upon which such advances are made, at the rate of 7 per cent. per annum. Provided, that in the event that said hops are not delivered in accordance with the provisions of this contract, then such advances shall be repayable by said seller to said buyer at the time when such delivery should have been made, and the repayment of such sums and all other obligations of said seller under this contract shall be evidenced by his promissory note or notes, and are secured by a mortgage lien in favor of said buyer upon all of said hops; and this instrument shall and does constitute such mortgage upon said hops in favor of said buyer for the purpose aforesaid, and shall stand as such mortgage and as a contract for the sale of such portion of said hops as are necessary to reimburse said buyer for all sums of money so due to said buyer under this contract. If, however, during the year of this contract, the growing hops herein referred to are not in such condition at the proper season to produce the quantity and quality of hops above specified and agreed upon, then said buyer may give notice in writing to said seller that said buyer will not make any advances or further advances to said seller and in such event said buyer shall be discharged from any obligation to make any advance of any money and if any advances have been made, the same shall be repayable when the above facts are ascertained.

"That said seller shall keep said hops insured at all times for an amount not less than the advances made to him under this contract, insurance policy to be delivered to the buyer, and loss made payable thereunder to the buyer as his interest may appear. If the seller fails to keep said hops insured as above provided, the buyer may insure same, at the expense of the seller, for which purpose the seller hereby constitutes the buyer his authorized agent.

"This agreement shall bind the heirs, devisees, executors, administrators, and assigns of all parties hereto."

The complaint alleges that, although the agreement entered into between the plaintiff and the defendant was evidenced by three separate instruments, said instruments—

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"relate to the same matter, are between the same parties, are parts entered into at the same time, and constitute, in fact, one contract; that said instruments are and were not distinct and severable; that the consideration expressed in each of said instruments is and was not distinct and severable; that the consideration entering into each of said instruments was the agreement to buy and sell said hops for said three years as set forth in said three instruments; that the entire consideration for each of said separate instruments is the entire consideration contained in said three separate instruments; that, in pursuance of said contract, plaintiff did plant, cultivate, and raise a crop of hops on the land described in said contract for the year 1918; that said crop so planted and raised on said land, during the year 1918, was in excess of the 40,000 pounds of hops agreed to be furnished under said contract; that said crop of hops was of the kind and quality stipulated in said agreement; that defendant Wagner, in pursuance of said contract, on or about the 1st day of March, 1918, advanced and paid to plaintiff the sum of \$800, and on the 1st day of May, 1918, the sum of \$800 for cultivating purposes; that said agreement provides that defendant C. A. Wagner, should advance to plaintiff the sum of \$1,600 on or about the 15th day of August, 1918, for harvesting, curing, and baling purposes; that said defendant C. A. Wagner advanced to plaintiff, under said contract, the sum of \$500 on August 17, 1918, and the sum of \$600 on August 31, 1918, for harvesting, curing and baling purposes; that on or about the 31st day of August, 1918, and thereafter until the 15th day of November, 1918, the market price of hops mentioned in said contract was 8 cents per pound; that during all of said time defendant C. A. Wagner refused to advance to plaintiff the sum of \$500, or any other sum, or any sum at all, for harvesting, curing, and baling purposes; that on the 31st day of August, 1918, and thereafter until the 15th day of November, 1918, defendant C. A. Wagner continually repudiated said agreement, and refused to carry out or perform any of the terms of conditions thereof; that, on account of the prevailing low market price of said hops, from August 31, 1918, to November 15, 1918, plaintiff was unable to procure money enough to harvest all his crops from any source, and did not have money or other means of harvesting, curing, and baling said crop of hops; that all of said crop of hops was not harvested, and that 450 bales of the same were totally destroyed; that on account of defendant C. A. Wagner's refusal to advance said sum of \$500 to plaintiff, plaintiff was unable to harvest all his crop for the year 1918; that during said time plaintiff repeatedly demanded of defendant C. A. Wagner that he advance to him the sum of \$500 to allow plaintiff to harvest said crops, but defendant, C. A. Wagner, repeatedly refused to advance said sum of \$500, or any other sum at all, for said purpose, and repeatedly repudiated said contract, and repeatedly told plaintiff that plaintiff was released from said contract, and that said contract was at an end; that on account of the refusal of defendant C. A. Wagner to so carry out the terms of said contract, all of said crop of hops was not

harvested, and 450 bales of the same were totally lost and destroyed; that said contract was terminated by defendant C. A. Wagner's repudiating the same and the acceptance of said repudiation by plaintiff; that after the signing of the armistice between the allies and their enemies, on or about the 15th day of November, 1918, the market price of hops began to rise, until, on or about the 18th day of December, 1918, the market price of hops mentioned in said agreement was 25 cents per pound; that on or about the 18th day of December, 1918, said defendant C. A. Wagner began to assert and claim that said contract was still in full force and effect; that on the 18th day of December, 1918, said C. A. Wagner had said instrument, relating to the crop of hops for the year 1919, recorded in the county recorder's office of Sacramento county, and that on or about the 24th day of January, 1919, he assigned said instrument, relating to the crop of hops for the year 1919, to defendant Ben F. Hall; that defendant Ben F. Hall has notified plaintiff of said assignment of said contract, and now contends that the same is in full force and effect, and that plaintiff is obligated to deliver the hops mentioned in said instrument to him; that each of said defendants now claim that said instrument, relating to the crop of hops for the years 1919 and 1920, is in full force and effect. It is further alleged that said instruments, relating to the crops of hops for the years 1919 and 1920, now constitute a cloud and an incumbrance upon plaintiff's crops for said years, and that the same, unless canceled and annulled by a decree of the court, will hinder and annoy plaintiff in the peaceable possession and enjoyment of said crops of hops for said years, and that they do now hinder, delay, and prevent plaintiff from contracting for the sale of said hops for said years, or of selling or disposing of the same. The prayer is for a judgment declaring said agreement terminated and canceled, and that said instruments, relating to said crops of hops for 1919 and 1920, be declared null and void, and that defendants, and each of them, their agents, attorneys, successors, and assigns, be restrained and enjoined from attempting to enforce either of said instruments or assert the validity of the same, or to transfer the same."

It further appears from the pleadings that prior to the time of the execution of the three instruments just referred to the plaintiff had contracted to sell to Wm. Uhlmann & Co. 300 bales of hops, or about 60,000 pounds of the crop of 1918 to be grown on the said premises, which contract was made prior to the contract for 40,000 pounds of the 1918 crop before the court in this action, and constituted a prior obligation; that on the 20th day of February, 1918, the date of the execution of the three contracts, the defendant Wagner sold and assigned, by an instrument in writing, the contract for the sale and purchase of the crop for the year 1918 to Harry Fraser; that on the 20th day of January, 1919, said Wagner sold and assigned by an instrument in writing the contract for the sale and purchase of the crop of the year 1919 to defendant B.

F. Hall; that on January 16, 1919, said Wagner sold and assigned by an instrument in writing the contract for the sale and purchase of the crop of the year 1920 to the defendant A. A. Merkeley. It appears that Mr. Fraser, the purchaser of the 1918 crop, did not desire to have his name known in the transaction, and, accordingly, the advances of money to assist the plaintiff in cultivating and harvesting his crop as called for by the contract for the 1918 crop were made by defendant Wagner with funds furnished for that purpose by Fraser.

The separate demurrers of the defendants Wagner, Hall, and Merkeley were overruled by the court, whereupon the said defendants filed answers denying generally the material allegations of the complaint, and asking that said contracts for the years 1919 and 1920, respectively, be adjudged "good, valid, existing, independent, and separate contracts," etc., and that the same should constitute valid liens upon the lands involved for said 1919 and 1920 crops, and for costs.

Upon a trial of the issues involved, the court made its findings of fact and conclusions of law, the latter being as follows:

(1) "That the contracts set out in plaintiff's complaint, and marked as Exhibits A, B, and C, were one entire contract; that the same were terminated by the breach and refusal of defendant Wagner to perform the same, and plaintiff's election to treat said breach as a termination of said contract; that the same were terminated by plaintiff and defendant Wagner mutually agreeing that the same should be and were terminated; that the same are now terminated, and invalid, and of no force and effect, and have no existence; (2) that the assertion by defendants of the validity of said contract and the claim of defendant to have an interest in the crop of hops mentioned in said contract for the year 1919 and 1920 prevents plaintiff from contracting to sell, or to sell, said hops for said years, and prevents plaintiff from peaceably enjoying and holding said property."

Judgment was ordered accordingly.

The appellants contend: (1) That the complaint does not state facts sufficient to constitute a cause of action, in that therein the plaintiff does not state that he is ready to and does restore and offer to restore to defendants the advances made to him by the defendant Wagner according to the terms of the contract; (2) that the court erred in holding that the several written instruments constituted a single contract or involved a single transaction. In this connection, it is further contended that the court erred in admitting evidence of a parol contemporaneous agreement of the parties as to the scope and effect of the three written instruments—that is, that parol testimony was incompetent to prove that the intention of the parties, unexpressed in the writings, was that the said writings were interdependent, and were to evidence

the terms of a single contract relating to a single transaction, the effect of said testimony being to change or modify the terms of a written agreement; (3) that the failure of Fraser and Wagner to make the further advance of \$500, mentioned in the complaint, did not constitute or involve a breach of the contract; (4) that defendant Hall was a purchaser for value without notice; (5) that there was no mutual cancellation of the contract as found by the court; (6) that findings 18 and 19 are not supported by the evidence. These findings are as follows:

18. "That defendant Wagner refused to perform said contract by his failure to advance \$500 to plaintiff; that said \$500 would have enabled plaintiff to have harvested the remainder of his crop; that plaintiff was unable to secure said \$500, or any other sum, from any other source, and by reason thereof was unable to harvest the remainder of his crop, and 450 bales of the same (about 90,000 pounds) was totally lost and destroyed to plaintiff; that, by reason of defendant Wagner's breach of said contract, plaintiff suffered damages, and was and is damaged in the sum of \$9,000."

19. "That prior to and at the time of the termination of said contract, plaintiff had performed all the terms and conditions thereof to be done and performed on his part, and was then and there ready, able, and willing to perform said contract on his part."

The contract involved in this controversy is not only one for the sale of the hops produced by plaintiff in the years 1918, 1919, and 1920, but also, by its express terms, constitutes a mortgage of said crops to secure the payment by plaintiff to Wagner of the sums advanced by the latter to the former according to the terms of the agreement.

The complaint alleges that Wagner promised and agreed to make certain advances to plaintiff for the purpose of enabling the latter to harvest the crops; that he (Wagner), after making certain advances which were short by \$500 of the maximum amount which he agreed to advance, refused to advance said mentioned sum to plaintiff, and so repudiated the agreement; that, by reason of such refusal, the plaintiff was prevented from harvesting all the hops growing on his premises in the year 1918, and that he thereby lost 450 bales. It is alleged that Wagner repeatedly refused to advance said sum of \$500 and repeatedly told plaintiff that he (plaintiff) was released from said contract, and that said contract was at an end, etc. From these allegations it is clear that the complaint proceeded upon the theory that there was a mutual renunciation of the agreement to sell and buy the hops, and therefore the principal object of this action was to obtain a decree removing the mortgage lien from the crops for the years covered by the agreement. It was necessary, of course, as a prerequisite to such relief, to have the contract declared void, and for that reason canceled and annulled, and

this, as alleged, upon the ground that Wagner had repudiated or abandoned the contract, entailing upon the plaintiff the loss mentioned.

[1, 2] It is undoubtedly the general rule that, in all actions either to rescind or cancel a contract, the party seeking the relief must restore to the defendant whatever of value he has paid or given under it, or, in other words, the defendant must be by plaintiff restored to statu quo. *Sullivan v. California Realty Co.*, 142 Cal. 201, 204, 75 Pac. 767. This rule follows from the equitable principle that he who seeks equity must do equity, and that upon that principle no one will be permitted to hold that which he has secured from another under a contract whose force he is seeking to destroy while it is still executory, unless he can show by his pleading and his proof that there are equitable circumstances in the case which would justify him in retaining whatever of value he has received under the contract from the other party or in rendering it not requisite that he should restore the other party to statu quo. In this case, however, the complaint shows that the defendant Wagner refused to live up to the terms of the contract, and this amounted to an abandonment thereof. The plaintiff seems to have acquiesced in Wagner's breach of the agreement, for he has not sued for damages for the breach, or attempted to enforce the terms of the agreement. He has proceeded upon the theory, well justified, that there was a mutual abandonment, which amounted to a rescission—indeed, the only way that a rescission may be effected by the act of the parties themselves, since the mere abandonment of the contract by one of the parties and refusal to proceed therewith cannot constitute a rescission, although such act is a ground for an action for rescission. Standing on the abandonment of the contract by Wagner and his own acquiescence therein, the plaintiff merely seeks by his complaint to secure a cancellation of the agreement, to the end that the embarrassment incident to the lien upon his crops for the years embraced in the contract and the mortgage may be removed.

But there are exceptions to the general rule that the party against whom the remedy of rescission is invoked must be restored to statu quo before the relief sought will be granted. Some of these exceptions are given in *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797, and among them is the case where, without fault of plaintiff, there have been peculiar complications which make it impossible, or not imperative, for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties. See *Richards v. Farmers*, etc., Bank, 7 Cal. App. 387, 393, 394, 94 Pac. 393.

While it is true, as stated, that the plaintiff

does not sue in tort or for damages for the breach of the contract, we may, nevertheless, consider the allegation in the complaint that he did suffer damage by reason of the violation of the contract by Wagner for the purpose of determining the equities of the case. The maxim that he who seeks equity must do equity does not apply where, as here, it is made clearly to appear in the complaint that, in the transaction as to which relief is sought, the plaintiff, by reason of the abandonment of the contract by the defendant, has suffered a loss equal to, if not in excess of, any loss which the defendant has suffered, or would suffer, from the transaction if restoration to the latter of what he has parted with has not been made. The allegation that the act of Wagner in renouncing the contract had cost plaintiff 450 bales of hops, on account of his inability to harvest them by reason of Wagner's refusal to advance the \$500, as agreed, while not direct as to the extent of his loss when measured in money, clearly enough shows, when considered in connection with the contract (which is made a part of the complaint), that the loss so suffered by him is far in excess of the sums advanced to him by Wagner. Under these circumstances, it was not necessary for the plaintiff to restore or offer to restore to the defendants the sums advanced him by Wagner to entitle him to the relief he, by his action, asks for, whether the remedy he invokes be either that of rescission or that of cancellation.

In this connection, we may with propriety further observe that the evidence does not call for the application of the equitable principle above mentioned. As above stated, the manifest object of plaintiff's action was to get rid of the mortgage lien upon his crops for the years covered by the mortgage. The court found, upon what we believe to be sufficient evidence, that the plaintiff, by reason of the failure of Wagner to complete the advancements he agreed to make to plaintiff and further, because of the failure of plaintiff to secure from any other source the sum of \$500, the latter suffered the loss of 450 bales, or 90,000 pounds of hops, and that the damage so suffered by plaintiff amounted in money to the sum of \$9,000. It is manifest, therefore, that, while it is true that plaintiff's action is, in effect, one to quiet title to the mortgaged crops, the equitable principle referred to, which is undoubtedly applicable in all cases to quiet title where the circumstances thereof make it appropriate (see *Booth v. Hoskins*, 75 Cal. 271, 276, 17 Pac. 225) is not, upon the evidence, applicable here.

[3] The next point to which attention will be given is that the court erred in allowing parol testimony for the purpose of explaining that the three instruments involved herein were understood and intended by Peterson and Wagner to constitute a single contract respecting a single transaction. The contention

of the defendants is, as has been shown, that the three several instruments were not interdependent or indivisible, but involved three distinct independent contracts, the one having no relation to or connection with the other. This, it is contended, appears from the face of the writings themselves, and hence, so it is argued, the effect of the allowance of parol testimony for the purpose above stated was to vary or modify the terms of said instruments by parol. The importance of this point is, as is obvious, that, even if the agreement as to the crop for 1918 was breached by Wagner, such breach could not effect or nullify the agreement as to the crops for the years 1919 and 1920.

The rule that the terms of a written contract cannot be changed or varied by parol testimony or evidence extrinsic to the writing itself is elementary. It has been expressly adopted into our system of laws, and is embraced in a number of sections of our codes, one of which is section 1856 of the Code of Civil Procedure. Expressly is it therein provided that "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms," and therefore neither the parties to such agreement nor their representatives or successors in interest can introduce evidence of the terms of the agreement other than the contents of the writing, except:

"(1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) where the validity of the agreement is the fact in dispute."

But said section contains this qualification:

"But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud."

The Civil Code (section 1625) also lays down a familiar rule relative to written agreements as follows:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Section 1698 of the last-named Code further provides:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

It is the provisions of the foregoing sections which appellants insist were offended by the allowance of the parol testimony referred to. This theory is founded on a misconception of the effect of the testimony upon the writings in question. The testimony, the legal propriety of which is here challenged, cannot justly be held to have had the

effect of varying or changing in any particular or in any sense the terms of the written instruments. The essential or vital terms of the latter were that the plaintiff would sell a certain specified number of pounds of the hops produced by him in each of the years mentioned in said instruments at a specified price to be paid by the buyer, and that Wagner would advance to plaintiff certain sums of money to be used in cultivating and harvesting the crops for the years covered by the agreement. It is obvious that the testimony objected to had no bearing whatever upon the terms of the agreement. The simple question was whether the three instruments were intended by the parties to constitute one, or a single contract. Upon their face they appeared to represent three distinct or several contracts, but the plaintiff, in his complaint, in effect alleged that they were intended and understood by and between him and Wagner, before and at the time of their execution, to represent one single transaction, and one single contract, and that it was that specific understanding and agreement that moved him to enter into the contract with Wagner upon the terms therein expressed; that, in brief, it formed part of the consideration inducing him to enter into the contract.

Section 1642 of the Civil Code declares:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

Section 1647 of the same Code provides:

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

Jones on Evidence (vol. 3, by Horwitz, § 439) declares this to be the rule:

"The general rule is not violated by allowing parol evidence to be given of the contents of a distinct valid contemporaneous agreement between parties which was not reduced to writing, when the same is not in conflict with the provisions of the written instrument."

Again, the same author (pages 178, 179, § 439, of the same volume) states the rule in this fashion:

"The law is that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where the written contract was executed upon the faith of the parol contract or representations, such evidence is admissible."

The books contain many cases in which the principles above stated have been applied. Indeed, in the case of *Torrey v. Shea*,

29 Cal. App. 316, 155 Pac. 820, in which the opinion was prepared by Mr. Justice Lennon, then a member of the Court of Appeal of the First district, but now of the Supreme Court, we have a concrete application of the rule recognizing the legal propriety of, as well as the necessity for, the allowance of parol testimony as in aid of the ascertainment of the real intention of the parties to a written contract, where the same is itself characterized by more or less obscurity in that particular, or where it is otherwise made to appear that the real intent of the instrument cannot be made known except by proof of a contemporaneous parol agreement. Like the case here, the action in that case involved a contract for the sale and purchase of hops produced by the plaintiff for three successive years. The contract, as here, was made into three different instruments, each covering a different one of the three years included in the agreement. The parties to the action in that case occupied, as litigants, positions reverse to those of the parties in the case at bar, the seller having breached the agreement by refusing to deliver the hops to the buyer thereof as agreed. The latter, as plaintiff, maintained, as does the plaintiff here, that the three instruments constituted a single contract, or but one transaction, and that such was the intention as was made manifest in their oral negotiations accompanying and directly resulting in the execution of the contract. The trial court in that case ruled—

"That the defendants were entitled to show by parol evidence that the three instruments were intended and executed by the parties thereto to cover but one transaction, and that the controlling consideration for the execution of the particular writing in suit, contracting for the delivery of hops during the year 1911, was the contemporaneous execution of two other instruments calling for similar deliveries in the years 1909 and 1910."

The appellate court, upholding the ruling of the trial court, with clearness expounds the rule sanctioning, under such circumstances as were existent in that case, and as are present in the instant case, parol proof of contemporaneous oral agreement disclosing the intention of the parties as to whether two or more writings, apparently independent of each other, were to constitute a single transaction. Indeed, so much is said in the opinion that applies with singular cogency to the question in hand, that the temptation to reproduce herein an extensive excerpt therefrom is difficult to resist; yet to do so would extend this opinion to a much greater length than is desirable, and we shall, therefore, content ourselves by a mere reference to the case. It should be stated, however, that the Supreme Court denied a hearing of the case, and later, in the case of *Merkeley v. Fisk*, 179 Cal. 748, 178 Pac. 945, cited *Torrey v.*

Shea upon the very proposition discussed in the latter case, and it is sufficient to make the following excerpt from the later case named:

"Obviously, the most certain criterion of the completeness of an individual writing will be found within the writing itself. It is therefore the general rule that two or more separately executed instruments may be considered and construed as one contract only when, upon their face, they deal with the same subject-matter, and are by reference to one another so connected that they may be fairly said to be interdependent. Of course, this rule is not so rigid as to be absolutely unyielding in the face of a suggestion contained in the writing itself that it is not complete, or of circumstances which call for the application of a well-defined exception to the rule that 'a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.' Civ. Code, § 1647. This is so, we apprehend, because, while ordinarily the subject-matter and identity of the parties to several instruments will be disclosed by a reference to the instruments themselves, nevertheless, 'the question of whether or not several instruments between the same parties were * * * intended * * * to cover a single transaction oftentimes cannot be ascertained from an inspection of the instruments themselves, and, consequently, if the intention of the parties be either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments'"—citing *Torrey v. Shea*, supra.

See the very recent case of *Stern v. Sunset Road Oil Co. et al.*, 190 Pac. 651, holding that the intention of the parties is the determining factor in the ascertainment of whether a contract evidenced by several or separate writings is or is not divisible. See, also, upon the same proposition, *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39; *Sterling v. Gregory*, 149 Cal. 117, 120, 85 Pac. 305; *Los Angeles Gas & Elec. Co. v. Amal Oil Co.*, 156 Cal. 776, 779, 106 Pac. 55.

While the precise question before us was not, as we judge from the opinion therein, before the court in *Sterling v. Gregory*, supra, nevertheless, the court (Mr. Justice Sloss writing the opinion) used this significant language:

"It must be remembered that the question whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction. The court seeks to determine the intent of the parties from a consideration of all the circumstances surrounding the making of the contract."

In that case, Judge Sloss approves the following from *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736, characterizing it as a sound statement of the rule:

"A contract is entire, and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent. * * * On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. * * * It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject; but on the whole, the weight of opinion, and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties. This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case."

How all the "circumstances surrounding the making of the contract," or the acts of the parties "and the circumstances of each particular case," other than the mere act of executing the contract, and the "circumstances" as exhibited by the writing itself, may be shown otherwise than by evidence extrinsic to the writing itself, it would, indeed, be difficult to point out.

Counsel for appellants contend, however, that the case of *Torrey v. Shea* is different, and therefore to be differentiated, from the present case, in that the complaint of the plaintiffs in the former specifically pleaded a collateral contemporaneous agreement to the effect that the several instruments there involved should constitute but a single and indivisible contract covering a single transaction, etc., whereas, so it is likewise asserted, the complaint in the instant case pleads no such agreement. Counsel for appellant Hall proceed in their brief: "The court, under the issue raised in the *Torrey-Shea* Case, quite properly, in our opinion, admitted the testimony of the defendants to establish the parol agreement alleged. * * * The evidence in *Torrey v. Shea* was directed to an issue raised upon allegations made in the amended answer of defendants, in accordance with which allegations the court properly found, and which findings were sustained by the evidence," while in the case at bar, having alleged no contemporaneous agreement, the plaintiff "sought rather, so it appears from the complaint, to rely upon a construction of the contracts." With this concession, so far as appellant Hall is concerned, the point sought to be maintained is surrendered, if it may justly be said that the complaint does tender an issue upon the question of the making of such an agree-

ment, and we think, as before suggested, that it sufficiently does so, in view of the silence of the instruments themselves upon that proposition, in the allegations—

"That said separate instruments for each year are and were not distinct and severable; that the consideration expressed in each of said separate instruments is and was not distinct and severable; that the consideration entering into each of said separate instruments was the agreement to buy and sell said hops for said three years as set forth in said instruments." Paragraph 3, *supra*.

We have carefully examined the cases cited by counsel for the respective appellants as supporting their position that it was error to permit proof of the parol collateral agreement in question, and we find none of them in point. Nothing can be gained by reviewing those cases herein. It will be sufficient to say that in all the cases of those cited in which an attempt was made by evidence dehors the writings themselves to add to them some term or terms not expressed or provided therein, or to vary or change the terms of the instruments themselves, it was with eminent propriety held that to permit testimony having that effect would involve a violation of the rule interdicting the modification of the terms of a written agreement by parol. But, as pointed out in the outset of this discussion, that is not this case. The evidence offered and received here was not for the purpose of varying the terms of the instruments, nor could it have that effect. The vital terms of the agreement, as stated above, were the agreement to sell the crops produced by plaintiff for the years and at the prices therein mentioned, and the agreement of Wagner to make certain specified advancements to plaintiff to enable him to cultivate and harvest the crops. As to these terms, the instruments themselves, upon their face, were couched in such terms as to import a complete legal obligation, and not characterized by any uncertainty as to the object and extent of the engagement. Of course, as to those vital terms, it is to be presumed that the whole engagement of the plaintiff and Wagner, and the extent and manner of their undertaking, are embodied in the writings. *Seitz v. Brewer's R. M. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; 1 Greenleaf on Ev. § 275; *Jones on Evidence*, § 439.

The evidence objected to here, however, as before pointed out, was intended merely as in aid of the solution of the question, not whether the terms of the agreement as expressed in the writings themselves were or were not what the parties agreed that they should be, but whether (the instruments being silent as to that matter) it was or was not the intention of the parties that the subject-matter of the three separate writings should involve or relate to and cover but a

single transaction, and the instruments themselves were to constitute a single contract, and, also to show whether the fact of making a three-year indivisible contract was or was not the controlling reason (not the consideration he was to receive for the hops under the agreement to sell and deliver the same to Wagner) which induced him to enter into the agreement to sell the hops for the consideration expressed in the written instruments; in other words, whether, but for the agreement that the contract should be a single one, and indivisible for the three years' crops, he would have entered into the contract at all for the sale of the hops on the terms expressed in the three instruments.

[4] It is deemed appropriate to consider in this connection whether the testimony allowed under the ruling last above considered is sufficient to support the finding that the parol contemporaneous agreement referred to was entered into or had between plaintiff and Wagner. The appellants contend that it was not.

The plaintiff testified that, in the first conversation with Wagner, which was held over the telephone, the latter proposed to him (plaintiff) a contract for one year's crop, to which plaintiff demurred, saying that he would not enter into such a contract unless it embraced the crops for three years. This conversation occurred two or three days prior to the day on which the three instruments were executed. Subsequently, Wagner again called plaintiff on the phone and said: "I have something else for you; we have an offer that might interest you." The plaintiff asked for the nature of the new offer, and Wagner replied: "I have two more years' offer. We have 15 and 16 cents." The following morning plaintiff and Wagner, by prearrangement, met at a business house in the city of Sacramento. Plaintiff then stated to Wagner that he wanted 16 cents per pound for his hops for three years, but Wagner was willing to offer 15 cents per pound. Plaintiff thereupon offered to enter into a contract for three years upon the basis of 16 cents per pound for the first and second years and 15 cents for the third year, to which proposition Wagner assented. Wagner thereupon proceeded to prepare the agreement upon the stereotyped printed forms generally used by hop buyers for such contracts, and, observing that he was making out a separate contract for each year covered by their agreement, the plaintiff said to the former: "Mr. Wagner, this is a three-year deal," to which Wagner explained that the form of contract he had was not large enough to insert "all the dates, different prices, for the different years. While," continued Wagner, "this is a three-year deal, we will put them on different forms for convenience sake." With this un-

derstanding—that is, that it was to be a "three-year deal"—the plaintiff consented, for the sake of convenience, to have the agreement evidenced by the three instruments.

This testimony very clearly and plainly tends to show that the parties entered into the written engagement with the distinct understanding, and under an agreement, that the transaction should and was to be regarded as one, and the three instruments as evidence of a single, indivisible contract. The trial court, therefore, having accepted said testimony as revealing the truth of the transaction in that particular, was warranted in making the finding that the transaction involved but a single, indivisible contract for the sale and purchase of the hops for three years.

[5] It is not necessary to present herein the testimony upon which the court predicated findings 18 and 19. It is enough to state that an examination of said testimony has convinced us that from it the court was authorized, in the exercise of its discretion as to the weight or evidentiary value of the testimony, to conclude as a matter of fact that the failure or refusal of Wagner to advance the \$500 involved a refusal by him to perform the contract; that said sum, if advanced as agreed, would have enabled the plaintiff to harvest the remainder of the crop; that plaintiff, although making an effort to do so, was unable to secure from any other source the loan of \$500, to be used in harvesting the remainder of the crop; and that, as a result thereof, 450 bales of hops were destroyed and lost by reason of having been required to remain on the vines, and unharvested; that the detriment thereby sustained by plaintiff amounted in damages to the sum of \$9,000; that, before and at the time that Wagner refused to further advance \$500, the plaintiff had performed all the terms and conditions of the contract to be done and performed by him, and was ready, able, and willing to perform said contract on his part. Of course, the latter finding must be considered with the other findings, and, as so construed, must be held to mean that plaintiff was ready to perform his part of the contract upon a performance by Wagner of the terms of the covenant of the agreement as to advances.

[6] The finding that there was a mutual cancellation of the contract by the parties derives support from the testimony of the plaintiff that after demanding from Wagner the \$500 referred to on several different occasions, on each of which Wagner stated to plaintiff that he (Wagner) could not raise that sum, the two met, when plaintiff thus addressed Wagner: "Mr. Wagner, if you do not give me that \$500, that breaks the contract," to which Wagner replied: "I know it does. I cannot raise the money, I can-

not help it—hops are very cheap, anyhow." Later (in the month of September) plaintiff met Wagner, when this conversation took place between them:

Wagner: "Hello, Paul; I hear you are going to bring suit against me."

Plaintiff: "Well, I ought to. I lost three or four hundred bales on your account, breaking this contract."

Wagner: "Do so, by all means. I want you to bring suit against me. I know you lost quite a number of bales."

The plaintiff continued:

"It was some time in September (1918). I do not know exactly when. I met him [Wagner] at Faust and McGinnis saloon. * * * I asked Mr. Wagner about the other two contracts. He says: 'They are a dead issue. They canceled themselves.' (It may here be suggested that Wagner's statement to plaintiff that he wanted the latter to bring suit against him [Wagner] may be accounted for by the fact that, prior to the above-mentioned conversation, Wagner had formally assigned the contract to Fraser, who, as seen, was the real vendee in the contract of sale, Wagner having acted for Fraser in the making of the contract, and the latter having actually furnished the money for the advances provided for.)

As heretofore stated, the plaintiff made no move looking to an enforcement of the contract, and did not, and has not, asked for damages for its breach. His present action marked the first step he took respecting the broken engagement, and this move was made only after it was made known to him that Wagner, after there was a rise in the price of hops, assigned the different instruments constituting evidence of the agreement and thus indicated that he intended to maintain that the agreement still existed, and imposed a valid and binding obligation upon the plaintiff. From the testimony and the other considerations thus adverted to, we do not doubt but that the court was well within the evidence in finding that the contract was mutually canceled by the parties.

[7] The point that the refusal by Wagner to advance the said \$500 did not constitute a breach of the agreement is founded upon the following situation: The plaintiff, as has already been shown, had, prior to the making of the contract with Wagner, entered into a similar contract with a hop-buying firm known as Uhlmann & Co., whereby he was to sell and deliver to said firm approximately 60,000 pounds of the 1918 crop. This contract was, of course, prior in right to the Wagner contract, and the latter was entered into by Wagner with full knowledge of that fact. It is contended that the evidence shows that the moneys already advanced to plaintiff under the Wagner contract were used, and that the \$500 which defendant Wagner refused to advance would also be used in harvesting the hops which were sold and to be

delivered to Uhlmann & Co., and that plaintiff was not entitled under the Wagner contract to the further advance of \$500 to be used for that purpose. It is hence argued that the refusal by Wagner to advance said sum of \$500 did not involve a violation of the Wagner contract.

There is no merit in the point or the argument. As stated, Wagner, when he entered into the contract with plaintiff, knew of the existence of the Uhlmann contract, and was presumably familiar with its terms. He did not, therefore, enter into the engagement with plaintiff under any misapprehension or in ignorance of the situation as it was created by the Uhlmann contract. Moreover, there is no express provision in his contract with plaintiff requiring the moneys he agreed to advance to the latter to be exclusively used in harvesting the portion of the hops that were to be delivered to him, and there is nothing in the terms of the agreement justifying the implication that such was the understanding. The agreement merely provides in general language that the defendant should advance to plaintiff a specified maximum sum of money for the purpose of enabling the latter to cultivate and harvest the hops to be produced by him, and in view of the fact that Wagner, when he made the agreement with plaintiff, had knowledge of the existence of the Uhlmann agreement, and its priority over his agreement, would seem to warrant the implication that the agreement to make the advances was made with the intention that the moneys so advanced should and would be used in harvesting plaintiff's entire crop for 1918.

[8, 9] It is lastly contended that the defendants Hall and Merkeley purchased and paid a valuable consideration for the contract in question without knowledge of the parol collateral agreement referred to, and it is insisted that as to them the rule or maxim, "When one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer" (Civ. Code, § 3543), is to be applied. The contention, manifestly, involves the claim of an estoppel in pais as against the plaintiff.

There are several distinct answers to the proposition. The first is that estoppel is not pleaded by either Hall or Merkeley, and "it is, therefore, not properly in the case." *Napa Val. Pkg. Co. v. S. F., etc., Funds*, 18 Cal. App. 461, 466, 118 Pac. 469, 470; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. Again, as to defendant Hall, it is to be observed that the assignment to him recites that the consideration therefor was the sum of \$1, and the presumption is that that amount was the actual sum paid by him for the assignment. 13 Cyc. 613; *Devlin on Deeds*, § 817; *Kinsell v. Thomas*, 18 Cal. App. 683, 692, 124 Pac.

(198 P.)

220. Indeed, it was admitted and stipulated by Hall that \$1 only was the amount which was paid by him to Wagner for the assignment. Obviously, Hall cannot be said to have been "peculiarly prejudiced" by the transaction, even if it were true that he was lured into purchasing Wagner's rights under the contract through the negligence or conduct of the plaintiff.

[10] The assignment to Merkeley, however, does not, save in general terms, state the consideration therefor, it merely reciting, "for a good and sufficient consideration;" and no doubt the presumption would be, in such case, that the consideration was a valuable one. But, assuming that the estoppel has been by pleading properly introduced into the case, the whole question is whether said defendants were induced to enter into the transaction through any act or words or conduct or negligence of the plaintiff. The findings and the evidence upon which they were predicated disclose, as has been shown, that the defendant Wagner broke the contract, repudiated it, and refused to proceed with it, and that the plaintiff did nothing towards compelling its enforcement until Wagner later made the assignments in question.

What else could the plaintiff have done but to sue for damages for the breach of the contract, if he had elected to stand upon it? He merely treated Wagner's renunciation of the contract as a termination of it, and allowed the matter thus to stand until Wagner undertook to revive it. There is no testimony of any acts or words of his indicating that he regarded or intended to treat it as a binding obligation after Wagner refused to proceed with it. If the agreement had been recorded, or was of record at the time of its breach and repudiation by Wagner, and plaintiff had failed to take steps before the execution of the assignments in question to have it canceled or annulled because of the termination thereof, then a different question might be presented. But at the time of the breach of the agreement none of the instruments evidencing its terms had been, or was, of record, and, presumably, in view of that fact, and his acquiescence in the termination of the contract by Wagner, the plaintiff intended to allow the transaction to stand that way, and to treat the entire contract, as Wagner expressed it, as "a dead issue."

We cannot see how it can be successfully maintained upon this record how Hall and Merkeley could have been misled to their prejudice, or at all, by any act or conduct of plaintiff. On the other hand, it seems to be clear that they themselves were negligent when entering into the transaction. The fact that the contract and mortgage (that is, the instrument covering the 1919 crop) which was executed on the 20th day of February, 1918, was not recorded until December 18,

1918, and the only one of the three several writings that was recorded, was sufficient to put Hall and Merkeley upon inquiry as to the status of the engagement between Wagner and plaintiff. They did not receive their respective assignments until January, 1919, and being, as the record shows, hop raisers and buyers, it would seem that so important a circumstance as a failure to record a contract, which also operated as a mortgage, for so long a period would at once have suggested to their minds the necessity for a full inquiry into the transaction between plaintiff and Wagner before purchasing and paying for Wagner's rights therein; and had they done so, they certainly would have learned of the true situation as to said transaction, and thus have saved themselves whatever of damage or detriment they may now be required to suffer. But, at any rate, even if it were true that a lack of diligence cannot be imputed to Hall and Merkeley, it is plain that, if they have been imposed upon to their pecuniary detriment in the transaction, it was due to no conduct or negligence of the plaintiff, but rather to the failure of their assignor to reveal to them, before executing to them the assignments, the true state of affairs between the latter and plaintiff, as it is to be gathered from the evidence and the findings.

There are some other points involving certain rulings of the court upon evidence which, after a careful consideration thereof, we have concluded are not of sufficient importance to require special notice thereof herein.

The judgment in Civ. 2264, Peterson v. Wagner & Merkeley et al., is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

(52 Cal. App. 795,

PETERSON v. WAGNER et al. (Civ. 2263.)

(District Court of Appeal, Third District, California. March 21, 1921.)

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Paul E. Peterson against C. A. Wagner and others, to terminate, invalidate, and avoid certain written instruments, and for an injunction. Judgment for plaintiff, and the defendants appeal. Affirmed.

W. Finlaw Geary, of Santa Rosa, for appellants.

Thomas B. Leeper, of Sacramento, for respondent.

HART, J. On the stipulation of the parties to this appeal, and those to the appeal in Peterson v. Wagner & Merkeley, Civ. 2204, 198 Pac. 25, the two appeals were considered together, so far as the points urged for a reversal are concerned. We have this day filed an opinion

in Civ. 2264, affirming the judgment. In said opinion, in accordance with the stipulation mentioned, we have considered and disposed of all the points raised on both appeals which we conceived required special consideration adversely to the appellants in both appeals. Accordingly, upon the authority of *Peterson v. Wagner & Merkeley et al.* (Civ. 2264) 198 Pac. 25, the judgment in Civ. 2263, *Peterson v. Wagner & Hall et al.*, is affirmed.

We concur: Prewett, Presiding Justice pro tem.; BURNETT, J.

(52 Cal. App. 48)

KLAFFKI v. KAUFFMAN et al. (Civ. 3098.)

(District Court of Appeal, Second District, Division 2, California. March 24, 1921.)

1. Master and servant §83 — Allegation of place of contract essential to recovery of penalty for nonpayment of wages.

A servant's right to penalty under St. 1911, p. 1268, § 3, as amended by Acts 1915, p. 299, for nonpayment of wages sued for, is purely statutory, and he must allege and prove that the services were contracted for or were performed in or at least were payable in this state, or, if they were not, that they were contracted for or were performed in a state having a similar statute.

2. Master and servant §83 — Penalty for withholding wages depends upon law of place of contract.

St. 1911, p. 1268, § 3, amended by St. 1915, p. 299, affords the employee two remedies, each of which is for the vindication of a distinct, substantive right, namely the common-law remedy for breach of the employer's contract to pay the agreed wage when due, the statutory remedy for vindication of a statutory wrong, to wit, the penalty allowed for the withholding of wages, and, though the penalty appertains to the remedy, the right thereto depends upon the laws of the state of employment and discharge.

3. Evidence §80(1)—Presumption that statutory law of another state is the same as our own does not extend to the matter of penalty.

While in the absence of proof to the contrary the law of another state will be presumed to be the same as our own, and this presumption extends to statutory as well as common law, yet there is the exception that the presumption of similarity of statutory enactment will not be indulged where the law of the forum imposes a penalty such as that for withholding wages due.

4. Appeal and error §1172(5)—Where judgment is in lump sum, it may be reversed in toto, though it was in part correct.

Upon an appeal in a case where servant has recovered for both unpaid wages and penalty thereon and the recovery of wages is not contested, but the case must be reversed because the pleadings will not support the recovery of penalty by showing the case within the statute

of this state or a similar statute of some other state or country, though the retrial be thus limited, the judgment may be reversed in toto because it is for one lump sum.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Roy H. Klaffki against Angela G. Kauffman and others for wages. Judgment for plaintiff, and the defendants appeal. Reversed and remanded, with directions.

C. O. Whittemore, J. R. Whittemore, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for appellants.

William J. Palmer, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action brought by plaintiff upon his own claim and certain claims assigned to him by his fellow laborers to recover wages due for work performed for defendants. Judgment passed for plaintiff, and defendants appeal. The evidence is not before us; the appeal being on the judgment roll alone.

[1] The action was to recover not only the wages of the men, but also the penalty provided by the act entitled "An act providing for the payment of wages," approved May 1, 1911 (Stats. 1911, p. 1268), as amended by the act approved April 28, 1915 (Stats. 1915, p. 299), section 3 whereof reads:

"In the event that any employer shall fail to pay, without abatement or deduction, within five days after the same shall become due under the provisions of section one of this act, any wages of any employee who is discharged or who resigns or quits, as in said section one provided, then as penalty for such non-payment the wages of such servant or employee shall continue from the due date thereof at the same rate until paid; * * * provided, that in no case shall such wages continue for more than thirty days."

In addition to the amounts found due as wages, the court found that there is due each of the several claimants a sum as the penalty provided by the act for the nonpayment of wages. The aggregate of the sums found due as wages is \$372, and the aggregate found due as penalties is \$532, making a total of \$904, for which total amount judgment was entered against defendants. There is no controversy as to the \$372 due the several claimants as wages. The only question raised by appellants is as to respondent's right, under the pleadings and the findings, to the \$532 found to be due as penalties under the statute.

The complaint does not allege nor does the court find that the men were hired in California, or that they quit or were discharged therein, or that they performed their work or were to receive their wages in this state. Indeed, the pleadings and findings are wholly

silent as to the place where the services were contracted for or where they were performed or were payable, or where the men quit their work. For aught that appears on the face of the judgment roll, which is all we have before us, the contract, for services may have been made and the work all performed and made payable in some foreign state or country. Appellants therefore make the point that so much of the judgment as is made up of the amount found due as penalties finds no support in either the complaint or the findings. Their claim is that the right to the penalties is purely statutory, and that therefore the plaintiff must allege and prove that the services were contracted for, or were performed in, or at least were payable in, this state, or, if they were not, that they were contracted for or were payable in or were performed within some state or country that has adopted a statute similar to that of this state—a statute giving a penalty to wage-earners for nonpayment of their wages when due. The record before us constrains us to hold with appellants in this contention.

The only replies that respondent vouchsafes to appellants' contention are: (1) The penalty allowed by our statute for nonpayment of wages pertains, not to the substantive right of the wage-earner, but to the remedy afforded him in an action to recover his unpaid wages; therefore, so it is argued, the law of the forum controls, regardless of where the contract may have been made, or where the wages were earned, or where made payable; (2) in any event there is a *prima facie* presumption that the law of the place where the wages were contracted for, or where they were earned or made payable, is the same as the law of this state. In our opinion neither of these points is tenable.

True it is that, though the substantive rights of parties are governed by the *lex loci*, it is the *lex fori* or law of the forum that governs as to the appropriate remedy to be afforded a suitor for the enforcement or protection of his right or for the redress or prevention of a wrong done or threatened him. It is often difficult to discern whether a particular inquiry relates to the remedy or to a substantive right. But, difficult as the question may be, the wrong inflicted or the right invaded, on which the action is based, must never be confused with the redress which the law affords. It is said in *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 153, 98 N. W. 918, 4 Ann. Cas. 519, that where the plaintiff sues for the redress of a wrong, "the act complained of is always to be diagnosed in the light of the law of the place where committed, and its character determined according to that law; but the particular kind of and the extent of the remedy to be applied necessarily depends on the notions of justice entertained by the forum by which it is to be administered." (*Italics ours.*)

In the instant case there not only is a breach of contract—a breach of defendants' agreement to pay the wages when due—but over and beyond this mere breach of contract there is something that, by the statute of this state, is made an actionable wrong—a wrong visited by the prescribed statutory penalty. That wrong is the continuance of the employer's breach of his contract to pay the wages when due. In actions of this character the plaintiff sues to recover, not only the wages due him under his contract with his employer, but also the penalty that the statute allows him because his employer, in addition to breaching his contract, has done him a further wrong—a wrong denounced by the statute, namely, the withholding of the wages for a greater period than five days after they become due. This wrong, in the language of the above excerpt from the opinion of the Iowa court, is "to be diagnosed in the light of the law of the place where committed, and its character determined according to that law." That is, the character of the act of withholding payment of the wages for more than five days is to be determined by the law of the place where the act is committed, or, at any rate, according to the law of the place where the contract of employment was made; and therefore whether the act complained of—the act of withholding the wages for more than the five days—is in and of itself, and aside from the mere breach of the employer's agreement to pay for the work, an actionable wrong, to be redressed by the recovery of a penalty, depends upon the law of the place where the work was contracted for or where it was made payable, or possibly, upon the law of the place where the work was performed, or where the employee quit or was discharged. We are not to be considered as determining which one of these things it is that brings a case within the provisions of our statute and impresses the act of withholding the wage with the character of an actionable wrong for which the penalty prescribed by our statute may be recovered. What we do say is that under our statute some one at least of these things must have occurred in this state in order to stamp the character of an actionable wrong upon the mere act of continuing the nonpayment of the wage for more than five days after it becomes due and payable; and this actionable wrong is the basis of a right of action that is additional to the wage-earner's right of action to recover the wages due under his contract. So that the right to the penalty is based upon an additional substantive right created by statute.

[2] The penalty provided by the statute does, it is true, appertain to the remedy. But this is no more than to say that the statute affords the employee two remedies, each of which is for the vindication of a separate and distinct substantive right; that is, there

is first the common-law remedy for breach of the employer's contract to pay the agreed wage when due, viz. the recovery of the wages due under the contract of employment; and there is also the statutory remedy for the vindication of the statutory wrong, viz. the penalty allowed the employee for withholding his wages for more than the five days. But each of these remedies appertains to its own separate and independent substantive right.

The situation is not like that where the statute empowers the court to impose treble damages when a tenant commits waste or in cases of forcible entry or unlawful detainer. In those cases the statute gives treble damages for the one wrongful act—the one and only wrongful act complained on in the complaint, namely, the tenant's waste, or his unlawful detainer, or the forcible entry, as the case may be. In that class of cases there is but one substantive right that has been invaded, and the treble damages allowed for the invasion of that right obviously pertain to the remedy only. But in cases arising under the act of 1911 there are two substantive rights. There is the employee's common-law right to the wages earned by him under his contract of employment; and there is also the employee's statutory right to the unearned wages which the statute awards him as a penalty for his employer's conduct in continuing to withhold his earned wages after they are due. So also there are two separate and independent wrongs. There is the wrongful violation of the employee's right to receive, when due, the wages earned by him; and there is also the statutory wrong, visited by the imposition of a penalty, which consists in the continued withholding of the wages after the expiration of the five days. To quote again from the Iowa case:

"The nature and extent of the wrong, everything relating to its essence, is one thing; the consequences which naturally flow from it quite another. The right of recovery depends on the former; the remedy to be applied, and its extent, upon the latter."

The case of *Louisiana & N. W. Ry. Co. v. Phelps*, 70 Ark. 17, 65 S. W. 709, is directly in point. There the plaintiff brought an action in one of the Arkansas courts to recover wages due him and likewise the penalty allowed by the Arkansas statute for nonpayment of wages. He had been employed in Louisiana and was discharged in that state. The Supreme Court of Arkansas held that plaintiff's right of action for any penalty for withholding payment of his wages accrued to him by virtue of his contract of employment and his discharge from defendant's service, and that therefore his right thereto, if any he had, depended upon the laws of Louisiana, where those acts occurred, and not upon the law of Arkansas, where the action was brought.

[3] Equally untenable is respondent's claim that, regardless of where the services may have been contracted for or where the claimants may have been discharged, it will be presumed, until the contrary is shown, that the law of that place, wherever it may be, is the same as that of this state. Without doubt, it is the established rule in this state that, in the absence of proof to the contrary, the law of another state will be presumed to be the same as our own; and this presumption extends to statutory as well as the common law. *Cavallaro v. Texas, etc., Ry. Co.*, 110 Cal. 348, 357, 42 Pac. 918, 52 Am. St. Rep. 94. But to this rule there is a generally recognized exception, which is that such presumption of similarity of statutory enactment will not be indulged where, as here, the law of the forum imposes a penalty. *Louisiana & N. W. Ry. Co. v. Phelps*, supra; *Grider v. Driver*, 46 Ark. 50; *Bird v. Olmstead* (Tenn. Ch. App.) 53 S. W. 978; *Chamberlayne on Evidence*, vol. 2, § 1213; 22 Corp. Jur. 153. See, also, *Myers v. Chicago, etc., R. Co.*, 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579.

[4] Since there is no attack upon those findings which show that plaintiff is entitled to a judgment for the amount of the wages actually earned by the claimants, the sum of \$372, there is no necessity for a retrial of any of the issues upon which those findings are based. Indeed, there seems to be no necessity for a retrial of any of the issues upon which the case already has been tried. The court has made findings upon those issues, and there is no pretense that any finding is not sustained by the evidence. The only issue upon which there seems to be any occasion for a trial, on the going down of the remittitur, is the issue that may be tendered by such amendment to the complaint as plaintiff may make in order that it shall appear that the case is within the California statute or within a similar statute of some other state or country. Though the retrial should be thus limited, and though plaintiff unquestionably is entitled, under the uncontested findings, to a judgment for \$372, we think it better to reverse the judgment in toto, since it is for one lump sum.

The judgment is reversed, and the cause remanded, with directions to the lower court to permit plaintiff, if he be so advised, to amend his complaint by alleging any fact or facts showing that his right to recover penalties for nonpayment of the wages is derivable from the statute of this state or is afforded him by some similar statutory provision in the enactments of some other state or country, and the court is directed to try the issue or issues thus tendered by such amendment, if any there be.

We concur: WORKS, J.; CRAIG, J.

(52 Cal. App. 133)

HAYNES v. DOXIE. (Civ. 3447.)

(District Court of Appeal, Second District, Division 1, California. March 29, 1921.)

Highways 179—Plaintiff running into unlighted truck stopped in the middle of highway on dark night held not contributorily negligent.

Where defendant, on a dark and rainy night, stopped his motor truck in the middle of the road for the purpose of placing lights thereon, and plaintiff, operating an automobile ran into the unlighted rear end of the truck, sustaining damages, held, that plaintiff was not shown to have been operating his automobile at a speed which amounted to contributory negligence as a matter of law by the fact that, on account of the darkness and rain, and the slippery condition of the road, he did not see the truck until he was within 25 or 30 feet from it, when it was too late to stop; it not appearing that plaintiff was running at a rate of over 30 miles per hour.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Robert E. Haynes against G. W. Doxie. From judgment for plaintiff, defendant appeals. Affirmed.

Thos. C. Ridgway, of Los Angeles, for appellant.

C. W. Hall, of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff recovered judgment against the defendant in a sum allowed as damages for injuries to plaintiff's automobile, which injuries were caused by negligence of the defendant resulting from a collision between plaintiff's automobile and a truck operated by the defendant. The defendant appeals from the judgment.

On the evening of February 20, 1920, after sundown, and at about the hour of 6 o'clock, darkness having set in, and at a time when there was a steady downpour of rain, the defendant, while operating a motor truck headed in a westerly direction on Wilshire boulevard, in the county of Los Angeles, stopped his truck at or near the middle of the road for the purpose of placing lights on the truck. This left the truck standing in the street without lights, and the defendant did not have a lighted lantern, or a light of any description, upon the rear end of the truck at the time when it was struck by plaintiff's automobile, as hereinafter stated.

In addition to the foregoing facts, the court found that at said time the plaintiff was driving an automobile in a westerly direction, on the northerly side of, and near the center of, the road; that at said time the plaintiff was driving at the rate of 18 miles per hour, and was unable to, and did not, see said motor truck until he was 25 or 30 feet from the rear end of the truck; that the

plaintiff, while driving as aforesaid, ran into and collided with the rear end of the truck; that the direct and proximate cause of the collision, and of the damage suffered by plaintiff's automobile, was the negligence and carelessness of the defendant in stopping his truck in such a position that its left, or south, wheels were in the middle of said Wilshire boulevard, and also the fact that, as plaintiff's automobile approached the rear of said truck, defendant was standing to the left or southerly side of said truck, and shouted at plaintiff, which caused plaintiff to attempt to pass to the right of said truck, and that but for defendant's act in shouting at plaintiff, he might have turned to the left, and avoided a collision with the truck; that the direct and proximate cause of the collision between plaintiff's automobile and the truck was the negligence and carelessness of the defendant in not stopping his truck near the edge of the boulevard, as required by the Vehicle Act of the state of California (St. 1919, p. 191), and because of the unusual darkness and rain, and also because of the fact that defendant, by shouting, caused plaintiff to attempt to pass said truck on the right, thereby striking the rear of the truck; that the collision occurred without fault on the part of plaintiff; that it is not true that plaintiff did not exercise ordinary care or caution or prudence to avoid the collision, and it is not true that the damages sustained by plaintiff were either directly or proximately contributed to or caused by the fault or carelessness or negligence of the plaintiff; and it is not true that plaintiff operated his automobile negligently or carelessly, or at a reckless or excessive rate of speed, or at the rate of 35 or 40 miles per hour, or that, by any fault or negligence of the plaintiff, he caused his automobile to collide with the truck; that Wilshire boulevard is a county boulevard outside of the city of Los Angeles; that the boulevard extends about one-half mile in an easterly and about a half mile in a westerly direction from the place of the accident without intersecting any highway or railroad crossing, and is level for that distance in both directions from the place of the accident, all of which facts were within the knowledge of both parties prior to and at the time of the accident.

The contentions of appellant as stated by his counsel, are as follows: (1) That the plaintiff was guilty of contributory negligence both upon the evidence and the findings of fact; (2) that plaintiff's negligence was contributory negligence as a matter of law; (3) that the court erred in finding that a shout of warning was negligence on the part of the defendant; (4) that the findings are inconsistent, and do not support the conclusions of law.

The points above stated impliedly concede negligence on the part of the defendant.

From the facts proved and found, it seems clear that the accident was caused by negligence of the defendant, and that there is no defense to the action unless the plaintiff was guilty of negligence which directly and proximately contributed to and caused the collision and damage.

In support of the claim that plaintiff was guilty of negligence, dependence is placed upon the testimony of plaintiff wherein he stated that it was dark and rainy; that his windshield was wet, and was fairly hard to see through; that it was slightly down grade there, and the road was slippery, and the car more or less inclined to skid; that plaintiff did not see the truck until he was within 25 or 30 feet from it. On these facts we are asked to declare it to be the rule that it is negligence for the driver of an automobile to drive on the highway on a dark night at such a rate of speed that he cannot avoid objects after they come within the area lighted by his lights. The principal decisions relied upon are cited in *Ham v. County of Los Angeles*, 189 Pac. 462, a recent decision rendered by division 2 of this court. The court there said:

"We are not prepared to say that negligence may not be predicated as a matter of law, irrespective of any positive law as to speed limits, where an automobile is being driven in the night on any part of the highway, and where the driver is dependent upon the lights of his machine for knowledge of the condition of the road and the traffic upon it, and runs into an obstruction, if he drives at a rate of speed which will not permit him to stop or slow up within the radius illuminated by his lights, and the accident is proximately caused thereby."

The fact that respondent was not able to see, and did not see, the unlighted truck until he was within 25 or 30 feet of the same does not fully establish the facts necessary to give appellant the benefit of the rule above stated. Notwithstanding the facts stated, it may also be true that if the truck had been lighted, as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile, and avoid the collision. The condition of the road, as to its openness and the distance to any point of intersection or any railroad crossing, was known to both parties, and the plaintiff was entitled to proceed at a rate reasonable under those conditions, and not exceeding 30 miles per hour. Our conclusion is that the plaintiff was not guilty of negligence in operating his automobile at the speed at which he was traveling at the time of the accident. It is not claimed that he was guilty of any other negligence. This being so, the third point above stated becomes immaterial.

We have given consideration to the contention that the findings are inconsistent, and do not support the conclusions of law. These

claimed inconsistencies relate to findings defining the positions of the truck and the automobile on the street, and several statements in the findings defining acts of negligence of which the defendant was guilty. The decision herein is not dependent upon the question of whether or not the truck was left standing on the left side of the roadway. Assuming that it was at the right of the middle of the road, it remains true that the truck was wrongfully allowed to stand unlighted in the path of road travel and under conditions likely to cause injury to persons lawfully traveling on the highway. It was the duty of defendant to operate his truck—

"in a careful manner, with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway." Vehicle Act, § 20(a); Stats. 1919, p. 215.

The finding which refers to the act of defendant in shouting at the plaintiff, and the effect thereof under the circumstances stated, was material only for the purpose of determining whether plaintiff's negligence, if he was negligent, was the proximate cause of the collision. Since it has been determined herein that negligence of the plaintiff is not established, the incidental question of proximate cause becomes unimportant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(52 Cal. App. 62)

PEOPLE v. GOSCINSKY. (Cr. 946.)

(District Court of Appeal, First District, Division 1, California. March 25, 1921.)

1. Indictment and Information \S 81(3)—Mistake in defendant's middle initial, immaterial.

That an information makes a mistake in or omits defendant's middle initial or name is immaterial; the law recognizing only one Christian name.

2. Criminal law \S 1167(4)—Failure to change name, on defendant's true name appearing during trial, harmless.

Even if, on it appearing, during the trial of one whose name was given in the information as "A. G.," and who when arraigned stated that that was his true name, that the "A." stood for "Alfred," the subsequent proceeding ought to have been conducted in that name, in compliance with Pen. Code, §§ 953, 959, failure so to do was a mere error of procedure, and in a matter of form, not tending to prejudice substantial rights.

3. Criminal law \S 1032(5), 1167(1)—Defendant cannot complain of failure of information to state county of offense where no demurrer and omission harmless.

Defendant may not complain that the information was defective because not stating the county where the offense was committed, he

not having specially demurred as he might on that account, and the evidence showing such county, and he not having been hampered in his defense or suffered any injury through the omission.

4. Physicians and surgeons \S 6(10)—Defendant has burden of proving possession of license to practice.

A physician prosecuted for practicing without a license has the burden of proving that he had one, a matter peculiarly within his own knowledge.

5. Physicians and surgeons \S 6(11)—Defendant's possession of a license held under the evidence a jury question.

Whether a physician, prosecuted for practicing without a license or certificate, had one, *held*, under the conflicting evidence, a question for the jury.

6. Criminal law \S 1159(3)—Jury's determination of fact on conflicting evidence binding on appeal.

The jury's determination, on conflicting evidence, of a question of fact, is binding on the appellate court.

7. Criminal law \S 1184—Appellate court will modify judgment imposing excessive alternative imprisonment.

Judgment for practicing medicine without a license imposing in case of nonpayment of fine alternative imprisonment for a period in excess of the maximum time by which the offense is punishable under Medical Practice Act, in contravention of Pen. Code, \S 1205, is not on that account void, but merely erroneous, so that the appellate court will, under authority of section 1260, modify it.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

A. G. Goscinsky was convicted of practicing medicine without a license, and appeals. Affirmed.

F. P. Feliz, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

KERRIGAN, J. This is an appeal from the judgment and from an order denying a motion for a new trial in a criminal prosecution wherein the defendant and appellant was charged with the offense of practicing a system and mode of treating the sick and afflicted without having at the time of so doing a valid, unrevoked certificate from the board of medical examiners of the state of California.

The information charged the defendant by the name of A. G. Goscinsky, and upon arraignment the defendant stated his name to be A. C. Goscinsky, and thereafter the proceedings were conducted in that name; but during the trial, when called and examined as a witness the defendant gave his name as Alfred C. Goscinsky. However, the pro-

ceedings continued in the name given by the defendant upon his arraignment.

[1, 2] The law recognizes only one Christian name; and it has been often held that a mistake in or omission of a middle initial or name is immaterial; but there is a conflict in the authorities as to the sufficiency of the use of initials in lieu of the given name. 29 Cyc. 265, 269. Assuming that from the time when it appeared that the letter "A." in the defendant's name as given by him stood for "Alfred" the subsequent proceedings ought to have been conducted in that name, and the initial "A." discarded, in compliance with sections 953 and 959 of the Penal Code, the neglect to do so was at most a mere error of procedure, and in a matter of form, which did not tend to prejudice the substantial rights of the defendant. He had himself stated on his arraignment that his true name was A. C. Goscinsky, and the fact that the name thus given was used throughout the remainder of the proceedings in no way interfered with his defense to the charge, and it will hardly be contended by the most zealous champion of the defendant's rights that the omission or defect complained of in this case resulted in a miscarriage of justice.

[3] The point that the information was defective in not stating the county in which the offense was committed may also be dismissed with the comment that the evidence showed where it was committed—i. e., where the defendant resided and practiced medicine—and certain it is that the defendant suffered no injury and was not hampered in his defense on account of this omission. It may also be remarked that he could have specially demurred to the information upon this ground, and neglected to do so.

[4] The court instructed the jury in part as follows:

"You are instructed that it is not necessary for the people to prove that the defendant did not have a license. Whether the defendant has or has not, or has had, a license is a matter peculiarly within his own knowledge. The burden is therefore upon him to prove that he has or has had a license if he seeks to make the possession of a license a defense."

A similar instruction was given and sustained in the cases of *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402, and *People v. T. Wah Hing*, 190 Pac. 662. The instruction correctly announced the law on the subject, and the court therefore committed no error in so directing the jury.

[5, 6] The evidence supports the verdict. The prosecution introduced evidence tending to show that the defendant was engaged in the county of Monterey in the practice of medicine and surgery, and then rested, whereupon the defendant took the stand and testified that a license was issued to him in the

year 1894 by the board of medical examiners of the state of California entitling him to practice medicine, and that such license was destroyed during the fire in San Francisco in the year 1906. He also testified that in the year 1898 he practiced in the office of Dr. Herbert W. Schultz, and that during that time his certificate hung on the wall in Dr. Schultz's surgical room above the X-ray apparatus. Dr. Schultz, however, took the witness stand in rebuttal, and testified that, while the defendant had been associated with him in his office as stated, he had never seen a certificate or what purported to be a certificate or license of any kind entitling defendant as a physician and surgeon to practice in this state. All questions of fact are for the jury, as also the question of the credibility of witnesses. It is quite apparent that the jury discredited the defendant's testimony that he had been granted a license to practice medicine and surgery in the state of California, and its determination of this fact is binding upon an appellate court.

[7] The Medical Practice Act provides as a penalty for the violation of any of its provisions a fine of not less than \$100 nor more than \$600, or imprisonment for a term of not less than 60 days nor more than 180 days, or by both such fine and imprisonment. Stats. 1917, p. 115, § 24. The judgment in this case provides that the defendant shall pay a fine of \$500, and in default of payment that he be imprisoned in the county jail one day for each \$2 of the fine. It is contended that the judgment is void for the alleged reason that it requires that the defendant be imprisoned, in default of payment of the whole of the fine imposed, for a duration of 250 days, contrary to the provisions of section 1205 of the Penal Code, which limits the duration of such alternative imprisonment to the maximum time by which the offense is punishable—in this case 180 days. But the judgment is not for this reason void, but erroneous and should for that reason be modified by this court. Pen. Code, § 1260. It is therefore ordered that the judgment be modified by adding to it the following words, to wit:

"Provided, however, that the term of imprisonment under this judgment shall not exceed the duration of 180 days."

As so modified, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(52 Cal. App. 171)

Ex parte SANDERS. (Cr. 991.)

(District Court of Appeal, First District, Division 1, California. April 4, 1921.)

1. Habeas corpus \S 85(1)—Court cannot assume warden of state prison will not discharge prisoner on proper date.

On habeas corpus by a prisoner in the state prison against the warden, the court cannot assume, as contended by petitioner, that the warden will not act in accordance with law, and discharge petitioner on the date when he is entitled to a discharge.

2. Habeas corpus \S 17—Prisoner not illegally detained until term expired.

Where the term for which petitioner for habeas corpus against the warden of the state prison was sentenced has not actually expired, petitioner is not illegally detained, and will not be so detained until his term has expired.

Application by Russell Sanders for writ of habeas corpus, directed to the warden of San Quentin Prison, to secure petitioner's release from custody. Writ denied.

See, also, 190 Pac. 647.

Russell Sanders, in pro. per.

PER CURIAM. It appears that the applicant was delivered to the custody of the warden of the state prison at San Quentin on the 6th day of April, 1913, to serve a term of eight years, which period he contends will expire on the 6th day of April next. The sole ground for the application is that the petitioner has "been given to know and understand" that the warden at the state prison will not discharge him from custody and restore him to his liberty until a date some time later than the day upon which he contends he is lawfully entitled to be discharged.

[1, 2] There are two reasons why we cannot entertain this petition at this time: First, we are not in a position to assume that the warden of the state prison will not act in accordance with law, and discharge the petitioner, if it be, as alleged in his petition, that he is entitled to a discharge, on the 6th day of April, 1921. The second is that the term for which the petitioner was sentenced has not actually expired, and, until it has, the petitioner is not illegally detained. Ex parte Ross, 82 Cal. 109, 22 Pac. 1086.

Application for the writ is denied.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(52 Cal. App. 93)

WINTERS et al. v. LINDSAY. (Civ. 3480.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1921. Rehearing Denied April 23, 1921. Hearing Denied by Supreme Court May 23, 1921.)

1. Corporations §99(3)—Company had right to exchange shares for property other than money, and could sell on less than par basis, leaving stockholders liable to creditors.

Under Const. art. 12, § 11, a bond and mortgage company had the right to exchange its shares for property other than money, and had the right, except as conditions imposed by the commissioner of corporations affected the matter, to sell or exchange such stock on a less than par basis of valuation, except that creditors would have the right to require stockholders to respond in an amount equaling the difference between the price paid and the par value of the shares.

2. Corporations §99(2)—Failure to observe terms of condition of sale of stock fixed by commissioner of corporations does not void stock.

Though the Legislature possessed power to delegate to the commissioner of corporations authority to fix the value of the property which should be exchanged for stock in a company, a failure to observe fully the terms of such a condition would not render the stock void, but might subject the officers of the corporation to the penalties of the law as otherwise fixed in the act.

3. Corporations §121(1)—If stock not void, action to recover against seller on account of its lack of value a collateral attack on issue.

If corporate stock as issued was not void, an action to recover damages sustained by reason of the fact that the stock sold to plaintiffs by defendant was of no value constitutes a collateral attack on the issue, and is ineffectual.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by John C. Winters and another against Lycurgus Lindsay. From judgment for defendant, plaintiffs appeal. Affirmed.

Oliver O. Clark, Claud B. Andrews, and Carnahan & Clark, all of Los Angeles, for appellants.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for respondent.

JAMES, J. Plaintiffs by this action sought to recover from the defendant damages alleged to have been sustained by reason of the asserted fact that certain corporate stock sold to the plaintiffs by the defendant was of no value. They were denied any relief by the judgment, and this appeal has resulted. The record consists of the judgment roll only.

The corporate stock secured by the plaintiffs from the defendant consisted of 19,944

shares of American Bond & Mortgage Company, a California corporation. The stock was given by the defendant as part consideration for real property of the plaintiffs located in the state of Nevada. The trial court found that this stock was worth the sum of \$1.25 per share, which was the value which the plaintiffs alleged defendant represented it to have at the time the exchange of properties was made. There is no contention that the stock as to its value did not fulfill all of the representations made by the defendant, but as a basis for recovery plaintiffs have urged the claim that the stock had been illegally issued to defendant—that it was void stock in consequence, and hence they received no value whatsoever. At the time the stock was issued the American Bond & Mortgage Company possessed in its treasury more than the number of shares that were represented in the certificate which defendant transferred to the plaintiffs; hence the question of an overissue is not involved. The determination of the case rests upon a solution of the question as to whether corporate stock, if not sold for the amount required and stated in the permit or certificate issued by the state corporation commissioner, is void for all purposes, and in whose hands it may be. The plaintiffs here stand in the place of an innocent holder for value. To make clearer the contention of plaintiffs, further facts as expressed in the findings of the court are necessary to be stated: Defendant obtained the shares of stock in the American Bond & Mortgage Company by exchanging therefor a large number of shares in a corporation called "The State Investment Company." Before this exchange was made the first-named corporation obtained from the commissioner of corporations a permit authorizing the sale of a large number of its shares, the permit containing, among other statements, the following:

"To sell and issue not exceeding 1,000,000 shares in exchange for property, the fair and reasonable net market value of which, after deducting therefrom all expenses incurred by such applicant in acquiring the same, shall, at the time of such exchange, equal or exceed 110 per cent. of the par value of the shares issued therefor. Said shares shall be sold or issued only for a consideration hereinabove recited."

The court found that—

These shares in the State Investment Company at the time they were exchanged for the American Bond & Mortgage Company's stock "had no market value whatsoever, and the value thereof, if any, was exceedingly speculative and doubtful, and did not in any event exceed 50 cents per share; and at all times herein mentioned the value thereof as shown by the books and records of said State Investment Company, a corporation, did not exceed 50 cents per share."

The expressions used in this finding are ambiguous, but it does appear therefrom that the stock exchanged by the defendant for the stock of the Bond and Mortgage Company had at least a substantial value. To be sure, if it was worth 50 cents per share, the total amount thereof exchanged by the defendant would equal but one-half the total value of the shares received by the defendant in return therefor. In order to sustain appellants' contention, it is necessary that it be held that shares of corporate stock, although authorized by a duly issued permit to be sold, are void unless there is received from the purchaser thereof, in exact measure, property of a specified value, where such a condition is stated in the permit of the corporation commissioner. The transaction herein referred to occurred in the year 1915. The law creating a commissioner of corporations and defining his duties as then in effect is found in the Statutes of 1913 at page 715. In that law it is provided—

That a permit to sell securities may be issued where compliance is made with certain forms; that the permit shall show that the "company is authorized to sell said securities within this state on such conditions, if any, as the Commissioner of Corporations may in said certificate prescribe. * * * The Commissioner of Corporations may impose such conditions as he may deem necessary to the issue of said securities, and may, from time to time, for cause, rescind, alter or amend the certificate." Section 5.

The act contains penal clauses under which a failure to comply with its terms is made punishable by a fine, and, in some cases, imprisonment. The act does not contain, like the successor to it (Stats. of 1917, p. 673), any clause declaring void, securities issued without complying with the requirements as to the obtaining of permits, or for a violation of the conditions thereof. It may be pertinent to here state that in the findings of the court it is also determined that the board of directors of the American Bond & Mortgage Company, by resolution adopted six months after the issuance of the stock herein referred to, attempted to repudiate the transaction with the defendant on the ground that the exchange had been effected in violation of the terms of the permit. We think it wholly immaterial as to what the board of directors did at the time last stated in the direction of an attempt to nullify the sale of the stock. It is not determined by the court that through any collusive agreement between the defendant and the Bond & Mortgage Company the stock was fraudulently issued; in fact, nothing appears which authorizes the assumption that the officers of the Bond & Mortgage Company acted in other than the utmost good faith in making the exchange with the de-

fendant. It does appear, to be sure, in the findings that the defendant knew all about the stock which he was delivering to the Bond & Mortgage Company and had knowledge of its market value; he had knowledge, too, it is shown, of the terms of the permit issued by the commissioner of corporations. On the other hand, it is not shown that he misrepresented the value of his stock to the Bond & Mortgage Company in any way. The failure of a corporation to observe regulations governing the sale of its stock, such as those provided for in the act to which we have referred, in our opinion amounts only to an irregularity, and will not taint the transaction as being *ultra vires*. Mr. Thompson in his work on Corporations, vol. 3 (2d Ed.) par. 2772, states that where a corporation is authorized to perform an act for a specific purpose and performs the act for another purpose, the case does not become one of *ultra vires*, and that such a plea is not available to either party concerned. The text is illustrated by citation to a case where a state bank under its charter had power to accept stock in a national bank as security, but no power to purchase such stock as an investment. The bank purchased national bank shares and, the national bank becoming insolvent, assessment against the purchasing bank made by the controller was resisted on the ground that the purchase was *ultra vires*. It was there held that the purchase of the stock was "merely the exercise, for an unauthorized purpose, of a power existing for other and legitimate purposes," and that the defense was not available, citing *Citizens' State Bank v. Hawkins*, 71 Fed. 369, 18 C. C. A. 78. This author further states:

"A plain distinction is to be made between cases where a contract is *ultra vires* because clearly outside of the power granted a corporation and the cases where a contract, while within the general scope of granted powers, is *ultra vires* because of some particular circumstance which may or may not be known to the other contracting party. In the former case an action on the contract will not lie; while in the latter, according to many of the decisions, an action may be maintained."

There was not an inherent lack of power in the Bond & Mortgage Company to issue and dispose of its corporate shares. It possessed the stock as a part of its treasury assets prior to the transfer of the same to defendants.

[1] Under the constitution (article 12, § 11) it had the right to exchange its shares for property other than money, and it had the right (except as the conditions imposed by the commissioner affected the matter) to sell or exchange such stock on a less than par basis of valuation. The only result which would follow in the latter case would be that the rights of creditors to require the

(193 P.)

stockholders to respond in an amount equaling the difference between the price paid and the par value of the shares would be unaffected. *Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265; *Hasson v. Koeberle*, 180 Cal. 359, 181 Pac. 387. The statute in force gave to the corporation commissioner power to impose conditions on the sale of stock.

[2] Allowing the very broad concession that the Legislature possessed the power to delegate to the commissioner of corporations authority to fix the value of the property which should be exchanged for stock, we believe that a failure to observe fully the terms of such a condition would not render the stock void. It might subject the officers of the corporation to the penalties of the law as otherwise fixed in the act. *Yetter et al. v. Delaware Valley R. Co. et al.*, 206 Pa. 485, 56 Atl. 57.

[3] Once admitting that the stock as issued was not void, then this action constitutes a collateral attack upon the issue, which is not allowed to be effectual. *Hasson v. Koeberle*, supra; *Fletcher Encyclopedia on Corporations*, vol. 5, §§ 3485-3486.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(52 Cal. App. 138)

MADER v. CHRISTIE. (Civ. 8386.)

(District Court of Appeal, First District, Division 1, California. March 30, 1921.)

1. Judgment \S 101(1)—Pleadings sufficient to support default, if apprising defendant of nature of demand.

A default judgment will not be set aside as being void on its face, in that the complaint fails to state sufficient facts to constitute a cause of action, unless the complaint wholly fails to apprise defendant of the general nature of plaintiff's demand.

2. Appeal and error \S 1024(4)—Finding on conflicting evidence not disturbed.

The trial court's finding, on motion to vacate default judgment, as to when an amended complaint was served, will not be disturbed on appeal, where based on substantially conflicting evidence.

3. Judgment \S 153(1)—Motion to vacate default after 11 months held too late.

Where defendant, although aware of entry of his default within 2 days thereafter, waited nearly 11 months before moving to have the same vacated and set aside, at which time judgment thereon had also been entered for 2 months, his motion was properly denied, as not seasonably made.

4. Judgment \S 153(1)—Motion to vacate default must be seasonably made.

When a judgment is not void upon its face, nor fraudulent, the court has no power to set it aside on motion, unless the motion is made within a reasonable time, the limit of which is 6 months; but in such a case resort should be had to an independent action.

5. Judgment \S 153(1)—Time for motion to vacate measured from entry of default.

The entry of the default fixes the beginning of the period within which motion to set aside the default and judgment should be made.

6. Appeal and error \S 172(1)—Grounds of motion to vacate, not urged below, not considered on appeal.

An objection to a default judgment, which was not one of the grounds of the motion to vacate the judgment, may not be considered on appeal from an order denying the motion.

7. Army and navy \S 34—Moratorium affidavit properly filed after default and prior to judgment thereon.

Plaintiff's moratorium affidavit was filed in time, although not filed before entry of default against defendant, where it was filed before entry of judgment thereon, under the express terms of the statute (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a-3078¼ss).

8. Appeal and error \S 1073(2)—Time of filing moratorium affidavit not error, where defendant not prejudiced.

Defendant could not complain that plaintiff's moratorium affidavit was filed too late, because not filed prior to entry of default against defendant, where it did not appear that defendant was in the military service, or that he was in any way prejudiced or at all affected by the fact that the affidavit was not filed earlier.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Anton Mader against John H. Christie. From an order denying defendant's motion to set aside default, defendant appeals. Affirmed.

W. H. Schulte and Frank B. Austin, both of San Francisco, for appellants.

Thomas P. Wickes and Harry E. Michael, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order denying defendant's motion to set aside his default and the judgment entered thereon. In the month of June, 1911, the plaintiff, through the alleged negligence of the defendant, suffered an injury necessitating the amputation of his left leg. About one year later he commenced an action against the defendant to recover damages therefor. At the trial of that action it appeared that plaintiff, two days after the injury, entered into a contract with the defendant whereby he released the defendant from all liability

on account of said injury in consideration of the sum of \$60, to be paid at the rate of \$5 a week, which agreement the court held to be binding, and accordingly directed the jury to return a verdict in favor of the defendant, which was done. An appeal was taken from the resulting judgment, pending which the defendant effected a compromise of the action with the plaintiff, without the knowledge of the plaintiff's attorneys, by the terms of which the defendant agreed to pay the sum of \$55 (being a balance due under the first agreement), and also the additional sum of \$500, and to procure permanent employment for the plaintiff; the latter on his part agreeing to dismiss the appeal. Said appeal was accordingly dismissed.

Defendant, as in the case of the first agreement, failed to perform the terms of this new one, whereupon the plaintiff commenced the present action, alleging in his complaint, in addition to the facts just recited, that the defendant had fraudulently induced him to make the second contract, and that by reason of the defendant's failure to perform its terms plaintiff had sustained damages additional to those alleged in his complaint in his first suit. A demurrer was sustained to this complaint, whereupon plaintiff filed an amended complaint, setting up further facts tending to meet the point of the demurrer to his first pleading, viz. that his cause of action was barred by the statute of limitations. This amended complaint was filed on Wednesday, November 6, 1918, and plaintiff claims that it was also served on that day. In the forenoon of the 18th of said month, no pleading thereto having been filed or served, and no order or stipulation extending time therefor having been made, plaintiff caused defendant's default to be entered. Defendant, on the other hand, claims that the amended complaint was not served on him until the 7th day of November, so that the 17th, falling on a Sunday, he had the whole of Monday, the 18th, to plead. On August 29, 1919, the plaintiff filed a moratorium affidavit, and thereupon a judgment by default was entered against defendant. On October 31, 1919, the defendant moved to set aside the default and judgment entered thereon, which motion, after hearing, was on that day denied.

[1] In support of his appeal from such order the defendant contends that the motion to set aside the judgment should have been granted for the reason that it is a nullity and void on its face, and that an examination of the evidence taken on the hearing of the motion shows that the amended complaint was served on November 7th, and that the default, entered on the 18th, was for the reason already given premature, and the judgment based thereon unauthorized and void. The claim of the appellant that the judgment is void on its face is grounded on the theory that the complaint fails to state sufficient facts do constitute a cause of action. There

is no merit in this contention; but, even if the complaint were open to this objection, it would not follow that the judgment is void unless it wholly failed to apprise the defendant of the general nature of the plaintiff's demand (*Christerson v. French*, 180 Cal. 525, 182 Pac. 27); and it is not seriously claimed, nor can it be held, that the complaint fails in this regard.

[2] Upon the other ground upon which the appellant claims that the judgment is void, it is sufficient to say that there is a substantial conflict in the evidence as to when the amended complaint was served, so that we are not at liberty to disturb the finding of the court as to that fact (*Norton v. A. T. & S. F. Ry. Co.*, 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198), even if we were so inclined, which we are not.

[3-5] Again, it appears that the defendant, who was aware of the entry of his default within 2 days thereafter, waited nearly 11 months before moving to have the same vacated and set aside, at which time the judgment had also been entered for 2 months. His motion therefore was not seasonably made, and was properly denied. When the invalidity of a judgment does not appear upon its face, a motion to set it aside must be made within a reasonable time, not exceeding 6 months. *People v. Thomas*, 101 Cal. 571, 36 Pac. 9. When a judgment is not void upon its face, nor fraudulent, the court has no power to set it aside on motion unless the motion is made within a reasonable time, the limit of which is 6 months; but in such a case resort should be had to an independent action. *People v. Temple*, 103 Cal. 447, 37 Pac. 414. And the entry of the default fixes the beginning of the period within which the motion to set aside the default and judgment should be made. *Title Ins. Co. v. King Land Co.*, 162 Cal. 44, 120 Pac. 1066.

[6-8] Finally, the defendant claims that, the moratorium affidavit not having been filed before the entry of his default, such entry was void, and afforded no valid basis for the subsequent entry of judgment against him. There are several answers to this contention, the first of which is that this was not one of the grounds of the motion to vacate the judgment, and therefore may not now be considered on an appeal from the order made thereon. *Lambert v. Marcuse*, 137 Cal. 44, 69 Pac. 620. Secondly, the affidavit having been filed before the entry of the judgment, it was seasonably filed according to the language of the act itself (*U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a-3078¼ss*), which in part provides:

"If there shall be a default of an appearance by the defendant the plaintiff, before entering judgment, shall file in the court an affidavit," etc. Section 3078¼bb.

And, finally, it nowhere appears that the defendant was in the military service, or that he was in any way prejudiced or at all af-

fectured by the fact that said affidavit was not filed prior to entering default.

The orders appealed from are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(53 Cal. App. 158)

HOGAN v. ANTHONY et al. (Civ. 3106.)

(District Court of Appeal, Second District, Division 2, California. April 4, 1921.)

1. Sales \S 121—Buyer who used motor truck after discovery of fraud waived right to rescind.

Plaintiff buyer of an automobile truck, who, on discovering that the truck was a three-fourths ton instead of a one ton truck, which he had asked for, expressed willingness to return the truck to defendant seller, but continued to use it in his business for 23 days after discovery of the fraud, did not effect a rescission, having waived his right to rescind by using the truck in his business after discovery of the fraud.

2. Sales \S 121—Buyer who ratified contract by using truck despite seller's fraud could recover damages but may not rescind.

Having ratified his contract for the purchase of a motor truck by using it in his business after discovering the falsity of defendant seller's representation that it was a one ton truck, the buyer could stand on his contract and recover any damages he might have sustained by reason of the fraud, but may not repudiate his obligations by seeking to rescind the contract he thus affirmed.

3. Sales \S 121—Use of tools or machine by purchaser after refusal of tender in rescission defeats rescission.

Use of tools, implements, machine, or apparatus after the seller has refused tender of it in rescission of the contract, would defeat the attempted rescission, if such use was for the purchaser's personal benefit.

4. Sales \S 92—Parties to sale after waiver of right to rescind may mutually effect rescission.

The parties to a sale may by mutual assent effect a rescission, though one has previously waived his right to rescind.

5. Sales \S 476—Purchaser who acceded to demand for possession of truck cannot claim surrender not under contract.

The buyer of a motor truck, who, on refusing to pay an installment note given for the price on account of defendant seller's fraud in representing the truck was a one ton truck, acceded to the demand of the seller's agent and gave up the truck, cannot claim that his surrender of possession was not made under and by virtue of the contract merely because he did not see fit to exact the particular form of notice that the instrument prescribed as a condition precedent to defendant seller's right thereunder to terminate the so-called lease of the

truck, for such notice could be waived by the buyer.

6. Sales \S 92—Fact conditional seller may have mistaken rights under contract does not operate as a rescission.

Though the conditional seller of a motor truck may have mistaken his rights under the contract in claiming that he had a right to keep the property, retain the part of the price paid, and recover on an installment note, the fact did not operate as a rescission of the contract on his part; it being manifest that he did not contemplate anything of the kind.

7. Sales \S 92—Evidence held to show no rescission by mutual assent.

In an action by the conditional buyer of a motor truck against the seller who took back the truck from the buyer with the latter's consent when the buyer refused to pay an installment note on the ground of defendant seller's fraud in representing the truck was a one ton truck, evidence held to show that there was no rescission of the contract by mutual assent.

8. Evidence \S 442(6)—Parol evidence of truck seller's warranty of carrying capacity inadmissible in view of written contract.

In an action by the conditional purchaser of a motor truck, the contract having been in writing and complete, it was not permissible for plaintiff purchaser to show any oral agreement on defendant seller's part warranting the truck to have any particular carrying capacity; no such warranty appearing in the contract.

9. Sales \S 391(9)—Buyer without right to rescind cannot recover money paid which is forfeited for his fault.

Where there has been no rescission of a conditional contract of sale, and the buyer is not entitled to rescind, the money paid by him on account of the purchase price belongs to the seller under the contract, and cannot be recovered by the buyer as in an action for money had and received, for the vendee's rights under a contract of sale may be forfeited for his breach of a contract condition.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by James P. Hogan against Earle C. Anthony and another. From judgment for plaintiff, the named defendant appeals. Reversed.

Paul Nourse, A. D. Laughlin, O'Melveny, Millikin & Tuller, and Hewlings Mumper, all of Los Angeles, for appellant.

Ralph E. Swing, of San Bernardino, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in plaintiff's favor in an action brought to recover \$500 paid by him to the defendant Anthony on account of the purchase price of an automobile truck. Anthony is the only defendant who appeals. For convenience, we shall treat the case as though appellant were the sole defendant.

On August 12, 1914, defendant agreed to sell and plaintiff agreed to buy the truck for the sum of \$1,650. At that time plaintiff paid \$500 on account of the purchase price and agreed to pay the balance in eleven monthly installments of \$100 each, and one, the last, of \$50, all to be evidenced by promissory notes due and payable in accordance with the agreement. On the next day, August 13th, plaintiff and defendant executed an instrument designated "Lease and Conditional Sale of Automobile." At the same time plaintiff made and executed the promissory notes in accordance with his agreement, made the day before. Thereupon the truck was delivered to plaintiff, who used it in his business until September 18, 1914, when he surrendered possession to defendant. The last-mentioned instrument, that entitled "Lease and Conditional Sale of Automobile," is the one that evidences the final agreement of the parties. It contains a provision to the effect that it shall be construed as a "lease," with an option on the part of plaintiff to acquire title to the truck for the sum of \$1, subject to a compliance with his covenants therein contained and payment of the notes according to their terms and conditions. Though the parties designated their contract as a "lease," it was, as held on a former appeal in this case (40 Cal. App. 679, 182 Pac. 52), a contract for the conditional sale of the truck.

To induce plaintiff to enter into the contract, pay the \$500, and execute his notes for the balance of the \$1,650, defendant, so the complaint alleges and the court finds, falsely and fraudulently represented that the truck had a carrying capacity of one ton. Upon this phase of the case the court found substantially as follows: At the time he entered into the contract plaintiff had no knowledge regarding such trucks and so informed defendant, and told him that he would have to rely upon defendant's representations. At that time plaintiff, who was engaged in the business of selling and delivering ice, informed defendant that he needed a truck with a capacity of and capable of carrying and conveying from 1 to 1½ tons of freight, and that he could not use a truck of a less carrying capacity. Defendant thereupon represented to plaintiff that the truck in question was a ton truck, that it had a hauling capacity sufficient for plaintiff's business, and that it would easily carry and haul 1½ tons of freight. Plaintiff relied upon defendant's representation as to the truck's carrying capacity and believed it to be true. Defendant's representation was false and fraudulent, the actual carrying capacity being but 1,500 pounds, or three-quarters of a ton. On August 26, 1913, plaintiff discovered that the truck was not a ton truck, and that its carrying capacity was but 1,500 pounds.

The theory of the action is that, after discovering the falsity of defendant's represen-

tation, plaintiff rescinded the contract. The findings upon this branch of the case are substantially as follows: On September 18, 1914, defendant demanded payment of plaintiff's note for \$100—the first of the twelve notes to fall due. Although the note had become due and payable on September 13, 1914, plaintiff refused to pay it unless defendant furnished him with a ton truck. Instead of paying the note, plaintiff, at defendant's request, on said 18th day of September, 1914, which was 23 days after plaintiff had discovered the falsity of the representation, returned the truck to defendant, who ever since has had possession. Plaintiff returned the truck because it was not as it had been represented to be and because it could not be successfully used by him in his business. Defendant never furnished plaintiff with a truck having a carrying capacity of one ton. Prior to the commencement of the action, but about two months after the return of the truck, plaintiff demanded a return of the \$500, which defendant refuses to pay.

The case has been in the District Court of Appeal twice before. On the first appeal (34 Cal. App. 24, 186 Pac. 861), defendant appealed from a judgment in favor of plaintiff. On that appeal the judgment for plaintiff was reversed on the ground that the only attempted rescission, as shown by the pleadings and findings then before the court, was a rescission of the contract evidenced by the writing executed on August 12, which, as pointed out by the court on that appeal, did not evidence the final agreement between the parties, their respective obligations being measured by the terms of the instrument executed August 13, entitled "Lease and Conditional Sale of Automobile," the very existence of which was, at that time, denied by plaintiff.

On the going down of the remittitur, following the decision on the first appeal, plaintiff filed a second amended complaint containing two counts. In the first he alleges facts which, if true, he insists show a rescission of the contract as evidenced by the last executed instrument. The second count in the amended complaint is a common count for money had and received by defendant for plaintiff's use and benefit. A trial was had of the issues tendered by this amended complaint, judgment passed for defendant, and thereupon plaintiff appealed. That appeal was upon the judgment roll alone. Plaintiff, as the appellant on that appeal, claimed that, on the findings made by the court on the second trial, he was entitled to a judgment for the \$500 that he had paid on account of the purchase price, with interest thereon from the date of payment. The appellate court held with him in this contention, and reversed the judgment with directions to the lower court "to enter judgment upon the findings in favor of plaintiff for \$500, together with interest thereon from August 12,

1914, and costs" (40 Cal. App. 679, 182 Pac. 52).

Upon the going down of the remittitur after the second appeal, the trial court, pursuant to the appellate court's instruction, entered a judgment on the findings in favor of plaintiff for \$500, with interest thereon from August 12, 1914. The present appeal is from that judgment, defendant claiming that the evidence taken at the second trial is insufficient to justify certain of the findings upon which, on the second appeal, the appellate court ordered judgment to be entered in plaintiff's favor. Because the judgment that was the first to be entered on those findings (the judgment that was reversed on the second appeal) was in defendant's favor, this is the first opportunity he has had to attack the findings by an appeal from the judgment. That he now does, claiming insufficiency of the evidence to justify such of the findings as show a rescission. It thus will be seen that the main question presented to us on this appeal did not, and, in the nature of the case, could not arise on either of the two previous appeals. On the first appeal the contract that plaintiff then claimed had been rescinded was not the contract as finally agreed to by the parties. On the second appeal the question presented was, Are the findings sufficient to support the judgment? On this, the third appeal, the question is: Is the evidence sufficient to sustain those findings?

Appellant claims that the return of the truck was not made pursuant to a rescission of the contract, but that it was taken by him from plaintiff under a provision in the "lease" giving him a right thereto in the event that plaintiff breached any of his covenants or defaulted in any payment. That provision is, in substance, as follows: In the event that the lessee breaches any of his covenants or defaults in any payment when due, the lessor, at his option, "may terminate this lease by giving notice of such termination to said lessee in writing by registered letter deposited in the United States post office addressed to said lessee, and upon such termination said lessee shall lose all right to the possession of said automobile and all rights under this lease and the right to purchase said automobile as hereinbefore mentioned, and said lessor shall thereupon be entitled to the possession of said automobile and all parts thereof; it is agreed that such termination of this lease shall not release the lessee from the payment of any sums to the lessor up to and including the day of such termination." The instrument further provides that "time is of the essence of this lease." It thus will be seen that, under and by virtue of the express terms of their agreement, the parties contemplated that upon default in any of the purchaser's payments the seller should be entitled to have both the property and all the money due and payable by the purchaser

up to the time when the seller elected to terminate the contract.

There is no substantial conflict in the evidence upon the question of rescission. Plaintiff himself testified on this point substantially as follows:

"I found out what the capacity of the truck was at the factory rating. I found this out some time after I got it. I don't remember just how long; a short time after I got it. * * * I only talked to Mr. Neff at that time. [Neff was defendant's agent through whom the conditional sale had been made.] * * * I told him how it was acting. I told him that I had found out that it was a 1,500-pound truck instead of a ton."

It was, as we already have pointed out, on August 26th that plaintiff discovered the falsity of defendant's representation as to the capacity of the truck. About a week after the discovery he met Neff and another of defendant's agents. Referring to the occasion of that meeting, plaintiff testified as follows:

"About a week after, I saw Mr. Neff. He and another gentleman came out one day and met me on the street. * * * The other man came up to me and wanted to know how the truck was acting. I told him about it, and he said: 'Well, there is a \$100 due on it. What are you going to do about it?' And I said, 'I am not going to do a thing about it.' There was no one out prior to that time trying to operate the truck nor at any time subsequent to that. * * * When Mr. Neff and the other man came out to talk about the \$100, this man came up to the machine and I told him how it was acting, and he wanted to know how it was getting along. I told him, and he said, 'Well, you've got to pay that hundred dollars due,' and I said: 'All right, come out and take it if you want it, but I am not going to pay any more until you make some settlement. I want somebody to come out here that knows something about it. I am willing to do anything agreeable, but I am not going to pay \$100 until something is done.' And he said, 'We'll come and take the truck,' and I said, 'All right,' and he turned around and got into the machine and drove off, and I did the same. I didn't see anything of them after that for some time, and then this man [defendant's representative] came out and I met him on Second avenue and Upland. I do not remember whether I was alone or had a man with me, but I think I had a man with me, and he spoke about the truck and about the \$100 and wanted to know if I was going to pay it, and I said 'No,' and he said, 'I am going to take the truck,' and I said, 'All right, but I think it would be better to make some settlement about it.'"

Respondent claims that this evidence shows that he then notified defendant that he would not be bound by the contract, and that he then and there offered to return the truck and rescind the contract.

About two weeks later plaintiff again met Neff, when, according to his own version, the following took place:

"Well," he said [referring to Neff], "if you want to, pay the hundred dollars; if you don't I will take the truck." I said, "I will go down to the ice house and take the load off." "All right," he said, "I will go down." He got in the machine and went down. He said, "Don't you think you had better pay this note?" I said: "I am not going to. This truck is no good to me and I will not pay any more money on it." He said, "I will tie this truck up," and I said, "Can you do it?" and he said, "I have got the papers right in my pocket to do it," and he said, "If you don't want to give it up I will go up town and get an officer and tie it right up," and I said: "You need not do that; if you want the truck I will put it anywhere you say so." And he said, "Take it to that garage," and I said, "All right."

The truck, accordingly, was taken to the garage and thereupon defendant's agent, Neff, took possession. Continuing, plaintiff further testified as follows:

"I didn't feel like paying for something I could not use in my business. It wasn't a ton truck, and I needed a ton truck in my business. It was only a three-quarter ton truck, and I didn't feel like paying another one hundred dollars on something I didn't want and was no good to me."

In reply to a question asking him why he returned the truck to defendant, plaintiff testified:

"I returned it with the expectation that I would get my money back or a suitable truck."

[1] Plaintiff, it is true, upon discovering that the truck was not a ton truck, notified defendant of that fact and expressed a willingness to return it; but we cannot accede to his claim that he then and there effected a rescission. On the contrary, he continued to use the truck in his business up to the time he did return it—23 days after his discovery of the fraud. And then he returned it only after defendant's agent, Neff, had threatened to get an officer and seize it. Under the circumstances disclosed by plaintiff's evidence, we think that no rescission was effected, and, unless the contract of conditional sale was rescinded, plaintiff, under the terms of his contract, is not entitled to a return of the \$500.

[2] By using the truck in his business after his discovery of the fraud, plaintiff waived his right to rescind. This is not one of those cases where the purchaser is allowed a reasonable time to ascertain by use, test, and trial whether the article is as warranted or as represented. The representation of which plaintiff complains was that the truck was a ton truck; that is, that its rated carrying capacity was one ton. If the representation had been that the truck would not heat to an unreasonable degree while being used in the ordinary and customary manner in plaintiff's business, irrespective of what its rated carrying capacity might be, it may well be that, in that event, he would be entitled to test its

qualities by using it for a reasonable time in his business, that thereby he might ascertain whether it would heat to an undue degree when thus used. But here the representation upon which plaintiff alleges he relied was the specific representation that the vehicle was a ton truck. When plaintiff attempted to have it insured he was informed by the insurance agent that it was only a 1,500-pound truck, and that that was its factory rating. Notwithstanding this unequivocal information and his discovery, beyond all question, of the falsity of the specific representation upon which he claims to have relied when he made the purchase, he continued the daily use of the truck in his business for about three weeks thereafter. The purchaser of an article who wishes to rescind the contract of sale cannot play fast and loose in the matter. He is not allowed to go on and derive all possible benefit from the transaction and then claim the right to be relieved from his own obligations by a rescission or refusal to perform on his part. If, after the discovery of the misrepresentation, he conducts himself with reference to the transaction as though it still were subsisting and binding, he will not thereafter be permitted to impeach the validity of the contract by seeking to rescind it or to escape performance of his covenants. Having ratified the contract by using the truck in his business after he discovered the falsity of defendant's representation, plaintiff could stand upon his contract and recover any damages that he may have sustained by reason of the fraud, but he may not repudiate his obligations by seeking to rescind the contract that he thus has affirmed. The rule is stated in *Black on Rescission and Cancellation*, vol. 2, p. 1388, as follows:

"If the purchaser of a tool, implement, machine, apparatus, or any other article intended to serve a useful purpose, discovers he has been deceived and defrauded, but nevertheless continues to use it, not for the purpose of testing it or trying to make it available, but for the purpose of deriving benefit or advantage from its use, he will be held to have waived his right to rescind the purchase, and cannot thereafter return the article and claim a restoration of the money paid for it."

The theory of the doctrine is that, having recognized the contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, the purchaser cannot afterwards be suffered to repudiate the transaction and allege its voidable nature.

[3] If we concede respondent's claim that, in his conversation with Neff about a week after the discovery of the fraud, he then and there offered to return the truck, but that his offer was not accepted the fact will remain, nevertheless, that he waived his right to rescind. The rule is that the use of a

tool, implement, machine, or apparatus by the purchaser after the seller has refused his tender of it in rescission of the contract, will defeat the attempted rescission if such use was for his personal benefit. *Hakes v. Thayer*, 185 Mich. 476, 131 N. W. 174; *Mizell v. Watson*, 57 Fla. 111, 49 South. 149; note to *Clark v. Wells*, L. R. A. 1916F, 481.

[4, 5] It is suggested that notwithstanding plaintiff's conduct may unequivocally indicate his acquiescence in the contract, and notwithstanding he thus may have waived his right to rescind, both parties, nevertheless, could, and in this case did, agree to and consummate a rescission when defendant was permitted to retake possession of the truck. The claim is that when plaintiff permitted defendant to retake the truck there was a rescission by consent. Without doubt the parties to a sale may, by mutual assent, effect a rescission notwithstanding one of them may previously have waived his right to rescind. But the evidence before us in this case fails to show a rescission by consent. To rescind a contract is to annul it, and claim nothing under it. *Miller v. Steen*, 30 Cal. 407, 89 Am. Dec. 124. If there be a rescission by mutual assent, each renounces all his rights under the contract and should put the other in statu quo. Here neither party renounced his rights under the contract. Defendant, when he took possession of the truck through his agent, asserted a right under the contract, namely, the right to seize the truck under that clause which permits him to terminate the "lease" if the "lessee" defaults in the payment of any installment of the purchase price when due. Just before taking possession, defendant's agent told plaintiff that he had better pay the \$100 note that was then due and payable. Upon plaintiff demurring to this, the agent said:

"I will tie this truck up. * * * I have got the papers right in my pocket to do it. If you don't want to give it up I will go to town and get an officer and tie it right up."

It is obvious that in thus threatening to resort to the machinery of the law defendant's agent was asserting what he supposed to be a right under the contract, namely, the right which, in the event that plaintiff should default in any payment when due, the contract gives to defendant to "terminate this lease" and to take "the possession of said automobile and all parts thereof," without thereby releasing plaintiff "from the payment of any sum due lessor up to and including the day of such termination." It is true the contract makes the giving of a written notice, by registered mail, a condition precedent to defendant's right thus to terminate the lease; but this provision respecting notice is for the benefit of the purchaser or "lessee," and one, therefore, that he may waive, and which, in fact, he did waive, when, upon defendant's agent threatening to

invoke the services of an officer, plaintiff himself voluntarily returned the truck without requiring the stipulated notice. Had he chosen to insist on a strict recognition of his contract rights, plaintiff could have refused to surrender possession until he had received the written notice by registered letter. Instead, he acceded to the demand of defendant's agent, and he cannot now claim that his surrender of possession was not made under and by virtue of the contract merely because he did not see fit to exact the particular form of notice that the instrument prescribes as a condition precedent to defendant's right thereunder to terminate the so-called "lease."

[6] For these reasons we conclude that there is nothing to indicate an intention on the part of defendant to rescind, but that every act, under the circumstances, indicates a contrary purpose. Instead of restoring or offering to restore plaintiff to the status quo, defendant, at all times, has stoutly maintained his right to keep the property, retain the \$500, and recover on the \$100 note that, by its terms, was payable at the time when his agent retook possession. Defendant may have mistaken his rights under the contract, but this does not operate as a rescission of the contract on his part, when it is manifest that he did not contemplate anything of the kind. *Miller v. Steen*, 34 Cal. 138.

Nor did plaintiff, when he permitted defendant's agent to retake the truck after the latter had threatened forcible seizure, intend to rescind, i. e., to claim nothing under the contract. Asked why he returned the truck, he testified:

"I returned it with the expectation that I would get my money back or a suitable truck."

The expectation that defendant might deliver to him a truck conforming to the representation that had been made shows that plaintiff never did unequivocally renounce all rights under the contract. There can be no partial termination of a contract. A party to a contract cannot assert rights thereunder for some purposes while regarding it as at an end for others.

[7] For the foregoing reasons we think it clearly appears that there never has been any rescission by mutual assent, and that plaintiff, by using the truck in his business after discovering the falsity of the representation, waived all right to demand a rescission.

[8] It is suggested that, because of his false and fraudulent representation as to the capacity of the truck, defendant had no right to retake it, and that, by doing so without right, he thereby breached the contract, thus giving to plaintiff the right to consider it as abandoned. The gravamen of plaintiff's case is fraud, not warranty. The case therefore must not be confounded with one in which the vendor has bound himself by a warranty,

that is, by contract. Defendant did not contract to sell plaintiff a ton truck or a truck of any particular carrying capacity. The contract reads: "Said lessor does hereby lease * * * one Stewart truck No. 348." Here is a complete description of a specific, clearly identified truck. The contract is in writing and contains no warranty that the truck specifically described therein is a ton truck. Upon its face the written instrument purports to be a complete expression of the whole agreement. No other provision, therefore, may be added to the agreement by parol. It is not permissible for plaintiff to show any parol agreement on defendant's part warranting the truck to have any particular carrying capacity. *Harrison v. McCormick*, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 96 Pac. 319; *Kullman, Salz & Co. v. Sugar, etc., Co.*, 153 Cal. 725, 96 Pac. 369. What plaintiff complains of, and all he may complain of, is that he was induced by a false and fraudulent representation to enter into the contract to purchase the truck. But while he may complain that the contract was brought about by defendant's fraud, he cannot complain that the latter has not done what his contract calls upon him to do, namely deliver the truck described in the written instrument, to wit, "one Stewart truck No. 348." Defendant did deliver "Stewart truck No. 348," and none other. Plaintiff, therefore, though he may complain of fraud that induced him to enter into the contract, may not complain of any breach of the contract. This being so, he is not entitled to do a rescission upon the theory that defendant, by breaching his contract in a substantial particular, has permitted plaintiff to elect to rescind. When plaintiff, after his discovery of the fraud, continued to use the truck in his business, thereby waiving his right to repudiate the contract, defendant, notwithstanding his fraudulent representation and his liability for damages by reason thereof, was free to assert any right afforded him under the contract thus ratified by plaintiff's conduct, including the right to retake the truck upon plaintiff's default in the payment of any note when due, subject to plaintiff's right to recoup any damages that may have been sustained by him by reason of the fraud.

It may be suggested that, because plaintiff was entitled to recover damages for fraud, defendant could not insist upon the payment of the \$100 note, or payment of any part of the purchase price, until there had first been deducted the amount recoverable by plaintiff as damages. Even so, this would only show that when defendant threatened to seize the truck because plaintiff had defaulted on the \$100 note he had mistaken his rights under

the contract. But, as said in *Miller v. Steen*, supra, 34 Cal. 144, such mistake would not operate as a rescission on his part when it was manifest that he did not contemplate anything of the kind. And by permitting defendant to retake possession in the assertion of a supposed right thereto under the contract, plaintiff himself was not contemplating a rescission.

[9] Finally, respondent claims that because his complaint contains a count for money had and received, no rescission of the contract was necessary. It undoubtedly is true that in an action for money had and received the plaintiff may recover from the defendant any money in the latter's possession which in equity and good conscience he ought to pay to plaintiff. And if, in this case, the contract had been rescinded by mutual assent, or if plaintiff, not waiving his right to a rescission, had elected to rescind the contract, then, in equity and good conscience, the \$500 in plaintiff's possession would be money that he ought to pay to plaintiff. But where, as here, there has been no rescission, and plaintiff is not entitled to rescind, the money paid on account of the purchase price belongs to defendant under the contract. The forfeiture of the vendee's rights under a contract of sale, for his breach of a condition of the contract, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of the contract, and it cannot be said that the money in the hands of the vendor as the result of such forfeiture is not rightfully his.

It follows that the judgment must be reversed, and it is so ordered.

We concur: WORKS, J.; CRAIG, J.

(52 Cal. App. 125)

ADAMSON v. LOS ANGELES COUNTY et al.
(Civ. 3680.)

(District Court of Appeal, First District, Division 1, California. March 29, 1921. Rehearing Denied April 27, 1921. Hearing Denied by Supreme Court May 26, 1921.)

1. Eminent domain § 167(3)—Sections of Political Code providing method for laying out public roads not exclusive of right of eminent domain.

Pol. Code, §§ 2681-2698, though providing a speedy and convenient method for the laying out of public roads, and the acquisition for such purposes of lands of private owners at fair valuations, were not intended to be exclusive to exclude boards of supervisors of counties and counties themselves from the exercise of those rights of eminent domain in the matter of acquiring land or rights of way for highway purposes, held by the state by virtue of its sovereignty and conceded to it by section 44; this in view of section 2643, subd. 4, and section

4041, Civ. Code, § 1001, and Code Civ. Proc. tit. 7, pt. 3.

2. Eminent domain §243(1)—Judgment in condemnation suit effective as setting apart land for highway.

Where by final judgment in a condemnation suit to acquire land for highway, brought by the county at the instance of the board of supervisors, it was adjudged that the strip of land in question was condemned for highway purposes, such land was thus acquired, set apart, and appropriated for the particular public use, and the last act essential to vest in the public a right to its use as a thoroughfare was accomplished.

3. District and prosecuting attorneys §84—Evidence §83(4)—Act of counsel in stipulating for increased judgment not void; county attorney presumed to do duty.

Act of counsel for a county, proceeding at the instance of its board of supervisors to condemn a strip of land for a highway, in consenting to an increase of the amount of compensation awarded the landowner by the verdict of the jury in the condemnation suit, held not void as without authority; the increase having been on account of discovery that the mileage of necessary fencing was greater than supposed, and the presumption being, in view of Code Civ. Proc. § 1963, that counsel for the county, the district attorney, a public official, regularly performed his official duty and was duly authorized to file his consent to the required increase.

4. Eminent domain §224—Court had power on motion for new trial to modify verdict by increasing award to landowner on account of low estimate of necessary fencing.

In suit by a county at the instance of its board of supervisors to condemn a strip of land for a highway, the trial court possessed power on motion for new trial to amend or modify the verdict of the jury by increasing the amount of compensation awarded the landowner, on account of a mistakenly low estimate of mileage of necessary fencing, to make such verdict conform to the evidence, and having exercised such power, and its order having been complied with, and the judgment in the condemnation suit become final, a taxpayer cannot come in and by injunction stop the public work already in progress on the highway merely on account of the inaccuracy of the court in computing the amount to which the landowner was entitled in damages.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Merritt H. Adamson against the County of Los Angeles and others to enjoin the expenditure of public money. From a judgment for defendants, on demurrer to the complaint, plaintiff appeals. Affirmed.

Anderson & Anderson and Nathan Newby, all of Los Angeles, for appellants.

A. J. Hill, Co. Counsel, and Paul Vallee, Chief Deputy Co. Counsel; both of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants, entered after an order sustaining a general demurrer to the plaintiff's complaint without leave to amend.

The action is one in which the plaintiff, as a resident and taxpayer of Los Angeles county, seeks to enjoin said county and its board of supervisors from proceeding with the expenditure of public money and with the employment of county officials and employees, and the use of county tools and appliances and materials, upon the construction of a certain roadway upon and along a certain right of way 40 feet in width and about 22 miles in length, extending into and over certain private property known as the Malibu ranch, owned by the Ripdige Company, a corporation. The complaint sets forth at length the proceedings had and taken before and by the board of supervisors of said county purporting to authorize the institution of an action on behalf of said county for the condemnation of the strip of land in question for the purposes of such highway, and also the institution and proceedings in such action resulting in a judgment in favor of said county condemning a right of way over said strip of land, and assessing and awarding damages to the defendant therein, the Rindge Company, for the taking of the same, which judgment became final, and also sets forth the proceedings before said board of supervisors authorizing and directing the prosecution of the work of constructing said highway at public expense, and the fact that said construction work was actually in progress at the time of the institution of the present action.

The first and main contention which the appellant makes upon this appeal is that the resolution of the board of supervisors purporting to authorize the said condemnation suit was not sufficient to confer jurisdiction upon the court of the subject-matter of said suit, and hence all proceedings had pursuant to said resolution were void, and as a sequence no road or right of way was condemned or laid out or established by such condemnation proceedings, and that therefore any and all expenditures of public money, and the creation or improvement of said proposed highway are and would be illegal. The entire basis for this contention on the part of the appellant rests in the assumption that the powers conferred by law upon boards of supervisors to lay out and established public highways are those embodied in those sections of the Political Code numbered 2681 to 2698, inclusive, providing for the laying out, altering, and discontinuing of roads. The method provided for laying out and establishing public highways by these sections of the Political Code is that commonly known as the "viewer" method,

frequently employed by counties in the acquisition of lands for new highways and in the laying out of the same; and it is the insistence of the appellant herein that this method is exclusive, and that, not having been followed by the board of supervisors of said county in the attempted acquisition of the right of way for the roadway in question, all subsequent proceedings in that direction were void.

In reply to this contention the respondent directs our attention to subdivision 4 of section 2643 of the Political Code, which it is urged confers express power upon boards of supervisors to acquire private lands and rights of way thereover for highway purposes by condemnation proceedings under the general right of eminent domain. This subdivision is part of the general section giving boards of supervisors the general control and supervision over roads within their respective counties, and by the terms of said subdivision they are empowered to "acquire the right of way over private property for the use of public highways, and for that purpose require the district attorney to institute proceedings under title 7, part 3, of the Code of Civil Procedure." The respondent further contends that, aside from this special provision granting this power and providing for this procedure, boards of supervisors possess the power to direct the institution of actions for the condemnation of private property for highways and for public uses under their general right of eminent domain under the provisions of section 44 of the Political Code and of section 1001 of the Civil Code; and it further contends that, in addition to these general grants of power, boards of supervisors have been expressly invested with these powers under section 4041 of the Political Code, which is embraced in article 4 of chapter 4 of part 4 thereof, under the title of "General Permanent Powers," and which section of the Code reads in part as follows:

"The boards of supervisors in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law * * * (4) to acquire and take by purchase, condemnation or otherwise land for the uses and purposes of public roads, highways, boulevards, turnpikes, and other public ways."

[1] We are entirely satisfied that the foregoing contentions on the part of the respondent herein must, both upon principle and authority, be upheld. The sections of the Political Code upon which the appellant relies in support of its contention, while they provide a speedy and convenient method for the laying out of public roads, and the acquisition for such purposes of the lands of private owners at fair valuations, were not intended to be exclusive, since to so hold would have the effect of excluding boards of

supervisors of counties, and hence counties themselves, from the exercise of those rights of eminent domain in the matter of acquiring land or rights of way for highway purposes held by the state by virtue of its sovereignty and expressly conceded to it by the terms of section 44 of the Political Code, and would also render nugatory and meaningless the other sections and subdivisions of said Code to which we have above referred.

But, aside from this consideration, we think that the contention of the appellant as to the limited powers of boards of supervisors under the several provisions of the Political Code above referred to has been quite definitely determined in a case which by analogy is almost identical with the case at bar. That is the case of *City of Los Angeles v. Leavis*, 119 Cal. 164, 51 Pac. 34. In that case the city of Los Angeles, a municipal corporation, brought suit to condemn land for a public street. It was contended that it had no power to commence or maintain such an action without having first taken the steps and resorted to the processes provided in the Statutes of 1889, p. 70, relative to the laying out, opening, extending, widening and straightening of public streets in municipalities, which in quite a number of respects embrace similar provisions to those embodied in the sections of the Political Code upon which appellant relies in support of his contention. The Supreme Court says:

"The contention, we think, is untenable. The provisions of the Act of March 6, 1889, are not exclusive, and were not designed to prohibit a municipality from maintaining condemnation proceedings under the provisions of the Code of Civil Procedure. * * * In *Pasadena v. Stimson*, 91 Cal. 238, the court, after quoting section 1001 of the Civil Code, wherein it is provided that any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, declared: 'A corporation, whether private or public, is a person. It follows therefore that under this general law, general in the widest and fullest sense of the term, any public or private corporation, or any natural person, may, for any of the uses defined in section 1238 of the Code of Civil Procedure, acquire property, without the consent of the owner, by means of the proceedings described in part 3, title 7, of said Code.' In *Santa Cruz v. Enright*, 95 Cal. 105, the same construction is given to the law."

The provisions of article 6 of chapter 2 of title 6 of the Political Code, comprising sections 2681 to 2698 thereof, do not purport to be exclusive, and may not be held to be so in view of the express grant of power embodied in subdivision 4 of section 2643 above quoted, and of the even more comprehensive enumeration of the general permanent powers of boards of supervisors contained in section 4041 of the Political Code by which such

boards are expressly authorized "to acquire and take by purchase, condemnation or otherwise land for the uses and purposes of public roads, highways and so forth." We are therefore of the opinion that the first contention of the appellant cannot be sustained.

In arriving at this conclusion we are not unmindful of the cases which the appellant has cited as supporting his contention; but an examination of these cases discloses that either the direct point here made was not under consideration there, or that the proceeding assailed was one having its inception under the provisions of sections 2681 and 2698 of the Political Code, and that the error complained of in those cases consisted in an alleged departure from the procedure laid down in those sections of the Code. Such cases do not have application to an original condemnation proceeding instituted under section 1237 et seq. of the Code of Civil Procedure.

Having thus determined the appellant's main point against his contention he still insists that, conceding the superior court had jurisdiction to hear and determine the condemnation proceeding, and that it has done so, still the strip of land so condemned did not become a public highway so as to entitle the board of supervisors to proceed to expend the public moneys for its improvement without the passage of a resolution of the board of supervisors declaring said land to be a public highway, which resolution he claims was never adopted.

[2] We do not find any merit in this contention. The final judgment in the condemnation suit adjudged that the strip of land in question was "condemned for highway purposes." It was thus acquired, set apart and appropriated for this public use, and, as was said by the Supreme Court in the case of *Wulzen v. San Francisco*, 101 Cal. 15, 85 Pac. 353, 40 Am. St. Rep. 17:

"When land within a street is 'condemned, appropriated, acquired, set apart, and taken for public use,' it would seem that the last act in the series essential to vest in the public a right to its use as a thoroughfare is accomplished."

We are cited to no case which undertakes to lay down a different rule.

The appellant's final contention is that the conditions prescribed by law as the prerequisite to entitle the county of Los Angeles, through its officials, to take possession of the strip of land in question for the purpose of doing highway work thereon were not complied with, and hence that these officials had no right to expend public money in the improvement of land to the possession of which they were not lawfully entitled. This contention rests upon the following state of facts:

The condemnation suit was tried before a jury which, among other things, found that

the amount of fencing in mileage requisite to fence the Rindge Company's land along the roadway was 29 miles, and that its cost would be \$18,850, or \$650 per mile, to which sum said company would be entitled in compensation. A motion for a new trial was made, one of the specifications of which was that the jury was in error as to the proper amount of this mileage of required fencing. The trial court was of the opinion that this was correct, and that the mileage of said fencing should have been 31½ miles, for which increase the Rindge Company should have been awarded further compensation at the specified rate per mile. It therefore required the plaintiff to consent to this increase as a condition of its order denying the motion for a new trial, whereupon counsel for plaintiff filed a written stipulation consenting to this increase in the defendant's amount of compensation, and thereupon the court entered its order denying the motion for a new trial. The contention of the present appellant is that the counsel for the county had no authority to stipulate for this increase in the judgment, and that the court had no power to make it, and by so doing to change the amount of compensation fixed by the jury.

[3, 4] We find no merit in the contention that the act of counsel for the county in consenting to an increase of the amount of the compensation awarded to the defendant by the verdict of the jury in the condemnation suit was void as without authority. The record does not so disclose, and in the absence of any showing to the contrary the presumption will be that counsel for the county—who in that case was himself a public official, namely, the district attorney, regularly performed his official duty and was duly authorized to file his consent to the required increase. *San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. 682; *Code Civ. Proc.* § 1963. Further than this, we have no doubt that the trial court possessed the power upon a motion for a new trial to amend or modify the verdict of the jury in the respect it did so as to make it conform to the evidence in the case, and that having that power, and having exercised it, and its order in that regard having been complied with, and its judgment in said condemnation suit having become final, this plaintiff cannot, merely by virtue of being a taxpayer, come in and, by way of injunction sought in this latter action, stop the public work already in progress upon the strip of land condemned in said former action for public use as a highway, merely because of some alleged inaccuracy on the part of the trial court in computing the amount to which the defendant therein would be entitled in damages.

Upon a review of the whole record we are satisfied that the strip of land sought to be

taken for highway purposes in the condemnation suit was adaptable to and properly subject to condemnation for such purposes; that the condemnation suit was one of the alternative methods provided by law for the acquisition of private lands by counties for highway uses; that the judgment made and entered in said condemnation proceeding was a legal and proper judgment, and that its effect was to transfer a right of way over the strip of land in question to the county of Los Angeles for highway purposes, and that no other or further act or declaration on the part of the board of supervisors was required to effectuate that purpose; and, finally, that the trial court committed no error or abuse of its discretion in refusing to grant or issue an injunction upon the plaintiff's complaint herein, the demurrer to which we hold to have been properly sustained.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 75)

SILVA v. ANGELO. (Civ. 2183.)

(District Court of Appeal, Third District, California. March 26, 1921.)

1. Landlord and tenant §326(1)—Farm lease held not to show that tenant should bear total expense of threshing and baling hay.

Where a farm lease provided that the lessee should deliver to the lessor one-half of all crops of every nature, in stack and sack, according to the custom of making divisions in the neighborhood, and there was no provision that the lessee should bear the total expense of threshing grain or baling hay, the lease providing that each party should furnish one-half of the feed, the lease cannot be construed as requiring the lessee to bear the total expense of baling hay and threshing grain, particularly as hay could be delivered unbled, etc.

2. Landlord and tenant §331(6)—Evidence held to warrant finding that farm lease required parties to share expense of threshing grain and baling hay.

In an action by the lessor to reform a farm lease which did not specify as to how the expense of threshing grain and baling hay was to be borne, testimony by the lessee that the expense was to be borne equally, which, of course, was competent, held sufficient to sustain the judgment denying reformation and to establish that the expense should be divided.

3. Trial §404(1)—Findings should be construed to support judgment.

Findings must be construed as to support the judgment if reasonably possible.

4. Reformation of instruments §45(9)—Findings in action to reform farm lease held to support judgment that parties should share expense of threshing grain and baling hay.

In an action by a lessor to reform a farm lease so as to require the lessor to bear the entire expense of threshing grain and baling hay, findings that the lease recited in detail all the conditions, and that the lessor was indebted to the tenant for paying his share of the cost of threshing and baling the crops, held to support the judgment denying reformation, etc.

5. Costs §32(3)—Where plaintiff recovered substantial judgment, he is entitled to cost of course, though some relief denied.

In an action to reform a farm lease and for an accounting, plaintiff is, under Code Civ. Proc. § 1022, subd. 3, entitled to costs as of course, or as a matter of right, where he recovered a substantial amount, though reformation of the lease was denied.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by A. J. Silva, by his guardian ad litem, Mary F. Silva, against Antone Angelo. From a judgment denying plaintiff part of the relief sought, as well as costs, plaintiff appeals. Judgment reversed, so far as it denied costs; otherwise, affirmed.

O. G. Hopkins, of Sacramento, for appellant.

John O. March, of Sacramento, for respondent.

HART, J. The object of this action is: (1) To reform a certain lease, whereby the plaintiff demised certain real property to the defendant for the term of three years, commencing on the 1st day of November, 1916, and ending on the 31st day of October, 1919; (2) to recover judgment against the defendant for the sum of \$983.80, alleged to be for moneys received by the defendant for plaintiff for the sale of hay and potatoes; (3) for an accounting by defendant "for the balance of the crops and proceeds of said leased premises."

The lease concerning which the controversy involved herein arose, as it was executed by the parties hereto, is set out in full in the complaint.

Among other covenants and conditions, the said lease, which appears in the complaint as paragraph 2 of the first cause of action thereof, is the following:

"The lessee further agrees that he will deliver and pay over to the said lessor, his executors, administrators or assigns, or to his or their order, annually, one-half of all proceeds and crops produced on the said farm and premises aforesaid, of every nature, kind and description, in stack and sack, according to the usual course and custom of making such divisions in the neighborhood and in a seasonable time after said crops have been gathered and harvested."

The lease contains no specific provision as to how or by whom the expense for threshing the crops and baling the hay produced upon the demised premises should be borne—that is to say, whether such expense should be borne equally by the lessor and lessee or entirely by the latter—the plaintiff contending that the understanding was that the defendant was to bear the whole of the expense incident to the harvesting of the crops and the baling of the hay produced upon the demised premises during the term of the lease. It is in this particular that the reformation of the lease is sought, and as the predicate for such relief, the complaint thus speaks:

"That prior to the execution of the said lease, and during the negotiations therefor, and the terms thereof, it was agreed between the said lessor and the said lessee, as one of the terms of said lease, that defendant, as such lessee, was to do, and he agreed to do, all the baling of hay and all the threshing of crops on said leased premises, during the term of said lease, at his expense, the said lessor to furnish one-half of the wire for baling and one-half of all sacks necessary; that subsequent thereto, plaintiff and defendant visited the law office of one O. G. Hopkins, at Sacramento, for the purpose of causing the terms of said agreement of lease to be put into written form, and executing same; that by mutual mistake, neglect, and inadvertence of both of said parties, they failed to recite to the said attorney that portion of the terms of said lease as hereinbefore set out, and the said terms in detail were omitted therefrom on account of such neglect; that the omission of said terms from said lease was not discovered by said plaintiff until about the month of May, 1918; that at or about said time, the defendant refused to carry out said lease as agreed upon as aforesaid, and demanded of plaintiff that he pay for one-half the cost of all baling and threshing and for one-half of all wire and all sacks used during the years 1917 and 1918."

The complaint then sets out (paragraph 5) an instrument in writing, as to which it is alleged:

"That at and before the making and executing of the said lease, this plaintiff and defendant intended and agreed that the said instrument and lease should mean, and the legal consequences thereof should be, as follows:"

The instrument thus set forth is, with the exception of the following paragraph, precisely the same in its language and provisions as the lease subscribed and so executed by the parties:

"The lessee further agrees that during said term he will do all the baling of hay and all the threshing of crops on said premises at his own expense, the lessor agreeing to furnish one-half of the wire for baling and one-half of all the sacks necessary."

It is then alleged that, through the mutual mistake of plaintiff and defendant, "the said

lease contract hereinbefore alleged and set out did not, and does not, truly state or express the intention of said parties, and does not truly express or set out what were to be the legal consequences of said legal contract," in that it failed to state specifically that the lessee agreed that he would himself bear the whole of the expense necessary to be incurred for the threshing of the crops and the baling of the hay produced during the term of the lease on the demised premises.

The complaint further states that, on the 16th of November, 1918, the plaintiff demanded of defendant in writing that the latter consent to a reformation of the lease in the particular above specified, so that it would conform to the agreement made between them in said particular, but that defendant refused to give his consent to a change in the lease so demanded, and still refuses to assent thereto.

Following the foregoing averments are allegations that the plaintiff has at all times complied with the provisions of the contract of lease required of him thereby, and by the actual agreement of the parties, and that defendant has received into his possession and retains certain moneys, aggregating \$963.80, which belong to the plaintiff, as his share of the proceeds of the sale by defendant of certain of the products of the premises in question.

The defendant answered, specifically denying all the averments of the complaint, and also filed a cross-complaint, in which it is alleged that the written contract of lease as executed by the parties contained the full and complete agreement between them, and that the terms, conditions, and covenants as set out in said contract of lease are therein stated and expressed as the plaintiff and the defendant understood and agreed were to be the terms, etc., upon which the premises were to be leased to defendant. It is alleged in the cross-complaint that—

"The usual course and custom of making such divisions in the neighborhood where said premises are situated was, at the time of the executing of said lease, and now is, that the lessor and lessee shall each pay one-half of the cost and expense of all baling of hay and all threshing of crops grown on such leased premises, and one-half of the wire for such baling and one-half of all sacks necessary for such crops; that said defendant paid the cost of all the baling of the hay and all the threshing of the crops grown on said premises during the years 1917 and 1918, which amounted to the sum of \$945.70; that one-half of said sum * * * was paid by said defendant for and on behalf of said plaintiff."

The total amount which it is alleged in the cross-complaint defendant paid out for the use and benefit of plaintiff is the sum of \$586.75, for which sum, in addition to the prayer that plaintiff be awarded nothing by

reason of his action, the defendant prays for judgment.

The court found:

Finding 2: "That the parties hereto, on the 22d day of December, 1916, entered into the written agreement of lease which was executed by them, and which is set out in paragraph 2 of the first cause of action of the complaint, and that under said lease defendant took possession of the property described in said lease."

Finding 3: "That it is not true that at and before the making and executing of the said lease, plaintiff and defendant intended and agreed that the said instrument and lease should mean, and the legal consequences thereof should be, as set out in paragraph 5 of plaintiff's first cause of action in said complaint."

Finding 4: "That it is not true that, through the mutual mistake of plaintiff and defendant, the said lease contract set out in paragraph 2 in plaintiff's first cause of action in said complaint did not, and does not, truly state or express the intention of the said parties, and does not truly express or set out what were to be the legal consequences of said legal contract."

Finding 5: "That the said lease, as signed and executed by the said plaintiff and defendant on the said 22d day of December, 1916, recited fully, in detail, all the terms and conditions as agreed upon by and between said parties."

Finding 6: "That during the first year of the lease, to wit, 1917, plaintiff furnished one-half the wire for baling and one-half the sacks necessary; that defendant furnished the other half, and paid the expenses of baling and threshing, and accounted to the plaintiff for the balance due on the sale of crops for 1917, according to the terms of the lease."

It was further found that the defendant, during the year 1918, sold hay and potatoes for the sum of \$983.80, which sum defendant received "to the use and benefit of plaintiff," and that no part of said sum has been paid to the last named by defendant; that, during the years 1917 and 1918, the defendant raised on the leased land certain crops, calves, and hogs, and let out for hire a team of horses belonging to plaintiff, all of which totaled in value the sum of \$224.75, one-half of which belongs to plaintiff, and of which no accounting to plaintiff has been made by defendant.

The court also found that the defendant, in the years 1917 and 1918, paid out for the benefit and use of plaintiff, under said lease, for the baling of hay, threshing of crops grown on the demised premises, and for other small items of expense, the total sum of \$513, "no part of which has been paid," and that defendant "is entitled to have set off against the claims of plaintiff the said sum of \$513," together with the sum of \$50, which it was found was the reasonable value of services performed by defendant for plaintiff in taking care of certain horses belonging to the latter during the term of said lease, making a total of \$563.

No specific finding was made as to the al-

leged "course and custom" in the neighborhood where the premises are situated with respect to the division of crops between the lessor and lessee of lands devoted to agricultural and other kindred purposes.

The court, as a conclusion of law, declared that plaintiff was entitled to a judgment for the sum of \$533.85 "and that neither of said parties have judgment for costs herein." Judgment was entered accordingly. Plaintiff moved for a new trial, which was denied, and he brings the cause here on appeal from those portions of the judgment allowing defendant a set-off in the sum of \$480.51 against the amount adjudged to be owing to him (plaintiff) by defendant, and denying to plaintiff his costs of suit.

It will be observed, from the particular in which the plaintiff sought to secure a reformation of the lease, that the whole controversy between the parties here centers in this proposition, namely: Whether the plaintiff was, under the contract of lease, obligated to bear one-half of the expense of harvesting the crops and baling the hay raised on the demised premises during the term of the lease, the contention of the plaintiff being that, even under the terms of the agreement of lease as it was executed by the parties, the defendant himself was required to pay all expenses so incurred.

The plaintiff contends that, from the language itself of the lease, it is perfectly clear that the agreement was that the entire expense of baling the hay and of threshing the crop was to be borne by the defendant. We are unable to coincide with that view. Indeed, while the construction that the pleader may put upon a written instrument is not controlling or binding upon the courts, the position of the plaintiff is, singularly enough, directly at variance with his plea for a reformation of the lease so that the instrument would unquestionably show that the understanding was that the entire cost incident to the labor and the expense required for the threshing of the crops and the baling of the hay was to be borne by the defendant. The lease specifically provides that the lessor and the lessee shall each, during the term of the lease, "furnish one-half of all seed necessary to be used in planting and farming said land, and one-half of barley necessary for horse feed, and extra parts of machinery." There is no other provision in the instrument which contains an express stipulation as to how or by whom the other expenses of carrying on the farming business on the demised land shall be paid or be borne. It is therefore very clear that a construction of the covenant in question cannot be materially aided by examining it in comparison with other provisions of the lease or the general context thereof.

The contention of plaintiff is, however, that the language of said covenant, to wit: "The lessee further agrees that he will de-

liver and pay over to said lessor * * * one-half of all proceeds and crops produced on the said premises, * * * of every nature, kind and description, in stack and sack, according to the usual course and custom of making such divisions in the neighborhood," etc., when read and considered by the light of the paragraph in the lease immediately following said language, can lead to no other rational conclusion than that the clear and essential implication is that the expense of threshing and baling was wholly to be paid by the defendant. The paragraph referred to reads:

"The lessee further agrees that, after such division or divisions have been made annually, he will haul and transport the share of crop or crops due to the lessor to such shipping point as the lessor may direct, without cost to the lessor."

[1] The argument supporting that proposition is that the transportation of the crops produced upon the premises, which, to facilitate the proper handling and shipping thereof, are required to be either baled or put in sacks, would require that they should be baled and placed in sacks, and, since the lessee is required to make delivery of the crops in that mode without cost to the lessor, it would follow that it was intended that he should, without cost to the lessor, put the crops in such condition as would admit of their proper delivery to the lessor at any point to be named by him. It is difficult to see wherein the latter provision can be of any assistance in the ascertainment of the intent of the parties upon the question whether the burden of the cost for threshing and baling should be upon the defendant alone or equally borne by the plaintiff and the defendant. The language of that paragraph, it will be noted, is that after the divisions are made, as provided in the preceding paragraph of the instrument, the lessee must—

"haul and transport the share of crop or crops due to the lessor to such shipping point as the lessor may direct, without cost to the lessor."

That by that provision of the lease the duty of performing the service of such hauling and transportation free of all expense to the lessor is placed upon the lessee, is a proposition so clear as to admit of no possible dispute; but it is equally clear that the requirement of the performance of that service by the lessee at his own exclusive expense is as far as the provision goes, either expressly, or upon any reasonable construction. It is obvious that it throws absolutely no light upon the question whether the expense necessarily required to thresh the crops and bale the hay was to be wholly paid by the lessee, or equally paid by both the lessor and the lessee, and this is true whether the provision is viewed alone or by itself, or in comparison with the preceding

paragraph of the lease. In a word, it is very clear that the covenant was intended to provide for the delivery into the possession of the lessor by the lessee the former's share of the crop after the division thereof had been effected, at the sole expense of the lessee, and, as stated, does not reflect any light upon the question whether the expense incident to the work of preparing the crop for such delivery should be borne solely by the lessee or in equal shares by both the parties to the lease. Thus, if there is to be extracted from the language of the lease itself an agreement or an intention in the parties, that the whole of the expense of threshing and baling should be borne by the lessee, we are driven to a determination of that proposition from the language of the preceding paragraph of the instrument, and, as before declared, we cannot reasonably so construe said language as to bring about that result. The controlling language of said provision, in this connection, is that the lessee "will deliver over and pay to the said lessor" his share of the crop, "in stack and sack, according to the usual course and custom of making such divisions in the neighborhood," etc. It is first to be noted that the word "bale" is not used in said provision, nor, for that matter, is there any express or direct provision anywhere in the lease requiring the crops to be "baled." Nor is there in the lease any express reference to the threshing of the crops. These circumstances we mention, however, not that we feel justified in holding that the threshing of the crops and the baling of such crops as are required thus to be preserved to be properly handled for commercial purposes are not required of the defendant under a fair and reasonable construction of the lease considered in its entirety, but particularly because the absence of the word "bale" from that particular provision, and the use of the word "stack" therein (the word "stack," as applied to farm crops, being commonly understood to refer to those crops which also may be "baled") would seem to limit the obligation of the lessee, in the matter of delivering to the lessor his one-half share of the crops, to the delivery thereof in "stack" and "sack." In other words, for the reason suggested, it would appear from the face of the provision in question that, when the lessee should "deliver and pay over" to the lessor in "stack" and "sack" his share of all the crops produced on the premises, the former's duty to the lessor under the lease had been fully performed. But, even if the covenant in question were reasonably amenable to the construction that those crops susceptible to baling were to be delivered to plaintiff baled, still we find nothing in the language of said covenant from which it can be inferred that the expense of baling was to be entirely met by the defendant. If the contention is that the words, "according to the usual course

and custom of making such divisions in the neighborhood," were understood and intended by the parties to mean, and were inserted in the lease to express such intention, that certain of the crops were to be delivered to the plaintiff baled, and that the defendant was to pay the whole of the cost of baling, as well as the cost of threshing, then, so far as the face of the instrument is concerned, the intention of the parties in that particular is still enveloped in obscurity, for nowhere does the lease, by its express language, enlighten us upon the nature and scope of the "usual course and custom in the neighborhood" where the premises are situated in the matter of the division of crops between the lessor and lessee of farming lands.

Thus we have considered the lease for the purpose of showing that, upon or from its face, it cannot be determined whether the agreement was that the lessee was to bear the whole of the cost of threshing and baling the crops. And the result of this conclusion is that, since the lease itself does not expressly provide how or by whom the expense for threshing and baling shall be borne, and is indefinite and uncertain as to that proposition, it was requisite, to ascertain whether it was the intention and understanding of the parties, that the lessee should bear the whole of the expense of threshing and baling the crops produced upon the demised premises, or that such expense should be borne in equal shares by both, either to prove what was the "usual course and custom of the neighborhood," if such course or custom would throw any light upon such intention, or to take testimony of the oral contemporaneous negotiations eventuating in the written lease, assuming that such negotiations would disclose such intention.

As shown, the plaintiff asked for a reformation of the lease in the respect in which we are now considering it and the defendant pleaded the custom of the neighborhood as to the division of crops, and alleged that it was the custom in the neighborhood in which the leased premises are situated for the lessor and lessee of farm lands, where the compensation of the lessor for the use of the land was to be one-half of the crops produced on the premises demised, to bear the expenses incidental to the threshing and the baling of the crops equally. Thus the plaintiff opened up inquiry into the oral negotiations immediately leading to the execution of the lease, and the defendant likewise made the nature and scope of the alleged custom an issue. The burden of proving such custom was therefore upon the defendant.

The plaintiff introduced testimony to the effect that the express understanding was, before the written lease was drafted and subscribed by the parties, that the defendant

was to pay the whole of the cost of threshing and baling, and that it was understood that a provision or covenant to that effect should be inserted in the written lease; that, through inadvertence or oversight, the plaintiff, at whose instance the lease was drawn by Mr. Hopkins, her attorney, neglected or failed to call the attention of her attorney to that particular part of the agreement, and that it was because of such inadvertence or neglect on her part that said provision was pretermitted from or not inserted in the lease.

[2-4] The defendant failed to sustain his claim, as set out in his cross-complaint, that it was the custom in the neighborhood in which the demised land is situated for the lessor and lessee in such a case as this to bear equally the cost of threshing and baling the crops. One witness testified that, while it was true that he himself had leased to a tenant land situated in the neighborhood in which the land in question is situated upon an agreement, among others, that the cost of threshing and baling the crops should be borne in equal shares between them, he was unable to say that such a custom prevailed or existed in said neighborhood. Other witnesses called by the defendant could not say that such a custom existed, or had ever existed, in said neighborhood. But the defendant himself, replying to the testimony presented by plaintiff as to the parol contemporaneous agreement as to the expense of threshing and baling, testified that it was explicitly agreed and distinctly understood between him and the plaintiff that each should bear an equal share of the cost of threshing and baling the crops. This testimony was, of course, competent under the issue joined upon the allegations of the complaint looking to a reformation of the lease, and, having been accepted by the court as disclosing the truth of the matter to which it related, was sufficient to warrant the finding that "the said lease, as signed and executed by the said plaintiff and defendant on the said 22d day of December, 1918, recited fully, in detail, all the terms and conditions as agreed upon by and between said parties," and the further finding that plaintiff was indebted to defendant for paying his (plaintiff's) share of the cost of threshing and baling the crops during the years 1917 and 1918. And that these findings support the judgment, notwithstanding that there is no direct finding that the agreement was that the lessor and the lessee were each to pay one-half of the expense of threshing and baling, there can be no doubt. Said findings necessarily include or, at least, imply the finding of such an agreement. The rule is that the findings must be so construed as to support the judgment, if reasonably it can be done, and upon such construction of the findings here as a whole, it is manifest that, as stated, the judgment is sufficiently supported.

[5] We think, however, that the court erred by its refusal to award plaintiff his costs. The action on the part of plaintiff was not only for a decree reforming the lease, but also for a money judgment against defendant, for money due the former as his share of the proceeds of the sale by defendant of certain crops produced on the premises in question. While the defendant did not deny in his answer that he was indebted to plaintiff in some amount, but, on the contrary, admitted that certain products of the farm had been sold by him, and that the proceeds of such sale were in his possession in the form of a draft, he did not offer to pay to or deposit in court for plaintiff the amount due the latter, even upon the basis of the counterclaim he set up against the plaintiff. The judgment for plaintiff was for the sum of \$533.85, and such judgment carried costs as a matter "of course," which means, as a matter of right. Code Civ. Proc. § 1022, subd. 3; *Stoddard v. Treadwell et al.*, 29 Cal. 281; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391; *Peake v. Harris*, 192 Pac. 311, 317.

The judgment, in so far as it denies to plaintiff his costs, is reversed, with directions to the court below to allow plaintiff his costs. In all other respects, the judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

(82 Okl. 18)

McGEE, County Treasurer, et al. v. SCHOOL DIST. NO. 196, COMANCHE COUNTY. (No. 9612)

(Supreme Court of Oklahoma. March 22, 1921. Rehearing Denied May 17, 1921.)

(Syllabus by the Court.)

1. Mandamus §121—Proper remedy to compel county treasurer to pay to school district its part of taxes collected.

Mandamus is the proper remedy to compel a county treasurer to pay to a school district money due it from another school district when such money has been collected by a tax levied for said purpose, and the money is in the hands of such county treasurer.

2. Mandamus §168(4)—Evidence showed sufficient money in county treasurer's hands to pay school district upon division.

On an examination of the evidence, held that it disclosed there was sufficient money in the hands of the county treasurer in the sinking fund of school district No. 67 to pay the amount due school district No. 196; that this money was raised by tax levied on the property in school district No. 67 for the purpose of paying school district No. 196 the amount found by

the county superintendent to be due from school district No. 67 to school district No. 196.

3. Schools and school districts §22—Law relating to division of school districts held not unconstitutional.

Section 5, art. 3, c. 219, Sess. Laws 1913, providing for the division of school districts and the equitable determination of the value of the schoolhouses and other property, and the proportion justly due to the new district, does not conflict with sections 9 and 10 of article 10 of the Constitution.

4. Mandamus §15—In mandamus to compel county treasurer to pay money collected for school district, invalidity of levy cannot be set up.

When a school board, in making out its estimated needs, does not include any estimate for the sinking fund to provide for the payment of either interest on bonds or money due to a new school district, which was formerly a part of the old district, but a division of the district having been made under the provisions of section 5, art. 3, c. 219, Sess. Laws 1913, and the county excise board inserts in said estimated needs a levy to provide funds for the payment of these items, and the tax levied under this action of the excise board, and without any authority from the school district board, is paid voluntarily, and without protest, by the taxpayers, and so received by the county treasurer; in an action in mandamus instituted by the school district entitled to receive said money to compel such county treasurer to pay said money so levied and collected, the county treasurer cannot set up as a defense the invalidity of such levy.

Appeal from District Court, Comanche County; Cham Jones, Judge.

Action by School District No. 196, Comanche County, against Ben McGee, as Treasurer of Comanche County, and another, in mandamus to compel defendant to turn over to plaintiff certain funds. A peremptory writ was awarded on a trial without a jury, and defendants appeal. Affirmed.

S. I. McElhoes, of Lawton, for plaintiffs in error.

W. O. Stevens, of Lawton, for defendant in error.

MILLER, J. This action was commenced November 25, 1916, in the district court of Comanche county, by school district No. 196, Comanche county, as a municipal corporation, against Joe L. Porter, as county treasurer of Comanche county, and is a proceeding in mandamus the said county treasurer to compel him to turn over to the said plaintiff, school district No. 196, \$858.29 held by the said county treasurer as tax collected and received by the said county treasurer from school district No. 67, Comanche county, Okl. Since the commencement of this action, Ben McGee has succeeded the said Joe L. Porter as such county treasurer.

The alternative writ was duly issued on December 1, 1916. Answer was filed to the alternative writ, and an amended answer was afterwards filed. The trial of the case resulted in a judgment of the court that the peremptory writ of mandamus be issued against the county treasurer, in accordance with the alternative writ heretofore issued.

The county treasurer, defendant below, filed a motion for a new trial, which was overruled, exceptions duly allowed, and notice of appeal given, as required by law, and this appeal perfected.

School district No. 196, plaintiff below, appears as defendant in error here, and the county treasurer of Comanche county, defendant below, appears as plaintiff in error in this court.

Late in the year of 1914, school district No. 67 of Comanche county, Okla., was, by order of the superintendent of public instruction of said county, divided, and two districts created. Nine square miles of territory was taken from said school district No. 67, and a new district created, being school district No. 196.

Thereafter, and in accordance with section 5, art. 3, c. 219, Sess. Laws 1913; the county superintendent proceeded to equitably determine the proportion of the present value of schoolhouses and other property justly due to said new district. Said section reads as follows:

"When a new district is formed, in whole or in part, from one or more districts possessing a schoolhouse or entitled to other property, the county superintendent of public instruction, at the time of forming such new district, shall equitably determine the proportion of the present value of such schoolhouses or other property justly due to said new district. Such proportion, when ascertained, shall be levied upon the property of the district retaining the schoolhouse, or other property, and shall be collected in the same manner as if the same had been authorized by a vote of the district for building a schoolhouse and, when collected, shall be paid to the new district to be applied towards procuring a schoolhouse for such district."

The evidence discloses that all of the property belonging to original school district No. 67 was retained as the property of school district No. 67 as created, and its boundaries defined after making the division. That no part of the property was in the new district created as school district No. 196. This is not controverted by plaintiff in error.

[1] The amount fixed by the county superintendent as being due from said district No. 67 to the defendant in error was \$858.29.

The plaintiff in error says in the beginning of his brief:

"We are not setting out and discussing the pleadings, for the reason that in all past stages of the case no issues as to their sufficiency

have been raised. Hence, we will go directly to the evidence."

The plaintiff in error raises and discusses only three questions in his brief:

First. That the evidence is insufficient to support the writ, in that it fails to show that the county treasurer had any money on hand with which to comply with the writ if it should be granted.

Second. That the act of the Legislature, section 5, art. 3, c. 219, Sess. Laws 1913, supra, is unconstitutional.

Third. That the school board of district No. 67 did not include in its estimate for the expenses of 1915 the amount due school district No. 196, and that the excise board did not have authority to increase the estimate by including a levy to provide this fund.

We will dispose of these questions in the order herein named.

[2] First. Plaintiff in error contends that the evidence is insufficient to support the writ of mandamus, in that it fails to show any funds in the hands of the county treasurer to the credit of school district No. 67 with which to pay the claim of school district No. 196. The evidence discloses the following facts:

Prior to September 17, 1914, school district No. 67 was an existing municipality in the county of Comanche, Okla. On September 17, 1914, a petition was filed with the county superintendent of Comanche county, Okla. This petition prayed for the detaching of a certain area of school district No. 67, and creating an entirely new district therefrom. Notice was given that such petition would be heard on the 10th day of October, 1914. Proof was made that these notices were served. Thereafter the county superintendent issued the following notice:

"Ten Days' Notice of the Alteration of School District Boundaries.

"Notice is hereby given that on the 29th day of December, 1914, I changed the boundaries of school district No. 67, township No. 1 S., range No. 1, 12 W. I. M., county of Comanche, state of Oklahoma, as follows:

"1. By detaching all of sections one, two, three, ten, eleven, twelve, thirteen, fourteen, fifteen, all in township one south, range twelve west I. M.

"And that if no appeal be taken within ten days of the posting of this notice, I will complete said change.

"Dated this 29th day of December, 1914.

"Jennett S. Crosby,

"County Superintendent of Public Instruction.

"Posted by me this 30th day of December, 1914, in five public places of district No. 67, township No. 1 south, range No. 12 W. I. M. (4:30 p. m. time.)"

Thereafter the county superintendent issued the following order, which the evidence shows was a part of the records in the office of the county superintendent of Comanche county:

"Lawton, Oklahoma, January 14, 1915.

"Petition of September 17th, 1914, from more than one-third of the legal voters of attached territory to Geronimo, Dist. No. 67, viz.:

"All of sections one, two, three, ten, eleven, twelve, thirteen, fourteen, fifteen, all in township one south, range twelve west I. M., is hereby acknowledged.

"Petition asks that the above described territory be detached from Geronimo, Dist. No. 67, and formed into a new district. Twenty-day notice of proposed alteration of school district boundaries posted September 19, 1914, by clerk of Dist. No. 67. Ten-day notice of change posted by clerk of Dist. No. 67. December 30th, 1914.

"January 12th, 1915. Petition granted and division of district completed.

"[Seal.] Jennett S. Crosby,
"County Superintendent, Comanche County."

Plaintiff in error, in his brief, makes reference to the evidence as above stated, and then sets out in his brief the 10-day notice and the order of January 14, 1915, and then says:

"It will be observed that up to this time nothing has been issued imposing any charges against school district No. 67. The order thus signed is that the 'division of district completed.' We believe any reasonable person would be led to believe that by this order of January 14, 1915, the final act had been done, and the matter closed. It is absolutely impossible to find from any order anything that would lead any person to believe that anything else or any other action would be taken against school district No. 67."

It will be observed that plaintiff in error does not question the sufficiency or regularity of the proceedings for the division of the district, and these questions are not raised by plaintiff in error, and we are not passing on that as, under the rules of this court, counsel is deemed to have waived the sufficiency, and regularity of all these proceedings. Thereafter a special school meeting was called by the county superintendent and the notices posted by Mary E. McCarthy, clerk of school district No. 67. It reads as follows:

"Notice of Special School Meeting.

"A special meeting of school district No. 196, township No. 1 south, range No. 1, 12 W. I. M., county of Comanche, state of Oklahoma, will be held at R. H. Stevenson, S. E. ¼ sec. 10, 1 S., 12 W., on the 30th day of March, A. D. 1915, at three o'clock p. m.

"[Signed] Jennett S. Crosby,
"County Superintendent.

"Posted this 17th day of March, 1915. Purpose to elect a director whose term shall expire in 1917, a clerk whose term shall expire in 1918, and a member whose term shall expire in 1915.

"Mary E. McCarthy, Clerk of Dist. 67."

The county superintendent thereafter made the following findings and order as to the equitable division of the property of school district No. 67.

"Lawton, Oklahoma, Sept. 1, 1915.

"Division of Property for School District No. 67 and No. 196.

"Section 37. *Division of Property Among Divided Districts.*—When a new district is formed, in whole or in part, from one or more districts, possessing a school house or entitled to other property, the county superintendent of public instruction, at the time of forming such new district, shall equitably determine the proportion of the present value of such school houses or other property justly due to said new district. Such proportion, when ascertained, shall be levied upon the property of the district retaining the school house, or other property, and shall be collected in the same manner as if same had been authorized by a vote of the district for building a school house, and when collected, shall be paid to the new district to be applied towards procuring a school house for such district. (5.)

"According to the tax rolls of Comanche county the taxpayers living in the territory which was attached to Geronimo, district No. 67, and which is now district No. 196, have paid in real and personal taxes for the years 1909, 1910, 1911, 1912, 1913, 1914, a total of \$3,280.64. During these years the average levy for general fund has been 5.08 mills. The average levy for sinking fund has been 1.8 mills. The total average levy has been 6.88 mills. 1.8 is the part paid to the sinking fund. 1.8 of \$3,280.64 is \$590.52.

"We consider \$590.52 to be the amount justly due said new district.

"[Seal.] Jennett S. Crosby,
"County Superintendent."

The estimates of expenses of school district No. 67 for the fiscal year ending June 30, 1915, was then introduced, and is as follows:

"Exhibit 9.

"School District Estimate.

"Report of the board of school district No. 67, to county excise board of Comanche county for the estimated expenses for the fiscal year ending June 30th, 1915:

General Fund.

Liabilities.	Resources.
Salary of teacher.....1980	Cash on hands..... 174.28
Number of teachers 4	State apportionment..... 230.00
Building 500	Tuition
Repairs 125	Other sources.....
Furniture 50	
Library 60	
Fuel and crayon... 60	
Janitor 90	
Other items..... 10	
	2875.00

Sinking Fund.

For What purpose Issued.	Date Issued.	Date due.	Rate.	Amt.	Amt. Raised.
Funding	10-20-08	7/1-28	0%	\$3000	\$180

"We, the trustees of school district No. —, do hereby certify that the above estimates were made by the school board at a meeting held on the 5th day of May, 1914.

"J. F. Cape, Director.
"A. O. Dickson, Clerk.
"Ove Harris, Member.

"State of Oklahoma, County of Comanche.

"I, A. Dickson, clerk of the school district No. 67, Comanche county, Oklahoma, being duly sworn, on his oath deposes and says that, by authority of the school board of said district, he on the 3d day of July 1914, posted in five public places within said district a true and correct copy of the within and foregoing estimates of expenses for the fiscal year ending June 30th, 1915.

"A. O. Dickson,
"Clerk of Dist. No. 67.

"Subscribed and sworn to before me this 7th day of June, 1914.

"Sandy W. Gregory.

"H. N. Whalin, Chairman Excise Board.

"Sandy W. Gregory, Secretary of Excise Board. [Seal.]"

Indorsements on back of Exhibit 9 are as follows, to wit:

"Filed this 7th day of July, 1914.

"Sandy W. Gregory,
"Secretary Excise Board.

"Levies: General fund, five mills. Sinking fund, 1.25 mills. Valuation, \$304,016.00. Estimates, \$2,064.00."

Next was introduced in evidence the financial statement of school district No. 67, for the year ending June 30, 1915, the estimated needs of said district for the year ending June 30, 1916, the action of the school district board and the excise board thereon, attached thereto, and as a part thereof, is a certificate showing a vote of school district No. 67 on a proposed excess levy of 2 mills, which is as follows:

Exhibit 10.

School District No. 67, of the County of Comanche, State of Oklahoma. Financial statement for fiscal year beginning July 1st, 1914, and ending June 30th, 1915, and estimated needs for current expenses for the fiscal year beginning July 1st, 1915 and ending June 30th, 1916, as required by section 7378, chapter 72, Revised Laws of Oklahoma 1910:

Financial Statement.

"A" Cash Account.

1. Cash on hand July 1st, 1915, to credit of general fund..... 184.63

Receipts.

2. Amount received from current taxes..... 1985.75
3. Amount received from back taxes.....
4. Amount received from state apportionment..... 235.40
5. Amount received from county apportionment..... 21.40

Total balance and receipts..... 2427.18

Disbursements.

Total disbursements..... 2085.44
13. Balance on hand.....

"B" Tax Levy Account.

1. Valuation current year, \$3040.16; rate general levy 5 mills.
2. Total taxes levied for fiscal year ending June 30, 1915 (compute amount on basis of valuation and rate of levy shown in line 1-"B")..... 1520.08
3. Total amount received from county treasurer to June 30th, 1915 (enter here amount shown in line 2-"A")..... 1985.75
4. Balance in process of collection for fiscal year ending June 30th, 1915..... 236.74

"C" Estimate Account.

4. Amount of approved estimate for current expense for fiscal year ending June 30, 1915 (enter here amount of estimate approved by county excise board for year named)..... 2034.00
5. Total warrants issued against above estimate (enter here amount from warrants stub)..... 2034.33

"D" Warrant Account.

2. Warrants issued against estimate for fiscal year ending June 30th, 1915 (enter here amount shown in line 5-"C")
Total warrants..... 2034.33
5. Warrants paid (enter here amount shown in line 10-"A")
6. Balance warrants outstanding June 30th, 1915..... 229.50

"E" Summary.

Assets.

1. Cash on hand June 30th, 1915 (enter here amount shown in line 13-"A")..... 271.74

Liabilities.

4. Warrants outstanding June 30th, 1915 (enter here amount shown in line 6-"D") 229.55

"F" Estimates Needs.

1. For salary three teachers... 1665.00
2. For repairs..... 25.00
For fuel..... 60.00
7. For furniture and supplies.. 10.00
10. For janitors..... 90.00
Total estimated needs.. 1850.00 1400.49 609.75
Estimated amount that will be received from the following sources:
15. Tuition and other sources..... 100.00

Approved Estimate and Levy.

(These blanks to be filled by excise board)

We, the undersigned, members of the excise board of Comanche county, state of Oklahoma, do hereby certify that we have examined the foregoing estimated needs of school district No. 67, and have approved the said estimates for the amounts and made levies therefor as follows:

1. General fund; approved estimate, 1400.49; rate of levy, mills..... 5.
2. Sinking fund; approved estimate, 1108; rate of levy, mills..... 4.75
3. Total levy; rate of levy, mills..... 9.75

We further certify that we have ascertained the assessed valuation of said school district to be \$23,110, and do hereby order that the levies herein above enumerated aggregating 9.75 mills extended upon the tax rolls.

Dated this 10th day of Sept. 1915.

R. J. Ray,
County Judge.

T. B. Orr,
County Attorney.

Charla Critcher,
County Clerk.

Jennett S. Crosby,
County Superintendent.

"H" Certificate.

We, the undersigned, directors of school district No. 67 of the county of Comanche, state of Oklahoma, do hereby certify that the above and foregoing statement of the fiscal condition of school district No. 67, county and state aforesaid, is true and correct, and that the amounts enumerated in the statement of estimated needs are reasonably necessary for current expenses in the proper conduct of the affairs of said school district.

We further certify that the above and foregoing is a true and correct copy of the statement and estimates prepared and made at a meeting held on the first Monday in July 1915, the same being the 6th day of July, 1915.

J. L. Sawyer, Director.
Mary E. McCarthy, Clerk.
W. Hubbs, Member.

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Affidavit.

State of Oklahoma, County of Comanche—ss.

Personally appeared before me, the undersigned notary public, Mary E. McCarthy, clerk of school district No. 67, who, being first duly sworn according to law, deposes and says: That she complied with the law by having the within estimate posted in five public places in district No. 67, there being no newspaper published in said school district.

Mary E. McCarthy.

Subscribed and sworn to before me this 8th day of July, 1915.

[Seal.]

Geo. C. Stablin, Notary Public.

My commission expires May 1st, 1916.

To the County Excise Board, County of Comanche, State of Oklahoma—Gentlemen:

Pursuant to the requirements of section 7378, chapter 72, Revised Laws of Oklahoma, 1910, we submit herewith, for your consideration, the within and foregoing statement of the fiscal condition of school district No. 67 of the county of Comanche, state of Oklahoma, for the fiscal year beginning July 1st, 1914, and ending June 30th, 1915, together with an itemized statement of the estimated needs of said school district for the fiscal year beginning July 1st, 1915, and ending June 30th, 1916.

Dated at Geronimo, this the 8th day of July, 1915.

J. L. Sawyer, Director.

Mary E. McCarthy, Clerk.

W. E. Hubbs, Member.

Certificate of Excess Levy.

State of Oklahoma, Comanche County—ss.

We, the undersigned, J. Lon Sawyer, W. E. Hubbs, and Mary E. McCarthy, the duly qualified and acting school district board of school district No. 67 of Comanche county, Oklahoma, do hereby certify: That at the annual meeting and election of the qualified voters of said district, duly advertised according to law held, at Geronimo on the 27th day of July, 1915, there was submitted to the school electors of said district and voted upon by them the question of whether an excess levy of 3 mills should be made on behalf of said district for the next ensuing fiscal year. That in said election there were cast 38 votes. Of said votes 38 were cast for the aforesaid levy and 50 were cast against it, making a majority of 12 votes not in favor of said 2 mills. This certificate is attached to and made a part of the annual estimate of said school district board to the honorable excise board of Comanche county, Oklahoma, under the provisions of House Bill No. 501, approved April 5, 1915, carrying an emergency.

In witness whereof, we have hereunto subscribed our names and affixed the official seal of said school district this 27th day of July, 1915.

J. L. Sawyer, Director.

W. E. Hubbs, Member.

Attest: Mary E. McCarthy, Clerk. [Seal.]

Under date of February 15, 1916, the county superintendent wrote Joe L. Porter, county treasurer, the following letter, which was introduced in evidence:

"Lawton, Oklahoma, Feb. 15, 1916.

"Mr. Joe L. Porter, County Treasurer, Comanche County, Lawton, Oklahoma—Dear Sir: In the division of the property of school districts No. 67 and No. 196, it having been ascertained that district No. 196 is equitably entitled to \$858.29, you are hereby authorized to transfer said amount which has been levied and collected upon the property of district No. 67 to the credit of said district No. 196. Very truly yours, Jennett S. Crosby, County Superintendent. [Seal.]"

Mrs. Jennett S. Crosby, who was the county superintendent of schools and a member

of the excise board during the years 1914, 1915, and 1916, testified as follows:

"Q. By virtue of your office, were you a member of the excise board for the year 1915? A. Yes, sir.

"Q. Do you know whether or not the excise board for that year considered the levy for the purpose of making payment of that amount which you say you found due to district No. 196? A. Yes, sir.

"Q. Have you before you now the determination of the excise board as made on September 10th, which included this particular fund in controversy? A. Yes, sir.

"Q. Tell the court in what item of the estimate you have before you that was included? A. It was included in the sinking fund.

"Q. The paper which you now have before you was signed by R. J. Ray, county judge, T. B. Orr, county attorney, Mrs. Critcher, county clerk, and yourself as county superintendent? A. Yes, sir.

"Q. You are familiar with the signature of all those people? A. Yes, sir.

"Q. And those are their signatures appended thereto? A. Yes, sir.

"Q. I will ask you if at any time you advised the county treasurer of the amount of that sinking fund which was due to school district No. 196 from the levy made for school district No. 67? A. Yes, sir, he was authorized to transfer it.

"Q. Is the paper marked 'exhibit 7' the paper to which you refer? A. Yes, sir. * * *

"Q. What you did undertake to do was to follow the command of the statute requiring you to determine what amount was equitably due from district 67 to district 196? A. Yes, sir; if you will allow me to refer to the order I made for the transfer of that fund, I will show you exactly what I did do. On the settlement between the two districts this is the section of the statute I followed, 'When a new district formed'—

"By Mr. McElhoes: We object to that as a matter of law.

"A. This is a part of the record, I have it pasted on here and it shows exactly what I did do.

"By the Court: It has been introduced in evidence, and will show for itself what it is. The objection is sustained.

"Q. You may refresh your recollection from anything you can, and tell the judge what you did do, and what you found? A. Well, we endeavored to determine, as it says, equitably, the proportion of the value of the property that was due the district, and then it says it shall be levied upon the property of the district retaining the schoolhouse, and collected in the same manner as though authorized by a vote by the people.

"Q. You did take into consideration the entire standing of both districts, and also the taxes that had been collected and levied from time to time in district No. 196 and also 67? A. Yes, sir; I compared the value of the districts for different years and the proportion paid by district 196 was about one third and 67 about two thirds; it ran that way for seven or eight years.

"Q. So you used the best judgment you possessed, and made the determination? A. Yes, sir; in as equitable a manner as I could.

"Q. And no appeal was taken from that determination? A. No, sir, and no protest was ever offered as to the division of the district, the 20-day notice was given, and then the 10-day notice that the alteration and change was to be consummated, and no protest or appeal had been offered.

"Q. For our convenience in argument, did you ascertain the rate of levy for 1914, 1915, and 1916 of the sinking fund of district No. 67? A. Yes, sir.

"Q. Give those to us.

"By Mr. McElhoes: I have no objection to what she says about it, but I don't want to be bound by it.

"A. I can get the record from the excise board. For the year 1914, it was 1.25 mills for the sinking fund. For 1915, it was 4.75 mills; that is the year the settlement was made; and for the next year it was 1.40 for the sinking fund."

John Thompson, an officer of school district No. 196, testified as follows:

"Q. You know the defendant, Joe L. Porter, county treasurer? A. Yes, sir.

"Q. You were an officer of school district No. 196 prior to the bringing of this suit? A. Yes, sir.

"Q. Did you have a conversation with Joe L. Porter, the defendant, just before you brought the suit relative to the amount of money in controversy? A. Yes, sir.

"Q. Did you have a conversation with him relative to whether he had that amount of money on hand before the suit was brought?

"Q. Tell the entire conversation? A. We went to Mr. Porter and asked him to turn over the money we understood was there to build the schoolhouse, and he said the money was there, but he could not see his way clear to pay it.

"Q. Did he tell you in what fund it was? A. Yes, sir; said it had been placed in the sinking fund."

Ben McGee, who had succeeded Joe L. Porter as county treasurer of Comanche county, Okla., testified as follows:

"Q. You are the county treasurer of Comanche county? A. Yes, sir.

"Q. Have you, since the former hearing of this case, had occasion to make a computation of the sinking fund of school district No. 67? A. Yes, sir.

"Q. For what period of time does that cover? A. July 1, 1914, to July 1, 1917.

"Q. Will you tell the court the total amount collected for the sinking fund of school district No. 67 during that period? A. \$1,847.74.

"Q. Tell the court what the balance is now on hand in that sinking fund? A. Not the exact figures, it is about \$1,300. I haven't the exact figures.

"Q. I will ask you to get the exact amount, if you can, on hand at the present time? A. The amount on hand to-day is \$947.24."

All of this evidence is undisputed, and the treasurer's records show \$947.24 in the sinking fund. The claim of school district No. 196 is \$858.29. It is evident there is more than enough in the sinking fund to pay the claim of school district No. 196.

The testimony of John Thompson is that Joe L. Porter, former county treasurer of Comanche county, told him there was money in the sinking fund to pay this, but he did not see his way clear to pay it.

Plaintiff in error then states in his brief:

"We call the court's attention to Exhibit 10, herein set out, showing the estimate filed by the board for district No. 67. Nowhere does it provide among its estimated needs anything for this charge by the county superintendent. Nor could it have done so, because that charge was not in existence at the time the estimate was made. Exhibit 10 also shows that the excise board made a levy for a sinking fund. Not a word is said in the estimate by the school board about needing one cent for the sinking fund. Nor is there anything in the record showing any need for a sinking fund. Just where the county excise board could get any authority for making this levy does not appear in the record, nor in the estimate and we have been unable to find any authority in law.

"In this whole record the only evidence of the need for a levy for sinking fund appears in Exhibit 9, where bonds in the sum of \$3,000, issued October 29, 1908, and maturing July 1, 1928, and bearing 6 per cent., are shown. These bonds are then 20-year bonds. This would require the raising of 5 per cent. for the principal and 6 per cent. for interest, making a total of 11 per cent., which, on a principal of \$3,000, is \$330.

"Exhibit 10 shows the assessed valuation for 1915 and 1916 to be \$233,110 and a levy of 4.75 mills which was made by the excise board provides an income of \$1,107.27. And if we deduct the foregoing \$330 necessary to take care of the bonds, we have left \$777.27. This assumes that all of the taxes were paid, and still we would not have enough money in any event to comply with the court's order.

"But the point we are emphasizing is that the excise board made this levy without a single thing in the estimate to authorize it."

Counsel assumes the bonds would require the raising of 5 per cent. of the principal of \$3,000. Exhibit 9 shows that the school district, in 1914, asked for \$180 in the sinking fund to provide 6 per cent. interest on \$3,000. They did not ask for any 5 per cent. to apply on the principal, and counsel's assumption is not based upon the record in this case. He says the 4.75 mills levy made by the excise board would provide an income of \$1,107.27. He assumes to deduct \$330 from this amount, but under the record he could not deduct more than \$180, and deducting \$180, it leaves \$927.27. The treasurer's records showed \$947.24 and the treasurer testified that some of this was carried over from 1914.

The testimony of Mrs. Crosby, county superintendent, is that the excise board made the levy in 1915 to raise money to pay school district No. 196, and made it as a part of the sinking fund, her testimony being that the amount of levy for the sinking fund for 1914 was 1.25 mills; for 1915, it was 4.75 mills, and for 1916, it was 1.40 mills. She testifies that this increase for 1915 was to provide the

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fund for school district No. 67 to pay school district No. 196 the amount she had found as the equitable adjustment between the districts. It is evident from her testimony that approximately 3.50 mills was provided in the sinking fund for this expressed purpose. Therefore, we conclude that the evidence clearly sustains the findings and judgment of the trial court; in fact, it could not have found otherwise. There is not a failure of proof, as contended for by plaintiff in error, and the authorities cited by him on failure of proof do not apply.

[3] The next question is the constitutionality of section 5, art. 3, c. 219, Sess. Laws 1913:

"Section 5. When a new district is formed, in whole or in part, from one or more districts possessing a schoolhouse or entitled to other property, the county superintendent of public instruction, at the time of forming such new district, shall equitably determine the proportion of the present value of such schoolhouses or other property justly due to said new district. Such proportion, when ascertained, shall be levied upon the property of the district retaining the schoolhouse, or other property, and shall be collected in the same manner as if the same had been authorized by a vote of the district for building a schoolhouse and, when collected, shall be paid to the new district to be applied towards procuring a schoolhouse for such district."

"It is a cardinal rule in the construction of a Constitution that it is to be so interpreted as to permit the objects for which it was framed and adopted, and to this end the whole instrument is to be examined, with a view to ascertaining the meaning of each and every part. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204; *Stanford v. Magill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 773. The presumption and legal intendment is that each and every clause in a written Constitution has been inserted for some useful purpose, and therefore the instrument must be construed as a whole in order that its intent and general purpose may be ascertained. As a necessary result of this rule, it follows that, wherever it is possible to do so, each and every provision must be so construed that it shall harmonize with all others, without distorting the meaning of any of such provisions, to the end that the intent of the framers may be ascertained and carried out and effect given to the instrument as a whole. *Wilcox v. People*, 90 Ill. 186, 196; *People ex rel. Jackson v. Potter*, 47 N. Y. 375; *Coffin v. Board of Election Com'rs*, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662; *Hawkins v. Filkins*, 24 Ark. 287; *Marye v. Hart et al.*, 76 Cal. 291, 18 Pac. 325; *Dyer v. Bayne*, 54 Md. 87.

"If the maximum levy for state purposes fixed by section 9, art. 10, extends to all taxes, whether assessed according to section 8, art. 10, or imposed by the Legislature, pursuant either to sections 12, 13, or 22 of article 10, then the tax in question, being in excess of the maximum levy for state purposes, cannot be sustained. But the language of section 9 does not, necessarily, authorize this conclusion, for

it is expressly provided that 'except as herein otherwise provided,' the maximum levy shall be that provided for in said section.

"The office of an exception in a statute (alike applicable to a Constitution) is, generally speaking, to take or exclude from the operation of the statute certain things or subjects which would otherwise be included therein. *Campbell v. Jackman*, 140 Iowa, 475, 118 N. W. 755, 27 L. R. A. (N. S.) 288; *Cassidy v. Royal Exchange Assur. of London*, 99 Me. 399, 59 Atl. 549; *State v. Barrett*, 172 Ind. 169, 87 N. E. 7; *Pabst Brewing Co. v. Milwaukee*, 148 Wis. 582, 133 N. W. 1112; *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398. There is nothing in the Constitution expressly giving to the counties and municipal subdivisions thereof the right to levy taxes on all property situated therein. We must assume that the framers of the Constitution, in conferring upon the state both the authority to provide for the levy and collection of the specific taxes named in section 12, art. 10, as well as the power of the state to select its subjects of taxation and levy and collect its revenues independent of the counties, cities, and other municipal subdivisions thereof, acted with deliberation, and had in view some definite purpose. All property upon which the state may impose a tax is, of course, situated within one or more counties of the state, and hence the state must, in selecting its subjects of taxation, invade the territorial jurisdiction of the counties, and, it may be, that of the cities or other municipal subdivisions thereof. In order that the Legislature might not be constitutionally controlled in the amount of the special taxes which it was authorized to levy, the Constitution in fixing the maximum levy provided, in the introductory portion of section 9, art. 10, 'except as herein otherwise provided.' This limitation upon the amount of the levy imposed in said section has reference, we think, to property in general, assessed for taxation at its fair cash value, where it is subjected to an ad valorem tax for all purposes, state and municipal, as provided in section 9, art. 10, and does not constitute a restriction upon the power of the Legislature to enact the statute under review, imposing a tax 'for current expenses of state government,' in excess of 3½ mills on the dollar."

See *Large Oil Co. v. Howard*, State Auditor, 63 Okl. 143, 163 Pac. 537.

Plaintiff in error contends that the things authorized to be done by section 5, art. 3, c. 219, Revised Laws of 1913, supra, are prohibited by sections 9 and 10 of article 10 of the Constitution. These sections read as follows:

"Sec. 9. Except as herein otherwise provided, the total taxes, on an ad valorem basis, for all purposes, state, county, township, city or town, and school district taxes, shall not exceed in any one year thirty-one and one-half mills on the dollar, to be divided as follows:

"State levy, not more than three and one-half mills; county levy, not more than eight mills: Provided, that any county may levy not exceeding two mills additional for county high school and aid to the common schools of the county, not over one mill of which shall be for such high school, and the aid to said common schools shall be apportioned as provided by law; town-

ship levy, not more than five mills; city or town levy, not more than ten mills; school district levy, not more than five mills on the dollar for school district purposes, for support of common school: Provided, that the aforesaid annual rate for school purposes may be increased by any school district by an amount not to exceed ten mills on the dollar valuation, on condition that a majority of the voters thereof voting at an election, vote for said increase.

"Sec. 10. For the purpose of erecting public buildings in counties, cities, or school districts, the rates of taxation herein limited, may be increased, when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and a majority of the qualified voters of such county, city, or school district, voting at such election, shall vote therefor: Provided, that such increase shall not exceed five mills on the dollar of the assessed value of the taxable property in such county, city, or school district."

The clause in section 9, supra, "except as herein otherwise provided," takes or excludes from the operation of the statute certain things which would otherwise be included therein. That which is otherwise herein provided includes the proviso in section 9; it also includes section 10. This section provides that, for the purpose of erecting public buildings in school districts, the rates of taxation herein limited may be increased by submitting the question to a vote of the people, if a majority of the qualified voters at such election shall vote therefor, but the increase shall not exceed 5 mills on the dollar of the assessed value of the taxable property in such school district.

The evidence discloses that the qualified voters of school district No. 67 had voted for the erection of a public building in this school district, and to increase the rate of levy, provided for in section 9. In doing this they came within the "exception as herein otherwise provided," which was contained in section 10 under the provision of which they voted for the \$3,000 bond issue. By voting this bond issue for the erection of this school building, all of the provisions of the Constitution were complied with. The levy to provide for the payment to district No. 196 for its equitable interest in this school building, and for the interest on the bonds was included in one item, and, when collected, went into a special fund known as the sinking fund.

The subsequent division of the district under section 5, Sess. Laws 1913, supra, did not create a new obligation. The obligation remained the same; i. e., the payment for this building in school district No. 67. It did not increase the cost of the building over and above what had been originally provided for. But certain of this money had been paid by a tax levied on property that, since the division of the district, was not within the boundaries of district No. 67. The provision of section 5, Laws of 1913, supra, providing for

the payment of such an amount as shall be equitably determined to be the proportion of the present value of such schoolhouse, which, when ascertained, shall be levied upon the property of the district retaining the schoolhouse, and collected in the same manner as if authorized by a vote of the district for building a school house, does not conflict with the sections of the Constitution above referred to.

This tax was levied and collected in the same way as the tax to provide money with which to pay the interest on the bonds issued for the erection of this same schoolhouse. The levy did not exceed the five mills for the year 1915; it was only four and seventy-five hundredths mills.

We are of the opinion that the Legislature was clearly within the provision of the Constitution in passing the law providing for the division of school districts (section 5, Laws of 1913, supra). The only thing remaining to be done when this money was collected by the county treasurer was to pay it to the new district; and this the county treasurer refused to do.

[4] There is but one remaining question: That the school board of district No. 67 did not include in its estimate for the expenses of 1915 the amount due school district No. 196, and that the excise board did not have authority to increase the estimate by including a levy to provide this fund. In support of this contention, counsel for plaintiff in error cited the following cases:

"In the case of *St. Louis & San Francisco Railroad Co. v. Haworth*, our Supreme Court says: [48 Okl. 132], 149 Pac. 1086: 'Any tax levied in excess of that required by the estimates of the township or school district officers for a fiscal year is illegal and void. (a) The collection of such illegal and void tax may be enjoined.'

"The matter is also very thoroughly discussed in the case of *St. Louis & S. F. R. Co. v. Thompson* [35 Okl. 138] 128 Pac. 685. The first paragraph of the syllabus is as follows: 'By reason of act of the Legislature, entitled "An act to provide for the levying of taxes on an ad valorem basis," etc. (chapter 64, Sess. Laws 1910, p. 109), the county excise board is without power to levy during any one year for township purposes in any township a tax in excess of the amount estimated by the directors of said township as necessary to defray the current expenses of said township during the ensuing fiscal year as approved by the county excise board and an additional amount of 10 per cent. thereon for delinquent taxes. Any tax levied by the excise board in excess of such an approved estimate of the township officers and an additional 10 per cent. for delinquent taxes is, as to such excess levied, illegal and void.'

"*Atchison, T. & S. F. Ry. Co. v. Eldredge* [Okl.] 169 Pac. 1071. In this case the issue involved in the case at bar was squarely before the court, and the court held: 'Prior to the passage of chapter 226, p. 412, Sess. Laws 1917, the county excise board was without au-

(198 P.)

thority to increase any estimate certified to them by the board of county commissioners, and taxes levied in pursuance of such increased estimate were void to the extent of such excess over the estimate certified by the board of county commissioners.'"

We do not think these cases are applicable to the question presented here. The money under this levy has all been paid by the taxpayers. They are not the ones raising the question. If any of these taxpayers had raised the question and sought to enjoin the collection of the tax, or had paid the tax under protest, and exercised their right under statute to collect it back, that would present a different question. The tax having been voluntarily paid by the taxpayer, and without protest, the county treasurer, in a mandamus proceeding to compel payment of the money to school district No. 186, for whom the money was levied and collected, is not in a position to question the right of the excise board to make this levy.

It therefore follows that the trial court was correct in awarding the peremptory writ of mandamus, and the judgment of the trial court is therefore affirmed.

HARRISON, C. J., and KANE, BLTING, and KENNAMER, JJ., concur.

(81 Okl. 227)

FENOGLIO v. FOLSOM-MORRIS COAL MINING CO. (No. 10062.)

(Supreme Court of Oklahoma. May 8, 1921.)

(Syllabus by the Court.)

1. Master and servant §204(2), 293(6)—Risk of neglect of statutory duty not assumed by miner; instruction on statutory duty to miner required.

In an action for damages for the wrongful death of a coal miner alleged to have occurred as the direct and proximate result of the failure of the employer to furnish props, cap pieces, and of the mine foreman to abate all dangerous conditions reported to him and to inspect said mine as provided in sections 3984 and 3988 of Rev. Laws 1910, the defendant cannot take advantage of the defense of assumption of risk, and it is the duty of the trial court, where there is evidence which reasonably tends to support the plaintiff's theory that the employer has failed to perform his statutory duty in safeguarding a coal mine as required by the statute, to instruct the jury as to the duty of the employer as prescribed by the statute, and a failure to do so constitutes reversible error.

2. Master and servant §228(2)—Contributory negligence defense in case of injury from violation of statutory duty.

In an action for damages by the administrator of the estate of a deceased person for wrongful death wherein it is alleged that the death of the deceased resulted from a violation

of a statutory duty imposed upon an employer, the contributory negligence of the person injured may be urged as a defense thereto, unless the statute prescribing the duty of the employer expressly excludes such defense.

Appeal from District Court, Coal County; J. H. Linebaugh, Judge.

Action by John Fenoglio, administrator of the estate of Antonio Fenoglio, deceased, against the Folsom-Morris Coal Mining Company for wrongful death. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions to grant a new trial.

J. R. Wood and E. N. Holland, both of Coalgate, for plaintiff in error.

Geo. Trice, of Coalgate, for defendant in error.

KENNAMER, J. This action was filed in the district court of Coal county on April 24, 1917, by John Fenoglio, administrator of the estate of Antonio Fenoglio, deceased, against the Folsom-Morris Coal Mining Company, a corporation, to recover damages on account of the death of Antonio Fenoglio. The material allegations of the petition filed by the plaintiff in error, John Fenoglio, as the administrator of the estate of Antonio Fenoglio, plaintiff below, alleges that Antonio Fenoglio was on the 14th day of March, 1917, employed by the Folsom-Morris Coal Mining Company in the capacity of a coal digger in mine No. 8; that while working at his employment in the last room of said mine, not numbered, off of second south entry in mine No. 8, at which place he had been directed by the defendant to work, and while so engaged in said work and service of the defendant company, without negligence on his own part, the said Antonio Fenoglio was killed by a fall of coal from the roof at or near the point and just above where he was working; that his death was caused by the neglect and carelessness of the defendant; that the defendant's negligence consisted of its failure to furnish the necessary timbers for propping the overhanging coal in the roof in the room in which the deceased was working; failure to inspect the mine and supervise the work as required by law; and in substance pleaded a general violation of sections 3983, 3984, 3988, and 3989 of the Revised Laws of 1910.

The defendant filed answer denying the allegations of the petition pleading assumption of risk and contributory negligence. The cause was tried and the issues of fact submitted to a jury on the 3d day of October, 1917, which resulted in a verdict in favor of the defendant. The plaintiff in due time filed a motion for a new trial, which was overruled by the court, and judgment entered in favor of the defendant. The plaintiff

brings the case here for review, having assigned numerous grounds of error. There is one question of law involved in this cause that is decisive of this appeal, and all the different assignments of error may be considered under the one proposition. The question presented is the correctness of the instructions of the court to the jury in which the court in substance instructed the jury that the right of the plaintiff to recover in the action was governed by the ordinary common-law liability. It appears upon a careful examination of the record that the court assumed that the deceased was killed by the falling of coal which was caused by his work in undermining it, and that he assumed the risk incident to his employment. Therefore the employer would not be held liable.

The court in his instruction to the jury failed to specifically instruct the jury what the statutory duties of the employer were, but presented the case to the jury upon the theory that the common-law rule of master and servant applied. The plaintiff, by different instructions, requested the court, almost in the language of the statute, to instruct the jury upon the statutory duties of the defendant. The court in failing to instruct the jury as to the duties of the defendant under the statute, committed reversible error.

[1] In an action for damages, where the plaintiff relies upon acts of negligence which constitute a violation of a statutory duty which the plaintiff claims was the direct and proximate cause of the injury, the defendant cannot take advantage of the defense of assumption of risk. *Jones v. Oklahoma Planing Mill & Manf. Co.*, 47 Okl. 477, 147 Pac. 999; *Whitehead Coal Mining Co. v. Schneider*, 75 Okl. 175, 183 Pac. 49; *Curtis & Gartside Co. v. Pribyl*, 38 Okl. 511, 134 Pac. 71, 49 L. R. A. (N. S.) 471; *Great Western Coal & Coke Co. v. Coffman*, 43 Okl. 414, 143 Pac. 30.

[2] The rule appears to be well settled in this jurisdiction that, upon a failure of the employer to comply with his statutory duties which resulted in injury to the employee, the defense of assumption of risk is not available. The defense, however, of contributory negligence is available. *Jones v. Oklahoma Planing Mill & Mfg. Co.*, supra.

In the case at bar the defendant in error failed to file briefs as required by rule No. 7 of this court, and it is not incumbent upon the court to search the record to find some theory upon which to sustain the judgment if the errors assigned and presented by the plaintiff in error appear to be reasonably sustained. However, we have carefully gone over the record in this cause, and have reached the conclusion that the trial court committed reversible error in failing to instruct the jury upon what constituted the statutory

duties of the defendant in operating its mine, and that the defendant would be liable if the jury found, from the evidence introduced, that the defendant had failed to perform its statutory duties, and its failure was the proximate cause of the deceased's death.

The judgment is therefore reversed, and the cause remanded, with directions to the trial court to grant the plaintiff a new trial and proceed with said cause in harmony with the views herein expressed.

HARRISON, C. J., and PITCHFORD, KANE, and JOHNSON, JJ., concur.

(31 Okl. 222)

MORRIS v. MORRIS. (No. 9738.)

(Supreme Court of Oklahoma. April 26, 1921.)

(Syllabus by the Court.)

1. **Divorce** §298(1)—In determining custody of minors, court must be guided by their best interest.

Under section 4384, Rev. Laws 1910, as governed by the rules prescribed in section 3331, a court, in awarding the custody of a minor child, must be guided first by what appears to be for the best interests of the child, in respect to its temporal and its mental and moral welfare.

In deciding what is for the best interest for the child in respect to its temporal, mental, and moral welfare, a court should well consider the influences and protection afforded by a parental affection, if such be manifest, and should not allow mere sordid wealth alone to weigh against a parent's love.

2. **Divorce** §303(1)—Decrees as to care and custody of child rarely made final, but subject to modification.

Decrees as to the care and custody of a minor child are rarely made final, but may be modified from time to time to meet the requirements of the child's welfare.

3. **Divorce** §312—Award of custody of child will not be changed on appeal after four years in absence of evidence as to existing conditions.

The decree awarding the custody of a child to her mother's parents, who were adjudged to be fit persons, rather than to her father, who was adjudged to be an unfit person, having been made nearly four years ago, the child being then only four years of age, will not be reversed now and custody awarded to the father, this court being without knowledge as to what changes have since taken place, and having no knowledge as to what conditions exist at this time, but such decree will be allowed to stand, subject to such modifications as present conditions and the child's welfare may require.

Kane, J., dissenting.

Appeal from District Court, Pontotoc County; Geo. C. Crump, Judge.

Proceedings by Thomas W. Morris against Rebecca Morris for the modification of a decree awarding the custody of a child to the mother. From a decree awarding the custody to third parties, plaintiff appeals. Affirmed.

Robert Wimblish and W. C. Duncan, both of Ada, for plaintiff in error.

W. F. Schulte, of Ada, and P. Mounts and John E. Williams, both of Frederick, for defendant in error.

HARRISON, O. J. This is an appeal from a decree awarding the custody of a child. It appears that in October, 1916, a decree of divorce was granted to Rebecca Morris from her husband, Thomas W. Morris, plaintiff in error, and the custody of their minor child, Majorie, then about three years of age, given to the mother. In August, 1917, the father, Thomas W. Morris, petitioned for a modification of the decree, and asked for the custody of the child himself. The mother and stepfather of the child's mother—that is, the maternal grandmother and stepgrandfather of the child—had her actual custody and care at the time this action to modify decree was brought. The mother of the child, in the meantime, had married again, and moved to Texas. The father of the child was living with his own mother on a farm.

The court, after hearing the testimony, made, among others, the following finding and order:

"The court finds that the little girl in controversy was born in the home of Mr. Bohanan and his wife, who have had the expense and care of her keeping up to date, or until the order was made some time ago delivering her to the defendant, and that the attachment has grown very strong in the mind and heart of Mr. Bohanan for the little girl, and the court is of the honest opinion that Mr. Bohanan and his wife are very honorable people, God-fearing people, and that they are able from a moral standpoint and a financial standpoint to give this little girl the training and education she ought to receive, and from the disposition of the plaintiff and the defendant fighting and quarreling and keeping up an uproar the court is of the opinion that, if this child is put in the home of Mr. Bohanan and her home settled there, it will be for the best interest of the little girl, and the court will so order and award the child to Mr. Bohanan."

From this decree the father, Thomas W. Morris, appeals upon three propositions, viz.:

(1) That under the law the court cannot take the custody of a minor child from its father and give it to a stranger.

(2) That the court erred in admitting hearsay testimony which tended to show the father's willingness for the child's maternal grandparents to have its custody.

(3) That the court erred in declining to

make findings of fact and conclusions of law upon request of plaintiff in error.

Upon the first proposition, plaintiff in error relied upon section 4368, R. L. 1910, which provides:

"The father of a legitimate unmarried minor child is entitled to its custody, services and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement. If the father be dead, or be unable, or refuse to take the custody, or has abandoned his family, the mother is entitled thereto."

[1] Possibly plaintiff in error overlooked section 4384, R. L. 1910, which provides:

"The husband and father, as such, has no right superior to those of the wife and mother, in regard to the care, custody, education and control of the children of the marriage, while such husband and wife live separate and apart from each other, and when they so live in a state of separation without being divorced, the district court or judge thereof upon application of either, may grant a writ of habeas corpus to inquire into the custody of any minor unmarried child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the court or judge must be guided by the rules prescribed in section 3331, in the chapter on 'Guardian and Ward.'"

The section 3331 referred to in the above quotation provides:

"In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:

"First. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference the court or judge may consider that preference in determining the question.

"Second. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

We would direct attention to the latter part of section 4368, *supra*, which provides:

"If the father be dead, * * * or has abandoned his family, the mother is entitled thereto."

It appears from the record that the decree of divorce and award of custody of the child was granted to the mother primarily upon the ground of abandonment by the father.

Under section 4384, *supra*:

"The * * * father, as such, has no rights superior to those of the wife and mother," etc.

It is provided in section 3331, *supra*, that in awarding the custody of a child the court or judge must be guided by what appears for the best interest of the child, in respect to its temporal, mental, and moral welfare. Thus the Legislature has enacted into statute law a most benign principle, one that has long been recognized and followed by our courts of justice. It is a principle which underlies good citizenship, it is a duty which government itself is obligated to discharge toward a child, and, upon the decree of fulfillment of such duty depends the benefits which the government may derive from a good citizen or the detriment it may sustain from a bad one. See Simpson on Law of Infants, c. 8, pp. 129 to 151; Tyler on Infancy and Coverture (2d Ed.) p. 277; 2 Kent's Comm. 205; Hurd on Habeas Corpus, 528; *Ex parte Adams*, 168 Pac. 1004.

Hence the court not only had authority to do what it did, but it was its plain statutory duty to do what it did, if the facts, circumstances, and conditions affecting the child's interest and welfare warranted the court's conclusions. Therefore the first proposition is not well taken.

As to the second proposition, *viz.* that the court received hearsay testimony tending to show the father's willingness for the child's maternal grandparents to have its custody, we are unable to see where such testimony had any bearing on the court in reaching its conclusions. The only testimony in this regard complained of in plaintiff in error's brief is the testimony of the child's mother, which is as follows:

"Q. Mrs. Morris, did you receive any information that Mr. Morris would be willing for the Bohanans to have this child? A. Yes, sir.

"Q. From whom did you receive the information? A. Mrs. Smith.

"Q. Where does Mrs. Smith live? A. Fitzhugh."

It does not appear from the record nor from the decree that this testimony had the slightest influence upon the court's decision. It may have been introduced, as plaintiff in error contends, for the purpose of showing his willingness for the child's grandparents to have its custody, but this suit was prompted by the plaintiff's desire to have the custody of the child. The whole suit revolved around his desire for the child's custody and his unwillingness for its grandparents to have its custody. Under the entire record there could not have been the slightest doubt of the plaintiff's desire for the custody of the child. The issue before the court was not whether he wanted the custody of the child, but whether he was a fit person to have its custody; hence the above contention is without merit.

As to the third proposition, "that the court erred in not making findings of fact and conclusions of law," the record discloses the following:

"By Mr. Wimblish: If the court is going to decide against us, we want findings of fact and conclusions of law.

"By the Court: The court would have been glad to make his findings of fact and conclusions of law had there been a request as by law required, but no request was made of the court to find the facts and conclusions of law until the court indicated he intended to give the child to Mr. Bohanan and his wife. * * *

The above statement is a part of the judgment and decree of the court. The reasons above given by the court are sufficient in themselves to answer the contentions which plaintiff in error makes as to his rights under section 5017, R. L. 1910, especially when said section is construed in connection with sections 4791 and 6005, R. L. 1910. But as a matter of fact the court did make specific findings of fact as to wherein the welfare of the little girl lay and as to the fitness of Mr. and Mrs. Bohanan to protect and promote her welfare, and as to the unfitness of either parent to have her care and custody, and upon such findings decided as a matter of law that the custody should be awarded to Mr. and Mrs. Bohanan, and so ordered.

From a review of the entire record, we do not feel justified in saying that the trial court erred in its judgment. The court heard all the testimony, saw all the witnesses, and was better acquainted with the circumstances than we, and was better able to properly adjudge the facts than we are upon the bare record. Hence we are unable to say as a positive matter of right that the decree should be reversed.

Reference is made in plaintiff's brief to the question whether financial abilities should control a court in decisions of this character, and in allowing the decree to stand for the present we are not to be understood as inclining toward the idea that wealth alone should control a court in determining the care and custody of a child, nor do we believe the trial court was influenced in any degree by such idea.

We are fully aware that often a child may be far happier, its life brighter and purer, and its general well-being far better subserved amid humbler surroundings than amid luxury and wealth. Often the brightest minds, the loftiest ideals, the noblest characters, and purest lives are developed amid the humblest of surroundings, while the same attributes are as often dwarfed and blighted by the morbid influence of luxury and wealth. Happy lives and good men and women are not made by sordid wealth alone, nor should money alone be put in the scale against a parent's love for its child in weighing a question of this kind. Parental affection is a child's richest heritage, it is nature's shield against harm to the child, and should be strongly weighed against before its happiness and the molding of its life and character be consigned to others.

These influences should receive careful consideration in deciding what is best for the child; its happiness, its actual weal, mentally, morally, and spiritually, being the thought which should guide a court in selecting its keeper.

[2] For these reasons, decrees of this character are rarely made final, but may be modified from time to time to fit the requirements of the child's welfare.

[3] The decree in this case was rendered some four years ago. The child is now about eight years of age. Conditions may have so materially changed since the decree was rendered that a modification thereof may now be proper, possibly necessary, for the child's good. If such be the case and application should be made, a court of justice would not fail to make proper modifications of the order. But, upon the record before us, not knowing what the present conditions may be, not knowing whether the parties are now living nor what changes may have taken place, we do not feel justified in reversing the decree, but will permit it to stand subject to such changes as the child's best interest may demand should further application be made.

Decree affirmed.

KANE, J., dissents.

All the other Judges concur.

(81 Okl. 286)

ST. LOUIS-SAN FRANCISCO RY. CO. v.
STATE et al. (No. 11922.)

(Supreme Court of Oklahoma. April 19, 1921.
Rehearing Denied May 17, 1921.)

(Syllabus by the Court.)

1. Carriers \S 189—Hauling cement material held switching service, and not road haul for determination of rate.

When a cement company having its plant located five or six miles from its quarry, where it obtains its rock and shale used in the manufacture of cement, contracts with a railroad company to transport its rock and shale from the quarry to the plant, the rock and shale being loaded into the cars by the cement company's employees, the railroad company by its employees attaches its engine to said cars, connects them up, hauls the loaded cars to the cement plant, and returns the empty cars to the quarry, this constitutes a switching service, and not a road haul, notwithstanding the railroad company may use approximately five miles of its main line of road in transporting such cars from the quarry to the plant and returning the empties to the quarry.

2. Carriers \S 189—Switching service not changed to road haul by acts of carrier.

Where a railroad company has transported crushed rock and shale from the quarry belonging to a cement company to its cement plant

for a period of approximately ten years and handled it as a switching service, the fact that the railroad company attaches a caboose to the string of cars or puts a road engine on to perform this service or puts on a full train crew such as would be used in the regular road service and issues regular bills of lading for each car of rock or shale so transported does not change the service from a switching service to a road haul.

3. Carriers \S 12(7)—Evidence held to show that service was a switching service and excessive rates charged therefor.

A careful examination of the evidence establishes that the service rendered in this case was a switching service; that the rate heretofore charged by the railroad company was exorbitant and excessive.

4. Public service commissions \S 6—Powers and duties defined.

The State Corporation Commission is established and its powers are defined by the Constitution of the state. Among its duties, it exercises the authority of the state to supervise, regulate, and control public service corporations, and to that end it has been clothed with legislative, judicial, and executive powers.

5. Public service commissions \S 27, 32—Appeal may be taken to Supreme Court from rulings of State Corporation Commission; Supreme Court must consider reasonableness of action appealed from; order of State Corporation Commission prima facie correct, and, if not, Supreme Court must fix a correct rate.

An appeal may be taken by the corporation whose rates are affected or by any person or corporation deeming themselves aggrieved by such action and such appeal shall be of right and shall be taken to and reviewed by the Supreme Court only. The jurisdiction of the Supreme Court on such appeal is to consider and determine the reasonableness and justness of the action of the Commission appealed from or any other matter arising under such appeal. The order of the Commission or rate fixed by it shall be regarded as prima facie just, reasonable, and correct; if in the opinion of the court the evidence taken before the Corporation Commission and certified to the court overcomes this prima facie presumption, it is then the duty of this court to make such order or fix such rate as it deems just, reasonable, and correct.

6. Carriers \S 18(2)—Procedure and duties of Supreme Court on appeal from State Corporation Commission stated.

When an appeal is taken from an order of the Corporation Commission fixing a rate to be charged by a public service transportation or transmission company to this court, it is tried by this court de novo upon the record and evidence introduced before the Corporation Commission and certified to this court. Upon a full consideration of the record, the order made by the Commission, and the evidence introduced, it is the duty of this court to judicially determine and fix such rate as it considers just, reasonable, and correct, irrespective

of who appeals. In such case it is not necessary to take a cross-appeal.

7. Carriers ⇐18(2)—Evidence held to require finding that rate fixed by Corporation Commission for switching service was too high.

On an examination of the record, the order of the Commission, and the evidence, we think the evidence overcomes the prima facie presumption in favor of the order of the Commission; the rate fixed by the Corporation Commission is too high; that 16.875 cents per ton, when loaded in cars furnished by the railroad company, is a fair and reasonable rate and charge for the transportation of the crushed rock and shale from the quarries of the Oklahoma Portland Cement Company at Lawrence to its mill at Ada, minimum carload to be marked capacity of car.

8. Carriers ⇐12(1)—Corporate Commission has right to fix charges for switching services.

The record examined, and held that the Corporation Commission had jurisdiction and authority to hear and determine this proceeding and decide what was a reasonable rate to be charged for the service rendered.

Appeal from Corporation Commission.

Action by the Oklahoma Portland Cement Company against the St. Louis-San Francisco Railway Company before the Corporation Commission to determine rates, wherein the State was made a party. From a ruling as to rates, the Railroad Company appeals. Affirmed in part, and reversed in part.

W. F. Evans, of St. Louis, Mo., and Kleinschmidt & Grant, of Oklahoma City, for appellant.

S. P. Freeling and R. E. Wood, both of Oklahoma City, for the State.

Henshaw & Hough, of Oklahoma City, and J. F. McKeel, of Ada, for Oklahoma Portland Cement Co.

MILLER, J. A complaint was filed by the Oklahoma Portland Cement Company, a corporation, against the St. Louis & San Francisco Railway Company, before the Corporation Commission, asking that the Corporation Commission adjust and fix a rate to be charged by the defendant railroad company for transporting crushed stone and shale from its quarries to its mill at Ada, the distance being approximately 5.5 miles. A hearing was had before the Corporation Commission. It adjusted and fixed the rate at 20 cents per ton on a basis of 50 tons to the car, minimum car rate of \$10 per car. The railroad company appealed from the ruling of the Corporation Commission.

The railroad company make seven assignments of error. The assignments from 1 to 5, inclusive, are discussed by the railroad company under three separate subdivisions, but in substance are: The order is unreasonable, unjust, discriminatory, is not supported by the evidence, and the Corporation Com-

mission erred in finding that the service rendered was a switching service instead of a road haul. All of these questions go to the sufficiency and weight of the evidence. We will therefore consider all of the questions together in determining the sufficiency of the evidence.

The undisputed evidence is that the Oklahoma Portland Cement Company made a contract with the railroad company on October 5, 1906, whereby the railroad company was to handle the cars of crushed stone and shale, transporting them from its quarries at Lawrence, Okl., to its mill at Ada, Okl., at the price of 8 cents per ton of 2,000 pounds of limestone or shale when loaded in cars furnished by the cement company, and at 10 cents per ton of 2,000 pounds of limestone or shale when loaded in cars furnished by the railroad company, minimum weight in either case to be marked capacity of car. This contract was to continue in force for a period of 20 years. The capacity of the cars in use is 50 tons, and this would make a minimum price of \$4 per car if the cars were furnished by the cement company, and \$5 per car if furnished by the railroad company.

It is conceded by the cement company that this contract cannot now be enforced for the reason that the Corporation Commission has a right to fix the rate. The contract was introduced in evidence, and was admissible for the purpose of showing what the railroad company at the time of making the contract considered a fair and reasonable rate. It was upon the strength of this contract that the cement company erected its plant at Ada, a distance of approximately 5.5 miles from its quarries.

[1] The undisputed evidence further shows that the railroad company handled these cars as a switching service, and not as a road haul; that it was so handled as a switching service for many years thereafter and until a federal order known as General Order No. 25 was issued in June, 1918, which provided for a minimum charge of \$15 per car on line hauls. After this federal order was issued, the railroad company put on this service a road engine, caboose, and a full crew of men. Then it issued waybills for each car of crushed rock or shale and called it a line haul or road haul and charged the \$15 per car instead of \$5 per car. Prior to that time waybills had not been issued, but simply a ticket referred to as a conductor's switching ticket.

The evidence further discloses that this engine handled some other switching, although the railroad company studiously tried to make it appear that it did not.

Evidence was introduced to show what rates were charged other plants where stone, crushed stone, rock, cement, gypsum rock, and other like materials were hauled by the

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railroad companies rendering a similar service, which rates are as follows:

Independence, Kan., 10 cents per ton; minimum \$5 per car; distance not given.

Kansas City to Sugar Creek, 11 miles; to Cement City, 13 miles; 20 cents per ton.

Chanute, Kan., 10 cents per ton; minimum \$5 per car; distance not given.

Earlham, Iowa, to Des Moines, Iowa, 20 cents per ton; new rate since August, 1918, 25 cents; distance 24.8 miles.

Ft. Bellefontaine to Prospect Hill, Mo., \$4 per car furnished by shipper; 25 cents per ton in carrier's equipment; distance 8 miles, congested St. Louis district.

Prospect Hill to St. Louis, \$5 per car; distance 7.8 miles.

From pit 6 miles East of Watonga to Okeene, Okl., 2 cents per 100 pounds; distance not given.

Clencoe lime and cement quarries to kilns on Missouri Pacific Railroad, 60,000 capacity, \$8 per car; 80,000 capacity, \$10 per car; distance not given.

Mankato, Minn., \$6.50 per car; distance 3½ miles.

Mincke, Mo., to Valley Park, 50 cents per ton; distance not given.

Ft. Smith, Ark., to Whitteville, Okl., 3½ cents per 100 pounds; two-line haul; 32½ miles.

Muskogee to Spaulding Spur, \$5 per car; distance not given.

This evidence was admissible for the purpose of showing what would be a just and reasonable charge for such service. The evidence further discloses that most of this rock and shale was used in the plant of the Oklahoma Portland Cement Company at Ada in the manufacture of cement; that the cement as a finished product was thereafter shipped out to various points in Oklahoma and elsewhere.

[2] Under the evidence introduced it is clear that the service rendered by the railroad company was a switching service, that it was not in any sense a line haul or road haul. The act of the railroad company in 1918 of putting on a caboose and a train crew did not convert it from a switching service to a road haul. This act on the part of the railroad company to make it appear to be a road haul in order that the railroad company, under the federal order above referred to, could charge the cement company \$15 per car for the service it had been rendering at \$5 per car and in disregard of the contract it had made in 1906, was, to say the least, not commendable.

[3-6] The cement company practically admitted that the railroad company would be entitled to a rate of 16.875 cents (sixteen cents and 8¾ mills) per ton, and ask that the rate be fixed at this amount. In view of all the evidence introduced in this case, we think the contentions of the cement company are well founded; that 16 cents and

8¾ mills per ton would be a reasonable rate for the service rendered by the railroad company. Other railroads are rendering a similar service for less compensation. It is the duty of this court, upon appeal, to fix a reasonable rate. Sections 20, 22, and 23 of article 9 of the Constitution of Oklahoma provide in part as follows:

"Sec. 20. From any action of the Commission prescribing rates, charges, or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as hereinafter provided for, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to cost, as may be prescribed by law) may be taken by the corporation whose rates, charges, or classifications of traffic, schedule, facilities, conveniences, or service, are affected, or by any person deeming himself aggrieved by such action or (if allowed by law) by the state. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court from the district courts, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the manner of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges, or classifications of traffic, schedules, facilities, conveniences, or service are affected, the state shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The Legislature may also, by general laws, provide for appeals from any other action of the Commission, by the state, or by any person interested, irrespective of the amount involved. All appeals from the Commission shall be to the Supreme Court only, and in all appeals to which the state is a party, it shall be represented by the Attorney General or his legally appointed representative. * * *

"Sec. 22. In no case of appeal from the Commission, shall any new or additional evidence be introduced in the Supreme Court; but the chairman of the Commission, under the seal of the Commission, shall certify to the Supreme Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered as the Commission may deem proper to certify. The Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the Supreme Court, upon disposing of the appeal. The Supreme Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission ap-

pealed from, as well as any other matter arising under such appeal: Provided, however, that the action of the Commission appealed from shall be regarded as prima facie, just, reasonable, and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided.

"Sec. 23. Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges, or the classifications of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the Commission at the time the original order appealed from was entered. * * *

Oklahoma adopted that part of its Constitution pertaining to the Corporation Commission from the Constitution of Virginia. Construing the Virginia Constitution, in the case of *Prentis v. Atlantic Coast Line Co. et al.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, Holmes, J., said:

"The State Corporation Commission is established and its powers are defined at length by the Constitution of the state. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that, for some purposes, it is a 'court' within the meaning of Rev. Stats. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the state to supervise, regulate, and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial, and executive powers. *Norfolk & Portsmouth Belt Line R. R. Co. v. Com.*, 103 Va. 289, 294," 49 S. E. 39.

See the following cases: *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 23 Sup. Ct. 28, 47 L. Ed. 79, 85; *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 268, 55 S. E. 692; *Com. v. Atlantic Coast Line R. Co.*, 106 Va. 61, 64, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124; *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 281, 55 S. E. 692; *Interstate Commerce Commission v. Cincinnati, N. O. & T. R. R. Co.*, 167 U. S. 479, 499, 500, 505, 17 Sup. Ct. 896, 42 L. Ed. 243, 253, 255; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 440, 23 Sup. Ct. 571, 47 L. Ed. 892, 893; *Southern R. Co. v. Greensboro Ice & Coal Co. (C. C.)* 134 Fed. 82, 94, affirmed in 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; *Ex parte Virginia*, 100 U. S. 339, 348, 25 L. Ed. 676, 680; *Upshur County v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L.

Ed. 196; *Wallace v. Adams*, 204 U. S. 415, 423, 27 Sup. Ct. 363, 51 L. Ed. 547, 551; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, 4 Interst. Com. Com'n R. 560; *Atlantic Coast Line R. Co. v. Com.*, 102 Va. 599, 621, 46 S. E. 911; *Southern R. Co. v. Com.*, 107 Va. 771, 772, 60 S. E. 70, 17 L. R. A. (N. S.) 364.

Under the above-quoted provisions of the Constitution, it becomes the duty of this court to determine the reasonableness and justness of the action of the Commission appealed from and fix such rate as this court deems reasonable and just. The action of the Commission appealed from shall be regarded as prima facie, just, reasonable, and correct. If the evidence when examined overcomes this prima facie presumption, the court should reverse or set aside such part of the order of the Commission as it deems not correct under the evidence. It then becomes the duty of this court to substitute such order as in its opinion the Commission should have made at the time of entering the order appealed from.

"Where the order is separable, and a part is without error, the other part being erroneous, the former part will be affirmed and the latter reversed." *St. Louis & San Francisco Ry. Co. v. Williams et al.*, 25 Okl. 662, 107 Pac. 428.

It may be said that the Oklahoma Portland Cement Company did not file a cross-appeal in this proceeding; therefore this court can only make such change in the order appealed from as asked for by the appellant. In other words, the appellant, has everything to gain and nothing to lose by the appeal. This view is not supported by the Constitution. The Constitution requires that this court determine the reasonableness and justness of the order made or rate fixed by the Commission. If it is not just and reasonable as viewed by this court, then this court shall substitute the order or rate it considers just and reasonable. When an appeal is taken from an act of the Corporation Commission, it is not necessary to file a motion for a new trial; neither is it necessary to file a petition in error in this court.

Section 22 of the Constitution, supra, provides that the chairman of the Commission shall certify to the Supreme Court all facts on which the action appealed from was based, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence so introduced or considered as the Commission may deem proper to certify. If it is unnecessary for the appellant to file a motion for a new trial or petition in error in order to appeal from an order made or rate fixed by the Corporation Commission, why should a greater burden be imposed upon the appellee and he be required to file a cross-appeal or cross-petition in er-

ror. He has the same right or authority to have any part of the record or evidence certified up that the appellant has. When the case comes before this court, it is a trial by this court de novo upon the record and evidence introduced before the Corporation Commission. It can only perform its duty under the Constitution by considering it de novo without any limitations on its power to fix the rate regardless of whether it be a higher or lower rate than that fixed by the Commission.

"It was the undoubted intention of the Constitution framers of Virginia, as well as those of Oklahoma, to doubly safeguard, not only the property rights of transportation and transmission companies, but also the rights of the public and the state. Section 20, art. 9 (Bunn's Ed. § 231) Const., provides that not only may an appeal be taken from an order of the Commission by the corporation whose rates, charges, classifications of traffic, schedule, facilities, conveniences, or service are affected, but also by any person deeming himself aggrieved by such action, or, if allowed by act of the Legislature, by the state; it being clearly contemplated that, if it did not prove adequate in permitting any aggrieved party to appeal therefrom, the Legislature should extend the right to the state to intervene and appeal from such order. In reviewing the order appealed from on the record upon which it was considered, it is contemplated that in its legislative capacity this court would consider the matter de novo, except that the findings of the Commission from which the appeal was taken should be regarded as prima facie correct, and that the order or legislative act made by the Commission on such finding should also be presumed to be just and reasonable. It presupposes that the Commission will have a hearing, that it will hear and weigh carefully the testimony introduced on the part of the citizen petitioning for relief, and at the same time will carefully hear and consider the testimony presented on the part of the transportation or transmission company against whom the complaint is made. It is further presumed that the Commissioners shall be specially skilled in their line of work, and that they shall carefully and specially study the relation of transportation and transmission companies to the public, and the regulation, operation, maintenance, and control of the same, with a view, not only of reasonably protecting them in their investments in the state, but that they may also be required to give reasonable service, conveniences, facilities, and accommodations to the public without discrimination for a reasonable and just compensation. This is the presumption unquestionably that

moved the Constitution makers to declare the rule that the order appealed from should be regarded as prima facie just, reasonable, and correct." Atchison, T. & S. F. Ry. Co. v. State, 23 Okl. 510, 101 Pac. 262.

See Atchison, T. & S. F. Ry. Co. v. Love, 23 Okl. 192, 99 Pac. 1081; St. Louis & San Francisco Ry. Co. v. Newell, 25 Okl. 502, 106 Pac. 818.

[7] We think the prima facie correctness of the order appealed from is overcome by the evidence, and it is hereby reversed in part. The last two paragraphs of the order made by the Commission are set aside, and the substituted order shall read as follows:

"The Commission further finds that the rate of 16.875 cents per ton for the transportation of the crushed stone and shale from the quarry to the mill of complainant is reasonable, and that said rate will earn a fair and just return upon the amount of the investment in the equipment and road bed used in rendering said service. It finds that the present rate is excessive, unreasonable, and earns for said railway line, an amount upon the investment which is excessive and out of proportion to the service rendered.

"It is therefore by the Corporation Commission considered and ordered that the defendant, St. Louis & San Francisco Railroad Company, a corporation, make and charge for the service rendered the Oklahoma Portland Cement Company in the transportation of crushed stone and shale from its quarry at Lawrence to said company's mill at Ada, when loaded in cars furnished by the railroad company, the sum of 16.875 cents per ton and no more, minimum carload to be marked capacity of car."

The sixth assignment of error is that the Corporation Commission is without jurisdiction or authority to render and promulgate the order. We have examined the record and it falls to show a lack of jurisdiction.

In view of the decision of this court, it is not necessary to consider the last assignment of error.

[8] That part of the order of the Corporation Commission which holds that the service heretofore and now being rendered by the defendant railroad company is in the nature of a switching service, and that the railroad company is not entitled to a rate as applied to a road haul rate applicable throughout the state, is affirmed.

All the Justices concur, except KANE, J., not sitting.

(82 Okl. 31)

ST. LOUIS-SAN FRANCISCO RY. CO. v. TEEL. (No. 10024.)(Supreme Court of Oklahoma, April 12, 1921.
Rehearing Denied May 17, 1921.)*(Syllabus by the Court.)***1. Negligence ⇨136(9)—Question for jury.**

Where, from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence, such question is properly for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the courts.

2. Appeal and error ⇨1002—Finding as to whether person injured was trespasser or licensee will not be disturbed on conflicting evidence.

Where, as in the case at bar, the question whether the injured person was a trespasser or a licensee was properly submitted to the jury on conflicting evidence under instructions which correctly stated the law, the verdict of the jury and the judgment rendered thereon will not be disturbed on appeal.

3. Appeal and error ⇨1067—Railroads ⇨398(1)—Finding of negligence of engineer supported; not error to fail to instruct as to abandoned defenses.

Record examined and *held*: (1) That the evidence reasonably tends to support the verdict of the jury and the judgment rendered thereon; (2) that the instructions to the jury given by the court fairly cover the issues of law joined by the pleadings and the evidence and were substantially correct; (3) that the remaining errors complained of are either without merit or are harmless under section 6005, Rev. Laws 1910.

Appeal from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by Irene Teel, a minor, by her stepfather and next friend, H. W. Spraker, against the St. Louis-San Francisco Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, and J. H. Grant, both of Oklahoma City, for plaintiff in error.

C. Caldwell, of Vinita, for defendant in error.

KANE, J. This was an action for damages for personal injuries, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Hereafter, for convenience, the parties will be called "plaintiff" and "defendant" respectively, as they appeared in the trial court.

The record discloses that on the date of the injury Irene Teel, the injured person, and her mother, were proceeding by foot

from one point to another of the city of Vinita, and had reached the intersection of the Katy and Frisco Railways, where they were standing in a traveled way, waiting for a Katy freight train to clear the crossing, which would enable them to continue their journey to their home in the northeast part of the city, which was their objective, when the injury occurred. At this point the Katy tracks run almost due north and south and the Frisco tracks run almost due east and west. The injured person and her mother were standing immediately south of the Frisco tracks and a few feet west of the Katy tracks. While thus standing a Frisco passenger train, moving west, ran into the Katy freight train, which was moving north over the crossing, turning over a box car loaded with lumber upon the plaintiff and her mother, killing the latter and very seriously injuring the former. The specific act of negligence charged against the defendant is stated in plaintiff's petition as follows:

"That the agents, officers, servants, and employes of the said defendant, and who were in charge of said passenger train, could see, did see, and by use of ordinary care should have seen and could have seen, the said freight train on said crossing at least one-half mile east of said crossing, and could have stopped, and should have stopped, said passenger train before reaching said crossing, and before it struck said freight train, but they wantonly, carelessly, negligently, and with gross negligence failed, refused, and neglected to stop said passenger train until after it struck the said freight train and caused said injury to the said Irene Teel in the manner aforesaid."

The answer of the defendant set up: (1) A general denial; (2) contributory negligence; and (3) that the plaintiff was a trespasser on the premises of the defendant, and therefore the only duty which the defendant owed her was to refrain from wantonly and willfully injuring her while upon its premises. The reply was a general denial.

Upon the issues thus joined there was trial to a jury, which returned a verdict in favor of the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Counsel for defendant summarize their grounds for reversal in their brief as follows:

(1) The verdict of the jury is not sustained by sufficient evidence.

(2) Error of the court in overruling said plaintiff in error's demurrer to the evidence of defendant in error.

(3) Error of the court in refusing to direct a verdict in favor of the defendant at the close of all the evidence.

(4) Error of the court in refusing certain instructions requested by defendant, and in refusing to give each of said instructions.

(5) Error of the court in giving to the jury

certain instructions and in giving each of said instructions which were duly excepted to by plaintiff in error.

(6) Error of the court in refusing to submit to the jury defendant's defense of contributory negligence, and in refusing to instruct the jury on the question of contributory negligence as raised by the defendant's answer.

As the first, second, and third assignments of error question the sufficiency of the evidence to support the verdict of the jury and the judgment rendered thereon, they may be considered together. As we view the record, there is no substantial conflict in the evidence of the respective parties on the merits on any material point. Both parties concede that the injury occurred substantially as hereinbefore set out, and it is not seriously questioned that these facts, standing alone, make a case which entitles the plaintiff to recover. Without contradicting the evidence adduced by the plaintiff, the defendant relies for a defense upon certain evidence introduced on its behalf, which it says conclusively shows that the injury was the result of an unavoidable accident. This defensive evidence, which for the purpose of the question now under consideration we will assume was uncontradicted, is summarized from the testimony of the engineer in charge of the passenger train, and shows substantially the following state of facts:

The engineer testified that when his train was within about a half mile of the Katy crossing he heard an unusual noise somewhere about his engine, and immediately shut off the steam; that almost immediately thereafter he heard a loud report, which proved to be caused by the bursting of the steam pipe which runs from the valve to the lubricator; that when this pipe broke the steam was thrown against the window of the cab a foot or a foot and a half from his face, and it struck with such force that it glanced from the window, slightly scalding his face, whereupon he jumped from his seat and ran to the gangway to get some air; that upon reaching the gangway he looked ahead and saw the Katy freight train on the crossing, and immediately ran back to the cab to turn the air brake valve, which would stop the train, but found it was so hot he could not do this; that during his effort to find the air brake he saw the lever, which he pulled into reverse, thus tending to slow the train a little, not a great deal. In answer to the question, "Could you have done anything else to have brought this train to a stop than what you did?" he answered, "Not a thing; nothing I could do to stop it." After throwing the lever into reverse, the engineer jumped from his engine and escaped unhurt.

The testimony of this and other witnesses described the gangway, the engine and cab, location of the whistle and automatic bell, and how the train was equipped with

air brake, location of lubricator and brake valve and their functions. This evidence discloses that the air brake valve was right in front of where the engineer was sitting when the explosion occurred; that his knee was right against the brake valve on this engine, and a little higher than his knee; that the brake valve has a little handle, and to put on air you just move it around; that it is easy to turn; that the engineer had been running the same train for 16 years, and had turned the air brake valve so often that it had become second nature to him.

The following questions and answers form part of the cross-examination of the engineer and give his explanation why he did not turn the air brake valve before leaving the cab immediately upon hearing the explosion:

"Q. Oh, after the pipe bursted, you reached up and shut off the throttle? A. I just shut the throttle and jumped off the seat box.

"Q. Why didn't you scoot your hand out there and shut off the air? A. I don't know why I didn't do that, I thought of getting out of there like any other man would do if hot steam would strike you in the face.

"Q. You did think of the throttle, you say? A. Well, that is natural for a man to shut the throttle off; a man would shut the throttle off if he got a bullet in his head.

"Q. He would also shut off the air too? A. Maybe he would, and maybe he wouldn't; I didn't at this time."

The engineer also testified as follows:

"Q. Where did you expect that train to stop? A. Where?

"Q. Where did you expect it to stop? A. Where did I expect it to stop?

"Q. Where did you expect that train to stop when you turned it loose full of passengers? A. I didn't have any expectancy about it.

"Q. And you just turned that train loose in the city of Vinita, loaded with passengers? Just let it go through town wild, did you? A. That is what I done; I couldn't do anything else."

Clearly this defensive evidence, conceding that it was undisputed, did nothing more than join an issue of fact for the jury on the question of negligence. The act of negligence complained of as we have seen was the failure of the engineer to stop his train in time to avoid the injury. It is conceded that the engineer did not stop his train, as ordinarily it would have been his duty to do, before reaching the crossing. But counsel say the uncontradicted testimony of the engineer conclusively shows that he did everything to avert the collision that could be expected of a reasonably prudent man placed in his circumstances. The engineer, very likely, thought he did everything he could to stop his train, as he testified in several instances that "I couldn't do anything else," but this was merely a conclusion of fact, and the jury, after hearing all the evidence, drew a different conclusion of fact. In our

Judgment the conclusion reached by the jury is amply supported by the evidence. While we do not feel disposed unduly to criticize the action of the engineer in the difficult situation that confronted him, we cannot help feeling that he did not sustain the best traditions of his trade or craft. We cannot conceive of a situation more fraught with serious consequences to life and limb than turning a heavily laden passenger train loose to run wild through a populous city in close proximity to another railroad crossing, which the engineer knew he was approaching. While we are not called upon to say whether or not the engineer acted as an ordinarily prudent man would act in the same situation, that being a question of fact for the jury, we have no hesitation in saying that we cannot suppress a feeling of disappointment. After hearing the engineer's testimony, the jury, correctly we think, reached the conclusion that an ordinarily prudent engineer would have turned the brake valve before leaving the cab, which it was shown would have stopped the train and entailed no additional risk to the engineer. We are unable to understand why the engineer did not do this, unless he unconsciously furnishes an explanation in his answer to the foregoing questions. When asked, "Why didn't you scoot your hand out there and shut off the air?" he answered, "I don't know why I didn't do that; I thought of getting out of there like any other man would have if hot steam would strike you in the face." This is the point, no doubt, where the jury and the witness draw different conclusions of fact from practically the same testimony. It probably appeared to the jury that the engineer was thinking too much of his own safety and not enough of the safety of others intrusted to his care, or who were likely to be killed or injured by his conduct. The engineer said, "I thought of getting out of there," and concludes that this was "like any other man would do if hot steam would strike you in the face." The jury probably concluded that an ordinarily prudent engineer would have thought of the terrible consequences to others, and turned on the air, which was right at hand. This would have taken but the fraction of a second, and it seems to us that it would have been the natural and ordinary thing to do. The engineer testified that it was natural for an engineer to shut off the steam, as he did, but when confronted with the question, "He would also shut off the air," he answered, "Maybe he would, and maybe he wouldn't; I didn't this time." The jury definitely answered the question in the affirmative. In this state of the record we are convinced that the assignments of error now under consideration are without merit.

[1] It is well settled in this jurisdiction that—

"Where, from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence, such question is properly for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the courts." *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153.

In the assignments of error questioning the action of the court in giving and refusing to give certain instructions, it is sufficient to say that we have examined the record carefully, and are of the opinion that the instructions given by the court fairly cover the issues of law joined by the pleadings and the evidence, and were substantially correct.

This record, stripped of its impedimenta, presents a case of no great difficulty. The defendant does not seriously question the material evidence of the plaintiff tending to show how the injury occurred; and, while the plaintiff does seriously question the defensive evidence of the engineer, we may assume that it was uncontradicted for the purpose of this discussion. This evidence presents this issue of fact: Did the engineer exercise such care in the circumstances as an ordinarily prudent engineer would exercise to avoid the injury? This, as we have seen, was a question of fact for the jury, which they answered in favor of the plaintiff. There being evidence reasonably tending to support the conclusion of fact reached by the jury, we are not at liberty to disturb it on appeal.

[2] It is also well settled that where, as in the case at bar, the question whether the injured person was a trespasser or a licensee was properly submitted to the jury on conflicting evidence under instructions which correctly stated the law, the verdict of the jury and the judgment rendered thereon will not be disturbed on appeal. *Littlejohn v. Midland Valley Ry. Co.*, 47 Okl. 204, 148 Pac. 120; *New York Plate Glass Co. v. Katz*, 51 Okl. 713, 152 Pac. 353; *C. & R. I. & P. Ry. Co. v. Felder*, 58 Okl. 220, 155 Pac. 529; *M. & T. Ry. Co. v. Wolf*, 78 Okl. 195, 184 Pac. 765; *C. & R. I. & P. Ry. Co. v. Schands*, 57 Okl. 688, 157 Pac. 349.

[3] On the last assignments of error it appears that, while it is quite true that the defendant set up the defense of contributory negligence in its answer, this defense seems to have been abandoned on the trial of the cause, as there was no evidence offered tending to establish it. In these circumstances the failure to instruct the jury on the question of contributory negligence was not reversible error. In this jurisdiction it is not every error of this class that will justify a reversal of the judgment of the trial court. Section 6005, R. L. 1910, provides as follows:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

After a careful examination of the entire record we are convinced that on the merits the evidence reasonably tends to support the judgment, and that none of the errors complained of belonging to the class mentioned in section 6005 have resulted in a miscarriage of justice or constitute a substantial violation of any constitutional or statutory right.

For the reasons stated, the judgment of the trial court is affirmed.

HARRISON, C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

(32 Okl. 44)

ST. LOUIS-SAN FRANCISCO RY. CO. v. DONAHOO et al. (No. 11058.)

(Supreme Court of Oklahoma. April 19, 1921.
Rehearing Denied May 17, 1921.)

(Syllabus by the Court.)

1. Railroads \Leftrightarrow 400(2)—Negligence as to persons using yards as pathway question for jury.

Where a railway company has permitted or acquiesced in allowing the public to use its right of way and yards as a footpath or passageway at all times of the day and night, and its agents, servants, and employees knowing of such use, said railway company is bound to exercise such degree of care in switching its cars in said yards that would be commensurate with the danger to which persons would be exposed who might be using its yards as a pathway, and whose presence might reasonably be anticipated, considering the number of persons traveling through the yards. Whether or not that has been done is a question to be submitted to the jury under proper instructions.

2. Railroads \Leftrightarrow 358(1)—Reasonable care required as to persons using yards under license.

It requires a more determined effort on the part of a railway company to stop the public from using its right of way and yards as a footpath or passageway, where such use has been continued for a long period of time and by a large number of people, than it requires to prevent its use in the first instance. Where there has existed a license, either express or implied, to use the right of way and yards of the railway company by the public as a footpath, and this has continued for a long period

of time, and is known to the agents, servants and employees of such railway company, the company is bound to use reasonable care to avoid injury to those persons whose presence there it may reasonably anticipate.

3. Death \Leftrightarrow 95(1)—Children's measure of damages same as wife.

Under sections 5281 and 5282 of the Revised Laws of 1910, the children of the deceased, where the wife of the deceased was dead at the time of bringing the action, may maintain an action in their own name, or by their guardian or next friend, for the wrongful death of their father, and the measure of damages would be the same as though the action was brought by the administrator of the estate or the widow of the deceased.

4. Appeal and error \Leftrightarrow 1002—Verdict for wrongful death final.

Where there are no eyewitnesses to the accident, but the undisputed evidence shows that freight cars being operated and moved by the railway company ran over the deceased and caused his death, the railway company may present to the jury its theory of how the accident occurred, but the plaintiff in the action has the same right to present to the jury his theory of the accident. Where each one of the theories so advanced are not so absurd or unreasonable as to make them almost impossible, the jury are at liberty to adopt whichever theory seems to them to be most reasonable under the evidence, and the railway company is not entitled to have this court adopt its theory and exclude the other. The jury, by returning a verdict for the plaintiffs in the court below, evidently adopted their theory. That theory not being unreasonable under the evidence, and the verdict being supported by the evidence, it will not be disturbed on appeal.

5. Rules of court amended.

Section 5254, Revised Laws 1910, as amended by chapter 249, Sess. Laws 1915, provides that when a supersedeas bond has been given to stay execution pending an appeal to this court, and the judgment is affirmed, judgment shall at the same time be entered against the sureties on such undertaking. For the purpose of carrying into effect said statute, this court has amended rule No. 11 to read as follows:

(a) Where the original supersedeas bond or a certified copy thereof is included in the case-made or transcript of the record and that fact is called to the attention of the court in the briefs of counsel for defendants in error, this court will, in all proper cases, where defendant in error is entitled thereto, render judgment thereon at the same time judgment is rendered in the cause.

(b) If the original supersedeas bond or certified copy is not included in the case-made or transcript of the record or if so included and not called to the court's attention in the brief, the defendant in error, or the party entitled thereto, may after the opinion of the court is filed, and prior to the time of issuing the mandate, file with the clerk of the court, a motion for judgment on the supersedeas bond and attach to said motion a certified copy of the supersedeas bond, if a copy has not been included

in the case-made or transcript, and this court will in all proper cases where the party applying is entitled thereto, enter an order rendering judgment on said bond.

(c) No motion will be entertained by this court to enter judgment upon a supersedeas bond unless the same is filed with the clerk of this court prior to the issuing of the mandate.

6. Appeal and error — 1236—Supreme Court may render judgment on supersedeas bond.

In this appeal the case-made contained a copy of the supersedeas bond. The defendants in error called this to the court's attention in their brief and asked that judgment be rendered against the sureties on said bond. The judgment of the trial court having been affirmed, this court will render judgment on the supersedeas bond under rule No. 11.

Appeal from District Court, Hughes County; E. F. Lester, Judge.

Action by Roy Donahoo and others, by their guardian and next friend, M. C. Burrell, against the St. Louis-San Francisco Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, Mo., and Kleinschmidt & Grant and Herman S. Davis, all of Oklahoma City, for plaintiff in error.

W. T. Banks, of Okemah, and J. L. Skinner and W. B. Toney, both of Holdenville, for defendants in error.

MILLER, J. This action was commenced in the district court of Hughes county by Roy Donahoo, Forest Donahoo, Carliss Donahoo, Vera Donahoo, and Albert Donahoo, by their guardian and next friend, M. C. Burrell, defendants in error, against the St. Louis-San Francisco Railway Company, a corporation, to recover damages for the death of J. A. Donahoo, who was killed in the yards of the defendant company at Henryetta on March 25, 1917. The wife of J. A. Donahoo, deceased, died subsequent to the death of her husband, and before this action was commenced, the above-named plaintiffs being the minor children of deceased, J. A. Donahoo, and his only surviving heirs at law. The case was tried before a jury, which resulted in a verdict and judgment in favor of plaintiffs for \$10,000, to reverse which defendant appeals to this court, and appears here as plaintiff in error. The plaintiff in error contends that the negligence of the deceased directly and proximately contributed to his death; that he was trespassing upon the property of said defendant at a place where he had no right to be at the time he met his death. While the plaintiff in error admitted its yards had been used, both day and night for many years, as a passageway or footpath by people going to and from the northeast part of town to the main part of town, yet it claims that it had protested against this use, and therefore is not liable in this action.

The plaintiff in error assigns a large number of errors; then in its brief and argument discusses two propositions:

First. Error of the court in overruling the motion of defendant for a directed verdict.

Second. Error of the court in giving certain instructions to the jury.

In considering the errors discussed, it will be necessary to review the testimony.

J. A. Donahoo was a strong, able-bodied man of approximately 40 years of age at the time of his death. He was a skilled workman, and engaged in operating machinery in a coal mine at Henryetta. His average earning capacity was approximately \$200 per month. On the night of March 25, 1917, between 8 and 9 o'clock, he was crossing the yards of the defendant company in going from the main part of the city of Henryetta to his home in the northeast part of town. While he was crossing these yards a switching crew, in making what is known as a "flying switch," kicked a string of 16 freight cars down the track; there was no light or person on the rear car of this string to give any warning. Some of these cars in the middle of the string ran over deceased, and caused his death. This was revealed by an examination of the car wheels.

Mrs. Jewell testified the yards and the portion of the railway track where deceased was killed were in plain view of her house. She had lived there 5 years, and at least two-thirds of the public traveled through these yards. She always went through there once a day, and sometimes more, in going to town to get her daughter, who worked at the telephone office. Sometimes it was between 9 o'clock and midnight that she would be required to go with her daughter back and forth to her work. She had never been warned by any employees or officers of the railway company to keep off of the tracks or out of the yards. She had not seen any sign posted by the railway company, warning the public that the yards were private property and for people to keep off. The road or path used by the public was made of cinders and chat. This path was also used by the employees of the railway company when doing their switching in the yards.

W. F. Staggs testified he had lived in Henryetta since 1912, and during all of that time the railway right of way and yards of the defendant was being used by the public in going to and coming from their homes. He had so used the right of way and yards where deceased was killed.

Max Kleiser testified he was the freight conductor in charge of the switching at the time deceased was killed, which was between 8:30 and 9 o'clock at night. His crew was engaged in switching cars, and had shoved or kicked a string of 16 cars down the track. They did not have any lookout or brakeman

on the head end, and the only noise the cars would make would be the click of the wheels over the joints of the rails. He further testified about some signs which said, "Private property; keep off." One was at the north end of the yards, and another at the Saddle Rock Restaurant. Then in response to a question as to how far these signs were from where deceased was killed, he answered:

"Well, one at the south end of the yards and one at the Saddle Rock Restaurant, I would say about two blocks south of where I found the body. One hung up north of Harvey street, about four or five blocks, north end of the yards."

M. C. Burrell testified that the right of way and the yards of the railway company in and about where deceased was killed had been used, and was used, by pedestrians in going to and coming from their homes. It was the usual and general route traveled by people living in that part of the city. He further testified as to the ages of the children of deceased at the time of the accident: Roy Donahoo was nineteen years old; Forest Donahoo was 13; Carliss Donahoo was 10; Vera Donahoo was 8; Albert Donahoo was 5 years old.

R. F. Wise testified he had charge of the Henryetta Coal Mining Company, and deceased worked at his mine prior to the time of his death. That deceased worked regularly, and was a skillful workman, running an electric cutting machine. The books showed deceased had drawn as his salary or wages for the month of February, preceding his death, \$192.50 and for March, \$214.15.

S. A. Brooks testified he was station agent of the railway company at Henryetta, and had lived there since December, 1912. He had notified people not to trespass on the yards of the defendant, and had complained to the mayor and police. The city officials of Henryetta had extended the corporate limits of the city so as to include the switching yards of the defendant. A man had been sent from Sapulpa to lecture at the schoolhouse in Henryetta on the danger of going through the yards where the trains are switching, and he distributed a large amount of literature in regard to it at the schoolhouse among the children, and left some at the station. A policeman had been down there a few times, gone through the yards and warned the people out, but the people paid no attention either to the warnings of the policeman or to the warnings of the witness. He testified about some signboards, but made the following admissions on cross-examination:

"Q. Now where are these signboards you talked about? A. One on Henry street, one some further down, and one that did set right where the freighthouse, set there right where you go into the yard, but in moving the freighthouse, moving it in March, that was torn down. That sign had to be taken down.

"Q. Now isn't it a fact that down here Di-

vision street is the one that crosses just north of the depot, isn't it? A. No, sir.

"Q. What street is that? A. Trudgeon.

"Q. Trudgeon? Well, Trudgeon; that crosses just north of the passenger depot? A. Yes, sir.

"Q. And Main street crosses just south of the passenger depot? A. Yes, sir.

"Q. Sign there just south of the passenger depot? A. Yes, sir.

"Q. Railroad crossing? Cross board? A. Yes, sir.

"Q. Railroad board up, 'Safety First,' down there? A. Yes, sir.

"Q. And that is all? A. That is probably all on the new one, but the old signboard stood there before; stood right here where this water tank was.

"Q. How long has this signboard I am speaking of been there, on Main street? A. So far as I know, been there always.

"Q. Since 1912; since you have been there? A. Yes, sir.

"Q. Isn't it a fact that there is another signboard away up here where Henry street crosses the railroad track, and doesn't that signboard—it has an arm this way says 'Railroad Crossing,' and on the cross it says 'Safety First'? A. Yes, sir; one up there, and one there.

"Q. And that is all it says? A. And one on Trudgeon.

"Q. And that all it says? Now, where is that on Trudgeon? A. Right on the track.

"Q. And that has a cross-arm this way, has it? A. Yes, sir.

"Q. And it has a point of the cross says 'Safety First'? A. Yes, sir.

"Q. And that is all? A. Yes, sir.

"Q. Now isn't it a fact that there is not a single, solitary thing on the track anywhere that says, 'Private property; keep off'? A. I am not sure about this one down there, but I am almost positive that the signboard there, like that one set along down there, is not like I told you the one set up there before we moved the freighthouse did set to start with, but when we moved the freighthouse that was taken down, and moved the freighthouse in March.

"Q. This last March? A. No, sir; March, 1917.

"Q. The same month Donahoo was killed? A. Yes, sir. * * * A. And they had an old sign right south of the old water tank there, said 'Private Property'.

"Q. That is not there now? A. No, sir; that is not there now.

"Q. Isn't a fact that that one by the freighthouse was the only one there in 1917, March 25th? A. That one there is only one had south end of the yard at that time.

"Q. And that was sitting west of the freighthouse? A. No, sir; sitting north of the freighthouse, where the freighthouse stands now.

"Q. You haven't succeeded, then, in keeping people from using that as a passway? A. Not all of them.

"Q. Isn't it a fact that the only ones that you have succeeded in keeping from using it as a passway are those that are killed? A. No, sir; some them have moved away from town.

"Q. Moved away from town? A. Yes, sir."

W. R. Grace testified he lived in Henryetta from 1912 to 1918. He was yardmas-

ter of the railway company at the time of the death of J. A. Donahoo. During the time he was yardmaster the people continued to use the yards as a thoroughfare for pedestrians; he spoke to some about their using it, and complained to the chief of police. Some of the pedestrians resented his interference with their passing through the yards, but they did not discontinue the practice.

Tom Tate testified he was a policeman in Henryetta in March, 1917. He assumed his duties as policeman about 10 days before the accident. He had warned people against going through the yards. He saw deceased on the night of March 25, 1917, before he was killed. That deceased was pretty drunk; had been drinking; he could smell it on his breath, and he was staggering around. After relating his story, he was asked these questions by the court:

"Q. What time was it? A. Between 11 and 12, as well as I remember, at night.

"Q. Was that on the same night that you learned later that he had been killed? A. Yes, sir."

The undisputed evidence of the railroad men, who found the body and all others who handled the body that night, was that he was killed between 8:30 and 9 o'clock.

W. W. Melton testified he was chief of police of Henryetta on March 25, 1917. He had had trouble with people trespassing on the right of way, and had removed children from the right of way. He further testified he saw J. A. Donahoo on the night he was killed. That deceased had been drinking and was drunk, he could smell Choctaw beer on him, and he told him to go home. He saw him some time after that when he was dead. On cross-examination witness Melton testified as follows:

"Q. What time on the 25th did you first see this man? A. As well as I remember it was between 9:30 and 10 o'clock.

"Q. And the last time was some half hour after? A. Yes, sir.

"Q. Before you saw him dead, did you see him take any drink of any kind? A. I did not.

"Q. Had that been the first time you were ever close enough to talk with him? A. I had talked to him before, but did not know him. Did not know his name was Donahoo, but knew his face.

"Q. How long have you known that trail up there through the yards? A. Do you mean the tracks?

"Q. Yes. A. About 5½ years.

"Q. Where this man's body was laying—was that on the left side of the main line? A. As well as I remember, it was the main line.

"Q. Now is it a fact that all the people living in the east and north part of town coming down to the foot of Main street if they don't come through that yard? A. Yes; they do.

"Q. How long have the people been using that right of way for a footpath from the northeast part of town? A. Very nearly since I knew anything about the town. When I first

knew anything about the town, there were not many people who came that way."

The plaintiff in error contends that under this evidence the court should have instructed the jury to return a verdict in favor of plaintiff in error, defendant below. We do not agree with this contention. We think the evidence was sufficient to take the case to the jury. Plaintiff in error then cites a number of cases in support of its contentions. We quote from plaintiff's brief as follows:

"The first assignment of error which we desire to discuss is the error of the court in overruling the motion for a directed verdict. The exact question involved in this case, so far as we have been able to find, has not been before this court for determination. There are certain elements involved in this case which distinguish it from all other cases, heretofore decided.

"The case of Wilhelm v. Missouri, Oklahoma & Gulf Railway Co., reported in 52 Okl. 317, 152 Pac. 1088, L. R. A. 1916C, 1029, was the first case decided by this court in which the question of the duty of a railroad to licensees was considered. This opinion was written by Mr. Commissioner Brett, and the facts briefly stated are:

"That one S. T. Wilhelm was run over by cars on the tracks of the defendant railway, and killed, in the town of Kenefick, Okl. The deceased at the time of his death was walking along a side track on defendant's right of way which had been used by the public since the building of the railroad, and the public use had been open and notorious; that a path had been made where the deceased met his death. While the deceased was walking between the rails on this particular track, the defendant kicked seven cars onto the side track, which the deceased was walking on, which cars ran over and killed the deceased. The main point decided in the Wilhelm Case is that when the right of way of a railroad company has been used by the public for a number of years as a pathway without objection upon the part of the railroad company, it then becomes a question of fact as to whether or not the railroad company had acquiesced in such use. Upon this point the court said: 'Besides, it is a general rule of law that, where the facts are such, whether disputed or undisputed, that different minds may honestly draw different conclusions from them, the case is one that should go to a jury. There was undisputed evidence in this case that this track had been used for a number of years by the public as a pathway without objection, and it was a question of fact for the jury to determine under all the evidence whether or not the railroad company had acquiesced in such use.'

"It would seem from the foregoing statement of the court that there was no contention upon the part of the defendant that the officers of the Missouri, Oklahoma & Gulf Railway Company, had ever protested against the use that was being made of its track by the public. This feature of the case clearly distinguishes the Wilhelm Case from the case at bar, and for that reason alone the rule therein announced is not controlling in the instant case. We do not feel that the court will be inclined

to extend the rule announced in the Wilhelm Case further than the facts in that case warrant."

Counsel for plaintiff in error seek to limit the scope of this authority to the question of whether or not the company had acquiesced in the use of its railroad tracks for the public. The second and third paragraph of the syllabus in the case of Wilhelm v. Mo., Okl. & G. Ry. Co., supra, was not quoted by plaintiff in error. It announces this rule:

"The rule as stated in A., T. & S. F. Ry. Co. v. Cogswell, 23 Okl. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837, to the effect that a railroad company is liable only for willful and wanton injuries which may be inflicted upon a licensee, is not followed. But it is held that, regardless of the fact that the person injured was a bare licensee upon the track of the railroad company, the company is bound to exercise that degree of care and watchfulness to protect human life that is commensurate with the probability that persons may be upon its track at any given point. And whether or not that has been done, under proper instructions, is a question for the jury.

"Where a railroad company makes a flying switch, in a vicinity where the employees know or should know there are likely to be human beings upon the track, with no brakeman on the cars to control them or to keep a lookout for pedestrians, *held*, that such conduct is gross negligence."

We again quote from the brief of plaintiff in error.

"The next case in which this question was considered by this court is that of St. Louis & San Francisco Railroad Co. v. Hodge, 53 Okl. 427, 157 Pac. 60. This opinion was written by Judge Sharp, and discloses that careful consideration which characterizes all of his opinions. Edgar E. Hodge was a boy 12 years of age, who resided at Snyder, Okl. Near the town of Snyder, Okl., the defendant maintained and operated a coal chute for a long time prior to the injury sustained by Edgar E. Hodge."

Plaintiff in error then draws its own conclusions in regard to the Hodge Case, seeking to show that this decision was based upon the sole question that the railroad company permitted the use without objection. We fully agree with counsel that this opinion, written by Judge Sharp, discloses that careful consideration which characterizes all of his opinions. Paragraphs 5 and 6 of the syllabus of this opinion read:

"That children on some occasions had been warned not to take coal or play about the premises of the company did not absolve the company from its duty to exercise reasonable care in operating its trains in the yards, where it was shown that the former custom had not been discontinued.

"The proximate cause of an injury is ordinarily for the jury, and is to be determined as a question of fact, in view of the circumstances of fact attending it."

Under this authority it was proper to deny the motion of plaintiff in error for a directed verdict.

Plaintiff in error next cites Chicago, R. I. & P. Ry. Co. et al. v. Austin, 63 Okl. 169, 163 Pac. 517, L. R. A. 1917D, 666, and then quotes excerpts from the opinion. The ninth paragraph of the syllabus in this case reads as follows:

"Nor does the fact that the railway company had placed signs along its right of way warning the public against trespassing thereon absolve it from the duty imposed by the custom of the public which had ripened into a license, where it appears that the custom had continued unabated after the placing of the signs."

These are the only Oklahoma cases cited by counsel for plaintiff in error. Cases from other states have been cited, which we have carefully examined, but we have invariably found distinguishing features in the case which distinguish them from the case at bar. Denver & R. G. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582. Here the distinguishing feature is disclosed in paragraph 5 of the syllabus which states the facts as follows:

"Plaintiff stepped on a railroad track at a point 600 feet from a station at which a train was standing, testifying that she looked in both directions, but saw no train, though the view was entirely unobstructed. She walked between the rails in the same direction in which the train was going, with an umbrella over her shoulder, and did not look around after going on the track. The train started from the station on an upgrade, necessarily making noise. *Held*, that plaintiff was guilty of contributory negligence, as matter of law."

We do not consider that any good purpose will be served by pointing out the distinguishing features in each and every case cited by plaintiff in error. We think the opinion written by Rainey, J., in the case of M., K. & T. Ry. Co. v. Wolf, 76 Okl. 195, 184 Pac. 765, is decisive of this question raised in the instant case. The above case is cited with approval in a very able opinion by Johnson, J., in the case of St. Louis & San Francisco Ry. Co. v. Jones, 78 Okl. 204, 190 Pac. 385, which plaintiff in error evidently overlooked in preparing its brief. See St. Louis & San Francisco Ry. Co. v. Irene Teel No. 10024, 198 Pac. 78, not yet officially reported. Anderson v. Great Northern R. R. Co., 15 Idaho, 513, 99 Pac. 91, we quote from the syllabus:

"A railroad company is bound to exercise a higher degree of care and watchfulness for the detection of trespassers on its track and the prevention of injury to them at points upon its track where people may be expected on the track or where the roadbed is used constantly by pedestrians, than it is required to observe with reference to trespassers generally or at other places and under different circumstances."

In *Palmer v. Oregon Short Line R. Co.*, 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229, we quote from the syllabus:

"A railway track need not be used so extensively by the public and for so long a time as to establish an implied license before the company may be required to keep a reasonable lookout for the persons on the track, such duty depending upon the place and the surrounding circumstances, but the use must be such as to apprise the company that the track is being used by a considerable number of persons with some regularity.

"In an action for injury to a person on a railroad track at a point frequently used by the public, where no implied license exists, it is a jury question whether the company has exercised ordinary care. * * *

"Where, in an action against a railway company for injury to a trespasser on a track, the character of the place where the accident occurred is in dispute, or the evidence is conflicting as to the number of people who used the track and the character of the use, the company's negligence is a jury question. * * *

"A railroad company must use ordinary care not to injure persons on or near tracks in thickly settled parts of cities, towns, and villages, where persons have free access to the tracks, and at all other places where the public in considerable numbers habitually have passed over or along the track for considerable time so as to impart notice of their use of the track to the company, or where the company expressly or impliedly permits such passage."

[2] The undisputed evidence shows that a large number of people had been using these railroad yards as a passageway; that this practice had continued unabated for many years. The railroad company had made at least spasmodic objections to this use of its yards by the public; in some instances by suggesting to some one person that it was dangerous to use the yards as a pathway. They had brought a man from Sapulpa on one occasion to lecture at the schoolhouse and distribute literature. The evidence on this was hearsay, and there is no testimony that he did actually deliver a lecture at the schoolhouse, or what he lectured on if such lecture was delivered. It requires a more determined effort on the part of the railroad company to stop the public from using a right of way, where such use has been continued for a long time and by a large number of people, than it would require to prevent its use in the first instance.

It appears that the company had signs up at one time, notifying the public that this was private property, to keep off, but at least one of these signs had been torn down by the company prior to the time of this accident, and had not been replaced. It was uncertain whether the other sign was up or not. This may have been considered by the public as an abandonment of its protest against the use of its yards as a passageway. Under the

evidence it was proper to submit to the jury the question whether or not the railroad company permitted or acquiesced in allowing the public to travel across its right of way and tracks. It was submitted under the following instruction:

"No. 12. If you believe from the evidence in this case that the defendant company did not permit or acquiesce in allowing the public to travel its right of way or tracks at the point where it is alleged that the deceased was killed, and that the defendant used reasonable means to keep the public from traveling the right of way and track at said point where it is alleged the deceased was killed, then you are instructed that no duty devolved upon defendant's employees in the operation of its trains, cars, and switch engines upon its tracks and in its yards at Henryetta, Okl., until they actually discover a trespasser, and then the only duty devolving upon them is to exercise ordinary care after the presence of the trespasser is discovered to prevent injuring him, and if you find from the evidence herein that the defendant's employees in charge of the switch engine and trains in its yards at Henryetta at the time and place said J. A. Donahoo is alleged to have been injured and killed did not at any time discover the presence of the said J. A. Donahoo, and were not aware of the fact that he was in said yard or about the track where it is alleged he was injured, then in that event it would be your duty to return a verdict for the defendant herein."

The plaintiff in error excepted to this instruction, but abandoned its objections, as it did not refer to it in its brief.

[1] If the railroad company permitted or acquiesced in allowing the public to use its right of way and yards, and its agents, servants, and employees knowing that people were in the habit of using the yards as a footpath, or passageway, at all times of the day and night, it owed to the deceased that degree of care, in switching its cars, which would be commensurate with the danger to which persons would be exposed who might be using its yards as a pathway, and whose presence might reasonably be anticipated, considering the number of persons traveling through the yards.

Plaintiff in error next complains of instruction No. 6, which is as follows:

"If you find from a preponderance of the evidence that, at the time of the alleged killing of the deceased, J. A. Donahoo, by the defendant, and long prior thereto, the defendant had permitted or acquiesced in allowing the public to travel along its right of way and track at the point where it is alleged that the deceased was killed, then it was the duty of the defendant company while operating its engines and cars through its agents and employees along said tracks and right of way at said point to keep a reasonable outlook for persons who might be traveling along said track and right of way."

We think this instruction is fully supported by the opinion in *M. & T. Ry. Co. v. Wolf*,

supra, and St. Louis-San Francisco Ry. Co. v. Jones, supra.

Plaintiff in error next contends the court erred in giving instruction No. 16, which is as follows:

"If you find for the plaintiffs in this case, then in assessing the damages which plaintiffs are entitled to recover the jury should assess the same with reference to the pecuniary loss sustained by the children of the deceased, and in determining this you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiffs' petition."

This instruction is quoted almost verbatim from an instruction approved in a carefully reasoned opinion by Kane, J., in *M., K. & T. Ry. Co. v. West*, 38 Okl. 581, 134 Pac. 655, the only difference being that in the *West Case*, supra, the widow's right to recover was considered in the instructions, as well as the rights of the children. Plaintiff in error insists that the instruction should have limited the liability of plaintiff in error to the sum which the children might reasonably expect to receive from the deceased from the date of the accident until they arrived at their majority. It complains that the measure of damage which the court gave to the jury under this instruction is that which would be applicable for the widow or administrator in an action by either of them for damage. That neither of the plaintiffs had any legal right to expect any contribution from the deceased after he or she reached their majority. The sections of the statutes (Revised Laws of Oklahoma 1910) applicable to this case are as follows:

"Sec. 5281. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Sec. 5282. In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

[3] In this case no personal representative had been appointed, and the widow having died before the action was brought, section 5282, supra, gave the children as next of kin

the right to maintain this action. The death of the widow did not limit the liability of the railway company for under section 5281, supra, the damages must inure to the exclusive benefit of the children and be distributed in the same manner as personal property of the deceased. Therefore there was no error in giving the instruction complained of.

[4] The last contention of the plaintiff in error is that the absence of a lookout was not the proximate cause of the injury and death, for this reason:

"The uncontroverted testimony in this case discloses that if Mr. Donahoo was killed by either one of the cars composing the 16 cars that were kicked down the main line, he was killed by either the seventh or eighth car. The only evidence in this respect is the fact that blood and hair were discovered on the wheels of the seventh and eighth cars. It is not contended by the plaintiffs in this case that the deceased met his death by being struck by the north car that was kicked down the main line. What effect would a lookout have had if he had been stationed on the rear end of the sixteenth car switched on the main line by the railroad employee?"

The plaintiff in error then advanced the theory that deceased was drunk, and fell between the seventh and eighth car, and in support of this theory makes this statement in its brief.

"The undisputed facts in this case disclosed that the deceased was in a drunken condition just prior to the time that he met his death."

Plaintiff in error based this statement on the testimony of Tom Tate and W. W. Melton. This assumption is not borne out by the evidence. He was killed between 8:30 and 9 o'clock on the night of March 25, 1917. Tom Tate testified he saw him in a drunken condition between 11 o'clock and midnight on the night of March 25, 1917, at least two hours after he was killed. W. W. Melton testified he saw him in a drunken condition between 9:30 and 10 o'clock on the night he was killed, at least one hour after he had met his death. This evidence was disputed by all of the witnesses who testified as to the time of his death.

The theory of defendants in error is that deceased was walking north on the track on which the cut of 16 cars was switched. Deceased was not aware of the approaching cars, they did not make much noise, and there being no one on the north end to warn him, he was struck by the north-end car, knocked down just outside the rail, and stunned. While in this condition, six or seven cars passed the point where deceased was lying. When deceased began to recover consciousness, and while yet in a semiconscious condition, he made a move which resulted in his right arm and head being placed over the rail, and the next car wheels that came

along crushed deceased, causing the injuries which resulted in his death.

The jury had the evidence and these different theories before them; they also had the opportunity of observing the demeanor of the witnesses on the stand. This court has held, if there is any evidence reasonably tending to support the verdict, the judgment will not be set aside on appeal. *Pool et al. v. Burger Bros.*, 56 Okl. 269, 155 Pac. 1144; *Oaks v. Samples*, 57 Okl. 660, 157 Pac. 739; *Futoransky v. Pope*, 57 Okl. 755, 157 Pac. 905, L. R. A. 1916F, 548.

We do not find that any of the assignments of error or contentions of the plaintiff in error are well-founded, or that any prejudicial error was committed by the trial court. This brings us to the request of defendant in error to enter judgment on the supersedeas bond filed by plaintiff in error, which bond is copied in the case-made, and, omitting the caption and filing dates on the back, reads as follows:

"Supersedeas Bond.

"Know all men by these presents that St. Louis-Francisco Railway Company, a corporation, principal, obligor, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto Roy Donahoo, Forest Donahoo, Carliss Donahoo, Vera Donahoo, and Albert Donahoo, by their guardian and next friend, M. C. Burrell, plaintiffs in the above-entitled cause, in the sum of twenty thousand five hundred and no-100ths (\$20,000.00) dollars, for the payment of which well and truly to be made, we, and each of us, do hereby jointly and severally bind ourselves, our successors and assigns, dated this 3d day of July, 1919.

"The conditions of this obligation are such that whereas, on the 30th day of April, 1919, judgment was rendered in favor of said obligees, Roy Donahoo, Forest Donahoo, Carliss Donahoo, Vera Donahoo and Albert Donahoo, by their guardian and next friend, M. C. Burrell, plaintiffs in said cause, and against said obligor, St. Louis-San-Francisco Railway Company, defendant in said cause, for the sum of ten thousand dollars (\$10,000.00) dollars and cost; and whereas, said defendant has taken an appeal from said judgment to the Supreme Court of the state of Oklahoma:

"Now, therefore, if the said principal obligor herein shall pay to the said obligees the condemnation money and cost, in case said judgment shall be affirmed in whole or in part, then this obligation shall be void; otherwise to remain in full force and effect. St. Louis-San Francisco Railway Company, by R. A. Kleinschmidt, Its Attorney. [Seal.] United States Fidelity & Guaranty Company, by Ed. M. Simons, Its Attorney in Fact. [Seal.]

"I approve this bond on the 5th day of July, 1919. E. M. Washington, Court Clerk, Hughes Co., Okla. [Seal.]"

[5, 6] Defendants in error have called this to the attention of the court in their brief, as provided for in rule No. 11 (165 Pac. viii) of

this court, and asked that judgment be rendered accordingly.

It is therefore further ordered, adjudged, and decreed by this court that the plaintiffs have and recover of and from the United States Fidelity & Guaranty Company, a corporation of Baltimore, Md., as surety for the St. Louis-San Francisco Railway Company, a corporation, the sum of \$10,000, together with interest at the rate of 6 per cent. per annum from the 2d day of May, 1919, and all costs accrued in this action.

This cause is remanded to the district court of Hughes county, with instructions to enter the foregoing judgment of record against the United States Fidelity & Guaranty Company, a corporation of Baltimore, Md., as surety.

The judgment of the trial court is affirmed.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(81 Okl. 259)

In re ASSESSMENT OF CENTRAL NAT. BANK OF OKMULGEE. (No. 11204.)

(Supreme Court of Oklahoma. May 10, 1921.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 564(3)—Order extending time for filing case-made made after expiration of previous order void.

A case-made, served by acceptance of service on January 17, 1920, and afterwards filed in the Supreme Court with a petition in error, does not give the Supreme Court jurisdiction to hear said appeal where the original order, extending time to make and serve case-made, was made on the 16th day of August, 1919, and allowed 90 days thereafter within which to make and serve case-made; and more than 90 days thereafter, and on, to wit, November 15, 1919, a second order was made by the trial court extending the time in which to make and serve case-made to January 5, 1920, inclusive, and on January 3, 1920, another order was made extending time to January 20, 1920, inclusive. The second order was void, as the trial court had lost jurisdiction by reason of the expiration of time fixed in the first order for making and serving case-made, and all subsequent orders of the trial court were also void and the Supreme Court has no jurisdiction to hear the appeal, *held*, on a motion to dismiss the appeal for want of jurisdiction by the Supreme Court, said motion will be sustained, and the appeal dismissed.

Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Proceedings to impose an assessment on the Central National Bank of Okmulgee. On appeal from an order of the Board of Equalization, judgment in favor of the Bank was

rendered, and the County Board of Equalization and the Board of County Commissioners appeal. Dismissed.

L. A. Wallace, of Okmulgee, for plaintiffs in error.

G. E. Cassity, of Okmulgee, for defendants in error.

ELTING, J. This is an appeal from Okmulgee county the county board of equalization of Okmulgee county, Okl., and the board of county commissioners of said county, and was filed in this court February 14, 1920.

This action, being originally an appeal from the board of equalization of Okmulgee county in the matter of the assessment of the Central National Bank of Okmulgee for 1918 to the district court of Okmulgee county, was tried before Hon. Mark L. Bozarth. Judgment in favor of the bank.

Motion for a new trial filed and overruled August 16, 1919. Appeal prayed by the county assessor and board of equalization of Okmulgee county. The order overruling motion for new trial included the following:

"And for good cause shown said county assessor and board of equalization of Okmulgee county, appellee herein, are granted an extension of 90 days from date hereof within which to make and serve a case-made, the appellant, said Central National Bank of Okmulgee, is given 10 days thereafter in which to suggest amendments, and case-made shall be signed and settled thereafter upon 5 days' notice in writing by either party hereto."

On the 15th day of November, 1919, the judge of the district court made an order extending time in which to make and serve case-made, giving them until the 5th day of January, 1920, which order was in words and figures as follows, omitting the caption:

"Now on this, the 15th day of November, 1919, the application of the county assessor and board of equalization of Okmulgee county, Okl., appellees herein, for an extension of time in which to prepare and serve a case-made being presented to the court and judge thereof, and said application being duly considered, the court finds that there exists good cause why said extension should be granted.

"It is therefore hereby ordered that said appellees be, and they are hereby, given until the 5th day of January, 1920, inclusive, in which to prepare and serve said case-made, and the time for preparing and serving said case-made is hereby extended until said date, appellant is given 10 days after service to suggest amendments, and said case-made to be settled upon 3 days' notice by either party. Mark L. Bozarth, Judge of the District Court."

On the 3d day of January, 1920, the district judge of Okmulgee county made another order extending the time to make and serve case-made to January 20, 1920, which order, omitting caption, was in words and figures as follows:

"Now on this, the 3d day of January, 1920, the application of the board of equalization and the county assessor for an extension of time in which to prepare and serve their case-made being presented to the court and the judge thereof, and said application being duly considered and the court finds that there exists good cause why said extension should be granted, it is therefore hereby ordered that said board of equalization and county assessor be, and they are hereby, given until the 20th day of January, 1920, inclusive, in which to prepare and serve said case-made, and the time for preparing and serving said case-made is hereby extended until said date, appellant is given 10 days after service to suggest amendments, and said case-made to be settled and signed upon 3 days' notice by either party. Mark L. Bozarth, Judge of the District Court."

On March 8, 1921, the defendant in error the Central National Bank of Okmulgee filed a motion asking this court to dismiss the appeal of the plaintiffs in error, for the reason that this court is without jurisdiction to hear and determine the matters involved in said appeal and the errors complained of in the petition in error filed herein by said plaintiffs in error.

The order made by the district judge of Okmulgee on November 15, 1919, extending the time within which to make and serve case-made was made at a time more than 90 days from the time of the original order, which original order extended the time 90 days from its date in which to make and serve case-made, and therefore such second order was a nullity, and the third order of the district judge of Okmulgee county extending the time to make and serve case-made was also a nullity, as the trial court had lost its power to make said orders of extension, and hence there is no legal appeal to this court, and therefore the motion to dismiss the appeal should be granted. Cripple Creek Oil Co. v. King, 76 Okl. 316, 185 Pac. 439; Morgan v. Board of County Com'rs, 59 Okl. 290, 159 Pac. 514; Wills v. Buzbee, 42 Okl. 206, 140 Pac. 1146; Cook v. Cook, 79 Okl. 222, 192 Pac. 215; Saxon v. Hardin, 29 Okl. 17, 118 Pac. 264; Parker v. Wadleigh, 43 Okl. 180, 141 Pac. 781; Greco v. Kool Kola Co., 79 Okl. 120, 191 Pac. 1036. Therefore the appeal will be dismissed; and it is so ordered.

HARRISON, C. J., and PITCHFORD, McNEILL, and NICHOLSON, JJ., concur.

(81 Okl. 215)

BYERS v. BRISLEY et al. (No. 9845.)

(Supreme Court of Oklahoma. April 28, 1921.)

*(Syllabus by the Court.)***1. Fraud §31—Remedies enumerated.**

A person induced by false and fraudulent representations to purchase or exchange for property has four remedies: He may, first, upon discovery of the fraud, rescind the contract absolutely and sue in an action at law, and recover the consideration parted with upon the fraudulent contract, and in such case he must restore, or offer to restore, to the parties sued whatever he has received by virtue of the contract; or, second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for him to restore, or make offer in his petition to restore, everything of value which he has received under the contract; or, third, he may affirm the contract, retain that which he has received, and bring an action at law to recover the damages sustained by reason of his reliance upon the fraudulent representations; or, fourth, he may, in an action against him to recover the purchase price or to enforce a security given therefor, set up the damages sustained by reason of the fraud, as a defense or by way of counterclaim.

2. Fraud §13(2)—False representations, with knowledge of falsity, actionable fraud; "fraud and deceit."

A party is guilty of "fraud and deceit" where he makes any false representation of a material fact, with knowledge of its falsity and with intent that it shall be acted upon by another in entering into a contract, or where he makes a positive assertion which is material, in a manner not warranted by his information, or where he is not shown to have reasonable grounds for believing it true, where the assertion so made is not true, even though by him believed to be true, and the definite assertion as a fact of that which is untrue, concerning that of which the party has no knowledge, is tantamount in its effect to the assertion of something which the party knows to be untrue.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud; Deceit.]

3. Appeal and error §1002—Verdict on conflicting evidence not disturbed on appeal.

In a trial by jury, where the evidence is conflicting, and there is competent evidence reasonably tending to support the contention of the prevailing party, the verdict will not be disturbed by this court.

Appeal from District Court, Tillman County; Frank Mathews, Judge.

Action by J. D. Byers against E. L. Brisley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

John E. Williams, of Frederick, and George A. Ahern, of Ardmore, for plaintiff in error.

Mounts & Davis, and Wilson & Roc, all of Frederick, and B. L. Tisinger and S. K. Bernstein, both of Oklahoma City, for defendants in error.

NICHOLSON, J. In December, 1909, the defendant in error E. L. Brisley, while at Green River, Utah, inspected a tract of land consisting of 39.44 acres owned by J. D. Byers, the plaintiff in error, said land being shown to the defendant by the agent of said plaintiff, at which time said land was priced to said defendant at the sum of \$15,776. A contract for the sale of said land was executed by the plaintiff at Green River, Utah, on January 5, 1910, and was by the defendant brought to his home at Frederick, Okl., and there executed by him on February 5, 1910. In said contract it was provided that the purchase price should be paid as follows: The sum of \$1,000 cash, the receipt of which was acknowledged; the sum of \$2,000 on April 1, 1910; the sum of \$4,776 on July 1, 1910, and the balance of \$8,000 to be paid within two years from the date of the contract, the last-named sum to draw interest at the rate of 8 per cent. per annum from date, and to be secured by a mortgage upon said tract of land. It was further agreed in said contract that if for any reason the peach trees growing upon said land, being three years or more old, should not bear a reasonable crop of fruit for the season of 1910, then the price should be reduced \$25 per acre on the whole tract, or the sum of \$986, which should be taken from the payment due July 1, 1910.

The defendant and his family moved from Oklahoma to Green River, Utah, in March, 1910, and on April 2, 1910, it having been determined that the peach crop for the year 1910 would be a failure, the sum of \$986 was deducted from the purchase price, and the defendant paid the plaintiff the entire amount of said purchase price, except the sum of \$8,000. The plaintiff executed and delivered to the defendant a deed to said land, and the defendants in error, E. L. Brisley and W. E. Brisley, husband and wife, executed and delivered to the plaintiff their note for the sum of \$8,000, dated January 5, 1910, and maturing three years from date, together with a mortgage securing the payment of said note and covering said land. The defendants took possession of said land and continued in possession thereof until September, 1912, when they conveyed it to Lenora Phillips in exchange for land in Cotton county, Okl., Lenora Phillips assuming the payment of said note for \$8,000 as a part of the consideration.

In 1914 Lenora Phillips defaulted in the payment of the amount due, and the plaintiff brought suit to foreclose said mortgage,

obtained judgment, and the land was sold for the sum of \$5,000 which sum was credited on the note, and on July 10, 1916, the plaintiff filed this action in the district court of Tillman county, praying judgment against the defendants for the sum of \$5,003.71, the balance remaining due on said note, with interest thereon at the rate of 8 per cent. per annum from June 8, 1916.

The defendant answered, admitting the execution of the note and mortgage, and pleading, first, that said note was given in part payment for the land in plaintiff's petition described, and that at the time of the execution of said note the plaintiff and said defendants entered into a written contract, by the terms of which it was agreed that, in consideration of said defendants having paid and agreed to pay the sum of \$7,776 in cash upon the purchase price of said land, which money was afterwards paid to said plaintiff, in case said defendants could not or were not able to pay said note when the same became due said note was to be void and of no effect, and both parties released from any obligation whatsoever under said note, and in the event that said note could not be paid that the money already paid to said plaintiff should be accepted in full satisfaction of any liability to said plaintiff, and that said defendants were not to be liable in any way upon said note, and attached a copy of the contract referred to as "Exhibit A." (This contract is the contract of sale of date January 5, 1910.)

As a further defense the defendants pleaded that the plaintiff made certain false and fraudulent representations as to the character, quality, and value of said land; that when said defendant E. L. Brisley went to see said land it was covered with about 12 inches of snow; that because thereof he could not inspect said land, and was compelled to and did rely upon the statements and representations of the plaintiff in regard to said land, its value, condition, and quality; that at said time said land had standing upon it a large number of fruit trees, and that the plaintiff represented to said defendants that all of said fruit trees were living, and that every foot of said land was very fine black, sandy valley land, very rich and fertile, and would produce a large amount of crops of all kinds; that if said defendants would buy said land they could raise enough cantaloupes and other garden products and other crops between the rows of said fruit trees to pay them a large profit, and that said fruit trees would bear sufficient to yield them a large profit; that plaintiff represented that there was about 10 acres of alfalfa growing on said land, which would produce seven or eight tons per acre each cutting, and that defendants could obtain four or five cuttings each year,

and that said tract of land was a very valuable piece of property; that said plaintiff had been offered at one time the sum of \$16,000 therefor, but that said land was worth a great deal more than that amount, and that in order to induce the defendants to locate on said land he would sell the same to them for less than it was worth, to wit, the sum of \$15,776, and if said defendants would buy said land the plaintiff would guarantee that the same, with good management, would increase in value within 18 months more than sufficient to double the money the defendants would have to pay upon said land; that said land had produced large crops of fruit, alfalfa, garden products, and other crops, and had always produced large crops for more than 10 years; that, relying upon said statements and representations, and believing the same to be true, said defendants purchased said land for said sum of \$15,776, and paid the plaintiff the sum of \$7,776 in cash, and executed to said plaintiff the note sued on for the balance of said purchase price.

It is further averred in said answer that, after having paid said sum of money, and after taking possession of said land, the defendants discovered that most of the fruit trees upon said land had been killed by the cold weather during December, 1909, and prior thereto, and, after making said discovery, they expended the sum of \$500 in removing the dead fruit trees from said premises; that they also discovered that the quality of said land was not as represented; that a large portion of said land was not black, rich sandy valley land, but was known as "rawhide" or "hardpan" land, and that it would not produce crops of any kind, and in fact no vegetation would grow thereon; that after they took possession of said land they discovered that said land had never produced paying crops of any kind; that the alfalfa upon said land would only produce two cuttings per year of about one ton per acre, and that the balance of said land would not produce paying crops of any kind; that said plaintiff had never been offered the sum of \$16,000 for said land; and that said land was not worth more than \$4,000. It was further averred that the representations so made by the plaintiff to said defendants to induce them to purchase said property were absolutely false, and that the plaintiff knew them to be false, and that the plaintiff made the same in order to induce said defendants to purchase said property; that said defendants were induced by false and fraudulent representations to purchase said property, and, had not said false and fraudulent representations been made to them, they would not have purchased said property; and by way of counterclaim the defendants prayed judgment against said plaintiff for the sum of \$7,776, and the

further sum of \$500, money expended by them in removing said fruit trees from said premises.

To the answer the plaintiff filed a demurrer, which was by the court overruled, and he then replied, pleading a general denial, and also an estoppel. On September 19, 1917, the cause was tried to a jury, and a verdict in favor of the defendants and against the plaintiff for the sum of \$2,500 was returned, upon which judgment was entered, and to reverse which this proceeding in error is brought.

Plaintiff in error contends that because the defendants have not reconveyed or offered to reconvey to the plaintiff said land, but have parted with the title thereto, that they have waived the fraud, if any, and are estopped to resist the action on account of any fraudulent representations made by the plaintiff inducing them to purchase the land. If this was an action for the rescission of the contract, there would be merit in his contention, and the authorities cited would be in point, but the defendants do not seek a rescission. On the contrary, their answer shows that they affirmed the contract, and seek by way of counterclaim to recover damages because of the alleged fraud of the plaintiff, and this they had a right to do.

[1] In *Howe et al. v. Martin et al.*, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840, this court held:

"A person induced by false and fraudulent representations to purchase or exchange for property has three remedies. He may: First, upon discovery of the fraud, rescind the contract absolutely, and sue in an action at law, and recover the consideration parted with upon the fraudulent contract, and in such a case he may restore, or offer to restore, to the parties sued whatever he has received by virtue of the contract; or, second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for plaintiff to restore, or make offer in his petition to restore, everything of value which he has received under the contract; or, third, he may affirm the contract, retain that which he has received, and bring an action at law to recover the damages sustained by reason of his reliance upon the fraudulent representations."

This case has been followed in *Burke v. Smith*, 57 Okl. 196, 157 Pac. 51, *Werline v. Aldred*, 57 Okl. 391, 157 Pac. 305, 158 Pac. 893, and *Hooker v. Wilson*, 169 Pac. 1097. And it is well settled that the vendee of land in an action against him to recover the purchase price thereof, or to enforce a security given therefor, may recover damages by way of counterclaim or recoupment for false and fraudulent representations by the vendor as to the location, boundaries, quality, quantity, and natural advantages of the land. *Brown v. Freeman*, 79 Ala. 406; *Eagan Co. v. Johnson*, 82 Ala. 233, 2 South. 302; *Mears*

v. Nichols, 41 Ill. 207, 89 Am. Dec. 381; *White v. Sutherland*, 64 Ill. 181; *Myers v. Estell*, 47 Miss. 4; *Van Epps v. Harrison*, 5 Hill (N. Y.) 68, 40 Am. Dec. 314; *Goodwin v. Robinson*, 30 Ark. 536; 13 O. J. 395. See, also, *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

[2] Plaintiff next contends that the misrepresentations alleged to have been made by the plaintiff as an inducement for the defendant to purchase the land were mere "trade talk," "matters of opinion," "representations as to value, etc.," and did not constitute actionable fraud or a defense to plaintiff's cause of action, and that the defendants had no right to rely upon said statements, but were bound to use their own judgment.

It is in some instances difficult to distinguish between mere trade talk and matters of opinion and statements of material facts, and each case must rest upon the particular facts and circumstances surrounding the transaction in question. In the third paragraph of their answer the defendants aver that at the time they went with plaintiff to see the land the same was covered with about 12 inches of snow, and that because thereof they were unable to inspect said land, and were compelled to, and did, rely upon the representations and statements of the plaintiff in regard to said property, its value, condition, and quality, in making said purchase; that at said time said land had standing upon it a large number of fruit trees, and that the plaintiff represented to them that all of said fruit trees were living, and that every foot of said land was very fine black, sandy valley land, and that every foot of said land was very rich and fertile, and would produce large crops of all kinds; that there was about 10 acres of alfalfa growing upon said land, which would produce seven or eight tons of alfalfa per acre at each cutting, and that defendant could obtain four or five cuttings of alfalfa each year; that said land was very valuable, and he had refused the sum of \$16,000 therefor, but that the same was worth a great deal more than that sum; that if defendants would buy said land he would guarantee that the same would increase in value within 18 months more than sufficient to double the money the defendants would have to pay for it and that said land had produced large crops for more than 10 years. While the statement of the amount of crops the land would produce in the future might be the expression of an opinion, yet the statement of what it had produced in the past was a statement of a material fact, as was also the statement as to the quality of the soil, the condition of the trees, and the sum he had previously been offered for said land.

In *Prescott et al. v. Brown*, 30 Okl. 428, 120 Pac. 991, the third and fourth paragraphs of the syllabus are as follows:

"3. In an action to foreclose a real estate mortgage secured by fraud and deceit, by the positive fraudulent misrepresentations made by the vendor with intent to deceive, the doctrine of caveat emptor, which is not founded on a high standard of morals, will not avail as a shield and protection to the deliberate frauds and cheats of sharpers, and such doctrine shall not be extended further than it has been carried by previous decisions, even with respect to 'dealers' talk,' 'matters of opinion,' 'representations as to value,' etc.

"4. A vendee has a right to act on the positive representations of existent material facts made by the vendor, even though the means of knowledge were open to him. The real question in such matters is, Was the party in fact deceived by the false representations? 'It is as much an actionable fraud willfully to deceive a credulous person with an improbable story as it is to deceive a cautious and sagacious person with a plausible one.'"

And in *Chisum v. Huggins*, 55 Okl. 423, 154 Pac. 1146, it was held that the statements by a vendor that he had been offered a certain sum for the property on sale, or that a third party had been offered a certain sum for the same kind of property in the same location, is a statement of a material fact affecting the value, and, if false, may form the basis of an action for deceit. It follows that the trial court did not err in overruling the demurrer to the third paragraph of the answer.

[3] We have examined the evidence adduced at the trial, and while it is conflicting, there is sufficient competent evidence on behalf of the defendants reasonably tending to support their contention, and, the cause having been submitted to the jury under proper instructions, their verdict will not be disturbed by this court. *Harrell et al. v. Scott*, 51 Okl. 373, 151 Pac. 1169; *Incorporated Town of Sallisaw v. Chappelle*, 171 Pac. 22; *Midland Valley R. Co. v. Rippe*, 61 Okl. 314, 161 Pac. 233; *Dickinson v. Perry*, 75 Okl. 25, 181 Pac. 504. The court did not err in overruling the demurrer of the plaintiff to the evidence of the defendant.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

DYMOND DRILLING CO. v. MORRIS.
(No. 10205.)

(Supreme Court of Oklahoma. May 10, 1921.)

(Syllabus by the Court.)

Appeal and error \S 773(2), 1236—When appeal will be dismissed and judgment entered on bond for failure to file brief stated.

Where the defendant in error files a motion to dismiss the appeal because of the failure of the plaintiff in error to file briefs within the time required by the rules of this court, and attaches to said motion a certified copy of the superseded bond, and prays for judgment thereon, this court will dismiss the appeal and render judgment on said supersedeas bond.

Appeal from County Court, Pontotoc County; Orel Busby, Judge.

Action by H. E. Morris against the Dymond Drilling Company. Judgment for plaintiff, and defendant appeals. Dismissed.

B. C. King, of Ada, for plaintiff in error.
Wimblish & Duncan, of Ada, for defendant in error.

NICHOLSON, J. The defendant in error has filed his motion to dismiss the appeal herein, for the reason that this cause was assigned for submission on the 19th day of April, 1921, and the plaintiff in error has failed to file brief as required by law and by the rules of this court, and to said motion has attached a certified copy of the supersedeas bond, and prays judgment against the sureties thereon; and, it appearing that the plaintiff in error has agreed that said appeal may be dismissed, and judgment rendered as prayed for, it is ordered and adjudged that said appeal be, and the same is hereby, dismissed and that said defendant in error do have and recover of and from E. Henson, the surety on the supersedeas bond herein, the sum of \$251.20, with interest thereon at the rate of 6 per cent. per annum from the 19th day of April, 1918, and for all costs, for which execution is hereby awarded and the court clerk of Pontotoc county, Okl., is directed to enter this judgment of record as required by law.

HARRISON, C. J., and PITCHFORD, McNEILL and ELTING, JJ., concur.

(81 Okl. 218)

BILLINGS et al. v. PORTERFIELD.
(No. 9584.)

(Supreme Court of Oklahoma. April 26, 1921.)

*(Syllabus by the Court.)***1. Warehousemen \S 34(7)—Finding that both first and second bailees were guilty of conversion held conclusive on appeal.**

When property has been placed in the possession of one of two defendants under a contract of bailment, and the custody has been shifted by the original bailee to another, who is the other defendant, and a purported sale is made to satisfy storage fees by authority of last custodian, but sale is not made as by law provided, and first bailee bids property in at sale, and in suit for conversion of property by owner thereof, and a question arises as to who is guilty of the conversion, whether first bailee or the second bailee, or both, and the question is submitted to the jury under proper instructions, and jury returns a verdict against both defendants, *held* that, on appeal to the Supreme Court, it is not an unreasonable inference to find the guilt of both, and that the verdict of the jury finding both liable is conclusive on the Appellate Court, and will not be disturbed.

2. Trover and conversion \S 40(3)—Finding of ownership of property sustained.

In a suit for conversion of personal property, the question is raised as to the plaintiff's ownership of the property, and the record discloses that the party who was the immediate prior owner testifies he had sold the property to the plaintiff; but the evidence discloses that the witness so testifying had seen after and cared for the property in the absence of the plaintiff, and some other circumstances were developed tending to show the sale was not an actual one—but the question of the ownership was submitted to the jury under proper instructions by the court and it found against the defendants and in favor of the plaintiff. *Held*, on appeal, verdict will not be disturbed.

3. Appeal and error \S 1002—Weight of evidence will not be determined on appeal where verdict reasonably sustained.

When all the material issues in a law cause are presented to the jury by proper instructions and the evidence, though conflicting, reasonably sustain the verdict, *held* that it is not necessary for the Supreme Court to go further, and examine the record to see upon which side is the greater weight of the evidence.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

Action by William A. Porterfield against J. W. Billings and another. Judgment for plaintiff, and defendants appeal. *Affirmed*.

Warren K. Snyder, of Oklahoma City, for plaintiffs in error.

Chas. H. Garnett, of Oklahoma City, for defendant in error Kee.

Chas. West, of Oklahoma City, for defendant in error Billings.

ELTING, J. This suit was instituted in the district court in and for Oklahoma county, Okl., by Wm. A. Porterfield, plaintiff, against J. W. Billings and O. B. Kee, defendants. Petition filed June 15, 1916; trial had before Hon. John W. Hayson, judge; cause tried by a jury; and verdict rendered November 22, 1916, in the sum of \$300 in favor of the plaintiff against the defendants.

This suit was filed for the recovery of the value of certain personal property described in the petition, alleged to be of the value of \$1,500. The grounds of recovery was conversion of the property by the defendants under an illegal and void sale of said property for rents due for storage of said property, which the plaintiff had stored with J. W. Billings, and said storage was made in pursuance of the following contract, signed by Wm. A. Porterfield and J. W. Billings, one of the defendants:

"This agreement made and entered into this 15th day of January, 1914, between Wm. A. Porterfield, of Oswego, Kan., and J. W. Billings of Oklahoma City, Okl., witnesseth that said Porterfield has this day leased from said Billings space and storage room in the rear of the building situated at No. 510 West Main St., Oklahoma City, Okl., for the placing and storage therein of certain goods and property consisting of 2 roll-top desks, 5 organs, 1 piano, and a lot of musical instruments, appliances, equipments, sundries, etc., and being the same goods and property this day removed from the storage rooms of the O. K. Bus & Baggage Company at the corner of Fifth and Harvey Streets in Oklahoma City aforesaid, and the said Porterfield agrees to pay and the said Billings agrees to accept \$5 per month as rental for the use of the space and storage room occupied by said goods and property any fraction or part of a month to be paid for at the same rate.

"Witness our hands the day and year first above written. Executed in duplicate.

"Wm. A. Porterfield.

"J. W. Billings."

The defendants answered, denying the conversion of the property; denying all allegations of the plaintiff's petition that are not specifically admitted; contending that the property was delivered to J. W. Billings for storage, and that the charge for storage had not been paid, and that J. W. Billings proceeded to sell said property as provided by law, for the sale of personal property for storage; to which the plaintiff filed a reply denying each and every allegation of new matter and every allegation inconsistent with the allegations of the petition, and admitted that he owed \$35 for storage, and asked that the \$35 be deducted from the amount of the plaintiff's recovery. Upon the issues thus joined, the parties went to trial before a jury.

Proofs as to the value of the property taken, were offered and proofs were taken as

to the entire transaction, including sale, storage, and disposition of property.

There was an attempted sale, as shown by the evidence, under the authority of Kee, one of the defendants, who had succeeded Billings, the original warehouseman, in possession of the property. At the sale, Billings bid the property in.

There is no claim that the sale was in compliance with the laws of the state providing for the sale of goods for storage fees by the warehouseman. The provision of our statute for sale in such cases is as follows (sections 825 and 827, c. 11, art. 3, Rev. L. 1910):

"Whenever any trunk, carpet bag, valise, bundle, package or article of property transported or coming into the possession of any railroad, or express company, or any other common carrier in the course of his or its business as common carrier, shall remain unclaimed and the legal charges thereon unpaid during the space of six months after its arrival at the point to which it shall have been directed, and the owner or person to whom the same is consigned cannot be found upon diligent inquiry, or, being found and notified of the arrival of such article, shall refuse or neglect to receive the same and pay the legal charges thereon for the space of three months, it shall be lawful for such common carrier to sell such article at public auction, after giving the owner or consignee fifteen days' notice, of time and place of sale, through the postoffice if his address is known, or by advertising in a newspaper published in the county where such sale is made, and out of the proceeds of such sale to pay all legal charges on such articles, and the amount over, if any, shall be paid to the owner or consignee upon demand."

"The provisions of this chapter shall apply to hotel keepers and warehousemen."

Porterfield, the plaintiff, was a nonresident, so the record shows, and the actual possession of the goods was first in Billings and then in Kee. The sale was made by Kee by posting notices, and was in no sense in compliance with the provisions of the statutes, and it is not contended that it was. The defense seems to have been: First, that the plaintiff, Wm. A. Porterfield, was not the real owner of the property, and that the real owner of the property was Porterfield's father-in-law, C. W. L. Stiehl, who testified that he had sold the property to his son-in-law, the plaintiff. The evidence shows that Stiehl, however, looked after the care and storage of the property, his son-in-law being absent, and a non-resident.

The second proposition raised by the defendants was that it was a mere paper sale, meaning by a "paper sale" what is defined as follows:

"A mere paper sale of a chattel, without depriving the owner of possession, is not sufficient to constitute conversion."

It is true that the plaintiff did have constructive possession, and so does any bailor

who intrusts property to a warehouseman, but, as heretofore stated, the actual possession was first in Billings, and, at the time of the sale, appears to have been in possession of Kee. Hence, either one or both of them were in possession in the sense that any warehouseman is in possession, and, if they had advertised the property in compliance with the provisions of the statutes heretofore cited, and sold the same in compliance therewith, title to property would pass; but their failure to comply with the provisions of said statutes, even in a reasonable way, and having sold the same, their action constituted a conversion.

The owner had a cause of action against them for conversion, and the value of his property at the time of the conversion was the measure of his damages against which it was right to offset the accrued rentals.

Evidence was taken pro and con upon these propositions and the issues were submitted to the jury. The court, in his instructions, defined ownership, conversion, and the measure of damage. The court also instructed the jury to allow for the sum of the admitted rents due in the sum of \$35. The jury rendered a verdict in favor of the plaintiff, Wm. A. Porterfield, in the sum of \$300. A motion for a new trial was filed, and overruled, and appeal prayed for, and the record was filed in this court November 14, 1917. Briefs of plaintiffs in error were filed March 25, 1920. Brief of the defendant in error was filed May 5, 1920. Brief was filed on behalf of J. W. Billings, and on October 5, 1920, answer to the brief of J. W. Billings was filed.

The brief of the plaintiff in error contains nine assignments of error. The brief quotes quite extensively from the evidence, and closes by quoting three or four of the instructions of the court, to none of which he specifically objects, and at the time they were given he does not appear to have excepted. The plaintiff in error makes a statement on page 46 of his brief as follows: "The demurrer to the evidence should have been sustained." We have examined the record, and fail to find where any such demurrer was presented.

We have examined the instructions of the trial court and they seem to be a fair, comprehensive, and correct statement of the law applicable to the issues. None of the instructions are excepted to or criticised by the attorney for plaintiff in error.

[1] There is a brief filed in behalf of J. W. Billings in an effort to show that Billings was not guilty of conversion, since he was the buyer, and not the seller. Whatever uncertainties may have arisen as to just what the relations of the two defendants were relative to the transaction, the question of their liability was submitted to the jury under a fair and proper instruction, and the finding is binding upon this court.

The instructions gave, in substance, the following rule as to liability for conversion, as stated in 38 Cyc. 2054:

"Every person is liable in trover who personally or by agent commits an act of conversion, or who participates by instigating, aiding, or assisting another, or who benefits by its proceeds in whole or in part."

In the same connection, see 38 Cyc. 2087, § "C":

"The connection of defendant with a conversion will be sufficiently shown by proof of any facts or circumstances which will justify an inference that he assisted in wrongfully taking the goods, shared in the proceeds thereof with guilty knowledge, or participated in some act which, in law, amounted to a conversion."

In the case of *Aylesbury Mercantile Co. v. Fitch*, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573, and in *Bilby v. Jones*, 39 Okl. 613, 136 Pac. 414, conversion is defined as follows:

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property, in denial of or inconsistent with his rights therein."

The definition of conversion, as presented to the jury by the trial court in the instant case, gives this definition in substance.

We have examined the two cases cited by the attorney for Billings in support of his contention: *Forth v. Pursley*, 82 Ill. 152; *Horak v. Thompson* (Iowa) 83 N. W. 889. We do not think these cases apply to the instant case. The first was a case where a mortgagee held a mortgage on one-half interest in a portable sawmill. He undertook an action for trover before the mortgage was due, and before he was entitled to possession. The court held he could not sustain it.

The last case was one where plaintiff had leased certain lands, and had erected certain structures thereon, with the understanding that the title of the same was to remain in him. Afterwards, two or three transfers of the real property were made, and, upon demand upon one of the transferees, delivery or pay for the property was denied. Whereupon the lessee sued him for conversion. The facts affecting the rights of the parties not being in dispute, hence, the determination of their rights was purely a question of law for the courts to determine, and the court held the defendant not guilty of conversion, and that the plaintiff had sued the wrong party.

In the instant case, personal property was intrusted to one of the defendants, as a warehouseman. He shifted possession of the property. Afterwards he appeared at a purported sale, conducted by authority of the one to whom he had turned possession of the property, and bought the property in. The seller and buyer are the defendants in the instant case. The circumstances are such,

and the conduct of the defendants is such, in relation to this transaction, that it could be reasonably inferred that they were both liable in conversion, and such the jury in the instant case must have concluded, since it returned a verdict holding them both liable.

The plaintiffs in error invoked the principle that it was the duty of this court to review the record, and if it is found that the findings of the jury are clearly against the weight of the evidence, the judgment must be reversed, and judgment directed.

This rule applies in purely equitable causes, and not to law causes wherein, as a matter of right, the issues are triable by a jury. The rule in such cases is stated to be as follows (first syllabus case of *Elwell v. Purcell*, 42 Okl. 1, 140 Pac. 412):

"Where there are controverted issues of fact and conflicting testimony as to their existence, the findings of the jury in reference thereto, under instructions not complained of, should be binding on this court."

See, also, *Chicago, Rock Island & Pacific Ry. Co. v. Newburn*, 39 Okl. 704, 136 Pac. 174, where the rule is clearly stated as follows:

"In order to determine whether there is any evidence in the record reasonably tending to support the verdict, it is the duty of the court to treat all the evidence offered by plaintiff as true, and treat all the evidence offered by defendant in conflict as having been rejected, and when all the evidence supporting the verdict, taken together and given all the presumptions and deductions of which it is reasonably susceptible, is sufficient, the verdict will be allowed to stand, notwithstanding the countervailing evidence in the record would have been sufficient to sustain a verdict for the other party."

To the same effect are: *Rumbaugh v. Rumbaugh*, 39 Okl. 445, 135 Pac. 837; *Dunn v. Carrier*, 40 Okl. 214, 135 Pac. 337; *Peters v. Holder*, 40 Okl. 93, 136 Pac. 400; *Tulsa Street Ry. Co. v. Jacobson*, 40 Okl. 118, 136 Pac. 410; *Moore v. Johnson*, 39 Okl. 587, 136 Pac. 422; *Walters Nat. Bank v. Bantock*, 41 Okl. 153, 137 Pac. 717, L. R. A. 1915C, 531; and numerous other authorities given in *Oklahoma Digest, Annotated, Cumulative Plan, Notes to Statutes*, vol. 3, under head of "Conflicting Evidence," § 1002, pp. 123, 124.

[2] As to the proposition of this being merely a paper sale, we will state that we are unable to see, in this case, anything different from a case where bailee undertakes to make a sale of the property placed in his custody for the storage, under the provisions of the statutes of our state, and failure to comply therewith. The bailee himself, by his own conduct and that of the other defendant, has gotten the relations of himself and the other defendant to the transaction in more or less doubt, and then seeks to take

advantage of the situation to escape liability when sued in conversion.

[3] Upon this state of facts being submitted to the jury under proper instructions, and instructions not objected to, and the findings being against the defendants, the verdict, under such circumstances, will not be disturbed.

We hold, therefore, that the judgment of the trial court must be, and the same is, hereby affirmed.

HARRISON, O. J., and PITCHFORD, McNEILL, and NICHOLSON, JJ., concur.

Ex parte HICKS. (No. A-3645.)

(Criminal Court of Appeals of Oklahoma. July 30, 1921.)

Petition by Gladys Hicks for habeas corpus, alleging illegal restraint by A. J. Brown, Chief of Police of Anadarko, Okl. Writ allowed, and petitioner discharged.

Morgan & Osmond, of Anadarko, for petitioner.

PER CURIAM. In this proceeding, Gladys Hicks, by her counsel, presented to this court a verified petition, wherein she alleges that she is illegally restrained of her liberty by A. J. Brown, chief of police of Anadarko; that her illegal detention consists in this: That she was tried and pronounced guilty on a charge of vagrancy by the mayor of said city, and fined in the sum of \$100, and was informed that if she would pay \$50 she would be released, provided she would leave the city and not return; that she paid said sum of \$50 and the next day said chief of police again took her in charge; that said restraint is unlawful and unauthorized, for the reason that said mayor was without authority to impose a fine of \$100. Therefore the commitment issued is void, in that it deprives petitioner of her liberty without due process of law.

This presents the identical question passed upon in the case of *Ex parte Johnson*, 13 Okl. Cr. 30, 161 Pac. 1097, and *Ex parte Monroe*, 13 Okl. Cr. 62, 162 Pac. 233. For the reasons stated therein, we are of the opinion that under the proceedings had petitioner was deprived of her liberty without due process of law, and that the writ should be allowed, and petitioner discharged.

Ex parte LAWHEAD. (No. A-3992.)

(Criminal Court of Appeals of Oklahoma. July 8, 1921.)

Petition by Don Lawhead for habeas corpus to be directed to Ben Dancey, Sheriff of

Oklahoma County. Writ discharged on petitioner's motion, and petitioner remanded.

T. G. Chambers, Sr., and Paul J. McCarthy, both of Oklahoma City, for petitioner.

E. L. Fulton, Asst. Atty. Gen., for respondent.

PER CURIAM. On June 4, 1921, there was filed with the clerk of this court a petition for writ of habeas corpus, which was presented to the Presiding Judge, alleging that Don Lawhead was unlawfully restrained of his liberty by Ben Dancey, sheriff of Oklahoma county; that the cause of said restraint was a warrant issued by the Governor of Oklahoma upon a requisition from the Governor of Colorado, predicated upon an information filed by Joseph W. Hawley, district attorney of Las Animas county, Colo., charging said Don Lawhead with the crime of obtaining money under false pretenses from one R. A. Murray, committed in said county and state, and alleging various grounds why said warrants were improvidently issued.

The writ of habeas corpus issued returnable before the court on June 6th, at which time all the parties appeared. Thereupon petitioner, through his counsel, asked leave to dismiss the cause, which motion was sustained, the writ discharged, and petitioner remanded to the custody of the respondent.

Ex parte MADDOX. (No. A-3465.)

(Criminal Court of Appeals of Oklahoma. Aug. 11, 1921.)

Petition by C. W. Maddox for writ of habeas corpus. Dismissed.

J. W. Smith, of Cordele, for petitioner.

PER CURIAM. On motion of counsel of record for petitioner in the above entitled and numbered cause, the same is dismissed without prejudice.

Ex parte REEDY. (No. A-2986.)

(Criminal Court of Appeals of Oklahoma. Aug. 16, 1921.)

Petition of Larry Reedy for writ of habeas corpus. Petitioner ordered discharged.

J. D. F. Jennings, of Oklahoma City, for petitioner.

B. D. Shear, Municipal Counselor, of Oklahoma City, and Frank N. Watson, Assistant Municipal Counselor, for respondent.

PER CURIAM. This was an application to this court for a writ of habeas corpus, filed April 21, 1917, upon the ground that petitioner, Larry Reedy, "is unlawfully restrained of his liberty and imprisoned in the

city jail of Oklahoma City by W. B. Nichols, chief of police." The writ issued, returnable forthwith.

Obedient to the writ, respondent produced petitioner and filed answer as follows:

"Comes now the city of Oklahoma City and confesses the writ to show cause heretofore issued in the above-entitled cause, and prays the court that said petitioner, Larry Reedy, be released."

It was thereupon adjudged and ordered that petitioner be discharged.

Ex parte SMITH. (No. A-3999.)

(Criminal Court of Appeals of Oklahoma. July 8, 1921.)

Petition by J. J. Smith for a writ of habeas corpus to be let to bail. Cause dismissed.

H. L. Hardgrave, of Antlers, for petitioner.
S. B. Hackett, Co. Atty., for respondent.

PER CURIAM. The petitioner, J. J. Smith, filed his petition in this court on June 14, 1921, seeking the writ of habeas corpus for the purpose of being admitted to bail, being held by N. F. Kirkpatrick, sheriff of Pushmataha county upon a commitment issued upon a preliminary examination had on a complaint wherein petitioner was charged with the crime of rape in the first degree. On June 18, 1921, counsel for petitioner filed a motion to dismiss the cause, which motion is sustained, and the cause dismissed.

WATSON v. STATE. (No. A-3699.)

(Criminal Court of Appeals of Oklahoma. July 30, 1921.)

Appeal from Superior Court, Okmulgee County; R. E. Simpson, Judge.

Link Watson was convicted of selling intoxicating liquor, and appeals. Affirmed.

E. M. Carter, of Okmulgee, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Link Watson, was convicted on an information charging the selling of four quarts of whiskey to one G. T. Berry, and his punishment fixed at confinement in the county jail for 6 months and a fine of \$500. From the judgment rendered on the verdict he appeals.

The proof on the part of the state, showing the sale of the whiskey as charged, is conclusive and uncontroverted. An examination of the record discloses that the appeal herein is destitute of merit.

The judgment of the lower court is therefore affirmed.

Ex parte WILLIAMS. (No. A-4009.)

(Criminal Court of Appeals of Oklahoma. July 19, 1921.)

Application by Al Williams for writ of habeas corpus to obtain admission to bail. Writ denied, and bail refused.

Welch & Welch, of Antlers, for petitioner.
The Attorney General, W. C. Hall, Asst. Atty. Gen., and Charles E. McPherrren, of Durant, for respondent.

PER CURIAM. This is an application by Al Williams for a writ of habeas corpus to obtain admission to bail on a charge of murder, complaint filed May 24, 1921, before Geo. R. Childers, justice of the peace of Antlers township, Pushmataha county, charging the murder of one W. L. Bowlin, wherein upon his preliminary examination petitioner was bound over to the district court without bail.

Petitioner avers that he has heretofore applied to the district court of said county for a writ of habeas corpus to be admitted to bail, and on the hearing thereon bail was denied. Petitioner avers that upon the evidence introduced at his preliminary examination, together with the affidavits of certain other persons, which are presented herewith, it is shown that the proof of his guilt is not evident, nor the presumption thereof great; that therefore petitioner is entitled to be let to bail pending his trial on said charge.

The evidence for the state, offered on the preliminary examination, shows that about sunrise on the 19th day of May, 1921, the petitioner did kill and murder W. L. Bowlin, by shooting him with a shotgun; that the charge entered behind the right ear, a few shot entering the neck and shoulder. The shooting occurred on the place of the deceased, in a small pasture where he kept his work horses. The evidence shows that the body was found a few minutes later in a little glade surrounded by a thicket, and two bridles were lying near the body. No weapon of any kind was found on or near the body. Petitioner admits the killing, but claims that it was done in his necessary self-defense.

We have examined the record, and, without entering into a discussion of the facts as disclosed by the proof, we deem it only necessary to say that, upon a careful consideration of all the testimony presented in support of the application, we are of opinion that petitioner is not entitled to be let to bail as a matter of legal right.

It is therefore considered and ordered that the writ be denied, and bail refused.

(116 Wash. 701)

MOORE v. MOORE. (No. 16407.)

(Supreme Court of Washington. July 8, 1921.)

Department 1.

Appeal from Superior Court, Okanogan County; C. H. Neal, Judge.

Suit by Rose A. Moore against James B. Moore. From an order denying defendant's motion to vacate the decree, and set his default aside, defendant appeals. Reversed, with directions.

Ferris & Ferris, of Spokane, for appellant.

P. D. Smith and W. C. Brown, both of Okanogan, for respondent.

PER CURIAM. Respondent, on March 19, 1920, was granted a decree of divorce from the appellant, which decree awarded her the custody of their six minor children; there being no appearance by the appellant. On April 16, 1920, the appellant served and filed a motion to have the decree vacated and his default set aside, on the ground that the order of default and decree had been taken against him through his inadvertence and excusable neglect. The trial court entered an order refusing to vacate the decree, from which order the appellant has brought this appeal.

It is not necessary to detail the facts alleged by the respondent as showing a reason entitling him to have his default set aside and the decree opened. It is only necessary to say, upon the authority of *Jarrard v. Jarrard*, 198 Pac. 741, recently decided by this court, that the relief asked for by the appellant should have been granted.

The order of the trial court, refusing to set aside the default and vacate the decree, is reversed, and that court is directed to allow appellant to file his answer, and to proceed to hear the case upon its merits.

WEST v. STATE. (No. A-3692.)

(Criminal Court of Appeals of Oklahoma. Aug. 8, 1921.)

*(Syllabus by the Court.)***1. Larceny** §55—Evidence held sufficient to sustain conviction.

Evidence examined, and held sufficient to sustain a conviction.

2. Larceny §70(1), 79—Instructions on variance and trespass unnecessary.

Where, in a prosecution for larceny of an automobile, the state's evidence tended to establish guilt of the crime charged, and defendant as a witness denied taking the car, there was no evidence requiring the submission of any issue of variance between the allegations and the proof. Nor did defendant's evidence

tend to raise the issue of his guilt of a trespass under the special act of the 1917 Legislature (Laws 1917, c. 149), providing against defacing, injuring, molesting, driving, or attempting to drive any automobile for joy riding or any other purpose. Defendant's evidence in this case amounted only to a denial of the alleged felonious taking of the property, and an attempted explanation of his possession of it. His evidence in no particular disclosed a trespass against the property.

3. Criminal law §763, 764(1)—Refusal of requested instructions invading the province of the jury is proper.

It is not error to refuse to give requested instructions which amount to comments upon the weight of the evidence, and are invasions of the province of the jury.

4. Witnesses §383, 389—May be impeached by contradictory statement, but not by matter collateral to issue.

A witness may not be impeached on any matter collateral to the matter in issue with a view to eliciting from such witness an admission at variance between former statements and those testified to on the trial. Where, however, the matter inquired about is relevant to the issue in the cause, and the witness denies having made a statement material thereto, such statement, if contradictory to his testimony given on the trial, may be shown to impeach him.

*(Additional Syllabus by Editorial Staff.)***5. Larceny** §64(1)—Presumption of guilt from the possession of recently stolen property is one of fact.

The presumption arising from the possession of recently stolen property that the possessor is the thief is one of fact, and not of law.

Appeal from District Court, Rogers County; C. W. Mason, Judge.

Clyde West was convicted of grand larceny, and appeals. Affirmed.

W. H. Kornegay, of Vinita, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

MATSON, J. Plaintiff in error, Clyde West, hereinafter referred to as defendant, was prosecuted in the district court of Rogers county by information charging the larceny of an automobile, the property of one Charles M. Seward. A trial to a jury resulted in a conviction, with punishment assessed at imprisonment in the penitentiary for a period of one year.

[1] It is first contended that the evidence is insufficient to sustain the conviction, and that the trial court erred in refusing to direct a verdict of acquittal. Under this assignment of error contention is made that the evidence does not show that the car was taken by defendant with an intent to personally deprive

the owner of it, and, further, that the evidence of defendant's good reputation for honesty is sufficient to overcome any presumption of fact that defendant was the thief arising from the possession of property recently stolen.

The uncontradicted evidence is to the effect that one Seward, who was the owner of a Ford touring car, parked the same in front of a hardware store on one of the business streets in the city of Claremore late in the evening of the 18th day of February, 1919; that after transacting some business the owner returned to the place where the car had been left, and found the same had been taken without his knowledge or consent. Some two hours thereafter, defendant was found in possession of this car, stuck in a mudhole on a public highway about three miles north of the town of Busheyhead, in said county.

Defendant had been in the city of Claremore that day, and had purchased a pair of shoes at a store there, giving in payment for same a check on a bank in the town of Chelsea. When defendant was apprehended in possession of the car by officers from the town of Chelsea, defendant living near said town, defendant gave a fictitious name, and claimed that he had come from the city of Tulsa in the car that day. After he was placed under arrest he was put in the back seat of the car, and told to stay there until the officers got the car out of the mudhole. One of the officers went to the front of the car and started to crank it and defendant grabbed the pair of shoes he had with him and started to run. One of the officers shot toward defendant two or three times, and defendant dropped the shoes and escaped. The officers recovered the car and drove it back to Claremore.

The next morning defendant returned to the scene in order to recover his lost shoes, but, failing to find them walked on to his home, a distance of six miles, and went to work sowing oats. He was apprehended and arrested that afternoon about 4 o'clock. After being taken to the jail, the owner of the car went up to the jail. He was a total stranger to defendant, but before he had said anything to defendant, defendant voluntarily remarked to him, "I didn't steal your car."

Defendant was first seen in possession of the car in the town of Busheyhead. At that time the car had been stopped near a lumber yard in said town, and defendant accosted a young man and asked him if he knew where he could get some oil for the car, and also some water. It was then very dark, and the stores were closed, but the young man found some oil and got water for the car for defendant, and this young man, desiring to go to Chelsea, got in the car and rode with defendant up to the place where he was afterwards apprehended. On the way up there, defendant drove the car at a very rapid speed, and remarked to this young man, "That's the

way I drive my car when I've got my girl in it."

The identity of defendant was ascertained through tracing the purchase of the shoes in Claremore, the fact that defendant had given a check in payment for the shoes being the means of identifying and locating him.

Defendant, as a witness in his own behalf, attempted to explain his possession of the automobile, and testified that when he was leaving Claremore, about 7:30 o'clock p. m., he was walking along the street towards the depot to take a train to Chelsea, and a white man who was a total stranger to him asked him where he was going, and he told this man that he was going to Chelsea, and the man told him, "Well, I am going to drive up there in this car, and you can go with me;" that he got in with this stranger and drove as far as Busheyhead, when a car with bright headlights was seen coming in the opposite direction; that as soon as this car was seen the stranger got out, and remarked that he was going up into the town of Busheyhead to get some oil for the car, and left defendant with it; that defendant waited about 30 minutes, and, the stranger not returning, defendant concluded he would get some oil for the car himself, and drive it on to Chelsea, where he was known, and leave it in a garage there, and that he was in the act of driving the car to Chelsea when he became stuck in the mudhole. Defendant also denied having any conversation with the young man concerning the car belonging to him (defendant), and about driving the car fast when he had his girl in it. Defendant also testified he had no recollection of having any conversation with Seward in which he denied stealing the car.

Some witnesses testified that defendant's previous reputation for honesty in the neighborhood in which he lived was good.

The foregoing is substantially the material evidence in the case.

[8] The rule in this state is that the presumption arising from the possession of recently stolen property, to wit, that the possessor is the thief, is one of fact, and not of law. If the possession is unexplained, or is unsatisfactorily explained, the evidence is sufficient to sustain a conviction for larceny, the inferences arising from such possession being for the jury to determine. *Davis v. State*, 7 Okl. Cr. 322, 123 Pac. 560.

[2] In this case defendant attempted to explain his possession of the stolen car, but his explanation is wholly unsatisfactory, and clearly incredible. An intelligent jury would hardly be expected to believe that a white man, who was a total stranger to defendant (a negro), would voluntarily accost him on a cold night in the middle of February and ask him where he was going, and as a result another unusual, if not remarkable, circumstance was the peculiar coincidence that this white stranger happened to be destined for

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the same place that defendant was headed for. Another very remarkable occurrence connected with defendant's possession of this car is the fact that after having stolen the car the white man would abandon it in the town of Busheyhead, and never return, and it is equally unbelievable that after waiting 30 minutes for the white man to return that defendant would, if innocent, continue in the possession of the car, supply it with oil and water, and continue on a journey toward his home without notifying a single person of his intentions; and again, the fact that he told the young man who rode with him from Busheyhead to the mudhole that he got the car in Tulsa, and intimated that it was his car, and also drove at a very rapid speed, are circumstances not consistent with innocence, and after his arrest the fact that he gave a fictitious name and again told the officers that he came from Tulsa, and attempted to escape, were all circumstances indicative of guilt; and the fact that on the next morning he returned to recover his shoes, the only link by which his identity could easily be ascertained, was another strong circumstance pointing to guilt.

We are of the opinion that the jury, from all the facts and circumstances, were authorized to conclude that the taking was felonious, and that defendant was the thief. Evidence of defendant's previous good reputation for honesty was properly admitted, and undoubtedly considered by the jury, especially, we think, in this case, in mitigation of the punishment, for the punishment assessed was imprisonment for a term of only one year, which is a very light sentence for the larceny of an automobile. While in some cases evidence of good character is sufficient to raise a reasonable doubt, and, in a case where the evidence against the accused is weak and unsatisfactory, may result in a reversal of a conviction, we do not consider this such a case. In truth, we believe the evidence here to clearly and unerringly establish the guilt of this defendant, and that if the jury made any mistake at all it was in not assessing a more severe penalty.

It is also contended that defendant, if guilty of any offense, was only guilty of a trespass, and should have been prosecuted under a special act of the 1917 Legislature (Laws 1917, c. 149), providing against defacing, injuring, molesting, or driving or attempting to drive any automobile for joy riding or any other purpose.

It was clearly a question of fact as to whether the automobile was taken in the first instance with a felonious intent to deprive the owner thereof. If that was true the offense was larceny, and not trespass, and as heretofore stated we think the evidence is amply sufficient to establish a felonious taking in this case. There is no evidence requiring the submission of any issue of variance between

allegations and proof. Nothing in defendant's testimony disclosed guilt of a different offense, and the state's evidence proved larceny.

[3] It is also contended that the court erred in refusing to give the following instruction:

"The explanation that has been offered in this case of the possession of the car and of how defendant was found in possession thereof is sufficient to overcome the presumption of guilt arising from the car being found in his possession."

This instruction was properly refused, as it amounts to a comment upon the weight of the evidence, and is a clear invasion of the province of the jury.

It is also contended that the court erred in refusing to charge the jury on the subject of the good character of defendant, coupled with the other circumstances attached with defendant's possession of the automobile.

[4] An examination of the instructions given discloses that the trial court gave a sufficient instruction on the subject of good character, and, further, the one requested on that subject was properly refused, because it amounted to a comment upon the weight of the evidence, and was also an invasion of the province of the jury.

The other assignments lodged against the instructions given are covered by what has heretofore been said concerning the sufficiency of the evidence.

It is also contended that the trial court erred in permitting the state, on rebuttal, to prove by the witness Seward that after defendant was arrested and in jail he voluntarily stated to Seward, "I never stole your car." We think this evidence was clearly admissible for purposes of impeachment. It was material to the issues in this: That defendant had denied any connection with the original taking of the automobile, and had attempted to explain his possession of it by testifying that he was accosted by a total stranger, a white man, and asked to ride, and that afterwards this white man deserted the car. The effect of defendant's testimony was, if believed, that he didn't know the owner of the car, nor where it had been taken. On cross-examination, defendant in effect denied any such conversation with Seward by claiming he did not remember. If defendant had seen Seward park his car in front of the hardware store, the inference would be that he knew Seward to be the probable owner of it, and if after his arrest he then recognized Seward and disclaimed having stolen the car without being informed that Seward was the owner of the car, such a statement was clearly contradictory of defendant's testimony that he had no knowledge of the original taking of the car, and therefore contradictory of his testimony that he met up with a stranger who was driving a car.

The testimony of defendant, therefore, as

we view it, made this evidence material and proper for purposes of impeachment. It is only in cases where the matters elicited on cross-examination as to contradictory statements are collateral that the party eliciting the same is bound by the answer. Where the subject-matter is material to the issue, and a denial of the statement is made by the witness, the subsequent impeachment of the witness is allowable. *Hartwell v. State*, 15 Okl. Cr. 416, 177 Pac. 383.

Finding no substantial merit in any of the grounds urged for the reversal of this judgment of conviction, the same is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

DE PRIEST v. STATE. (No. A-3698.)

(Criminal Court of Appeals of Oklahoma. Aug. 11, 1921.)

(*Syllabus by Editorial Staff.*)

Criminal law §1069(1)—Appeal must be perfected within six months.

Under Rev. Laws 1910, §§ 5992, 5997, all steps necessary to confer jurisdiction of an appeal on the Criminal Court of Appeals must be taken in a felony case within six months after the rendition of judgment in the trial court; otherwise the Court of Criminal Appeals does not acquire jurisdiction of the case, and the attempted appeal must be dismissed.

Appeal from District Court, Muskogee County; Chas. G. Watts, Judge.

Rufert De Priest was convicted of the crime of grand larceny, and sentenced to two years' imprisonment in the state penitentiary, and he appeals. Appeal dismissed.

Brook & Brook, of Muskogee, for plaintiff in error.

The Attorney General, for the State.

PER CURIAM. Plaintiff in error, Rufert De Priest, hereinafter referred to as defendant, was convicted in the district court of Muskogee county of the crime of grand larceny, and punishment fixed as above stated.

Defendant has attempted to appeal to this court from the judgment of conviction rendered against him in the trial court by filing in this court, on the 10th day of February, 1920, a case-made with petition in error attached. However, an examination of the record discloses that defendant, within the six-month period after the rendition of judgment, served no written notices of appeal upon the court clerk or county attorney of Muskogee county, as provided in section 5992, Revised Laws 1910; nor did he, within said six-month period, have any summons in error issued out of this court upon the Attorney General, or procure a waiver of the issuance and service of same by said officer, as provided in section 5997, Revised Laws 1910.

All steps necessary to confer jurisdiction of the appeal on this court must be taken in a felony case within six months after the rendition of judgment in the trial court. If the appeal is not properly perfected within the six-month period, this court does not acquire jurisdiction of the same, and the attempted appeal must necessarily be dismissed; and it is so ordered.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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SMITH et al. v. FIRST NAT. BANK OF ANADARKO. (No. 10798.)

(Supreme Court of Oklahoma. May 8, 1921.)

(Syllabus by the Court.)

1. Banks and banking ⇨262—Exceptions to statutory rule regarding management of national banking associations enumerated.

Section 5145, Revised Statutes of United States (U. S. Comp. St. § 9683), provides that the affairs of each national banking association shall be managed by not less than five directors, who shall be elected by the shareholders. This rule, however, is not without many exceptions. For instance, the vice president, cashier or other officer of the bank may act without the scope of his authority, and in a matter to which he is not authorized, and yet the bank may subsequently act in such a manner with reference to the particular transaction or subject-matter as to amount to a ratification of the unauthorized action of such officer, or it may take such affirmative action in accepting the benefits and fruits of the transaction as to preclude it from thereafter questioning or denying the authority of the officer to act for it. It may also remain silent and inactive at a time when good faith would have impelled it to have spoken up and disclaimed the unauthorized act of its officer. In these and many other instances that might be mentioned, the unauthorized action of such officer of the bank may become, in presumption and contemplation of law, the act of the bank itself.

2. Mines and minerals ⇨78(1)—Drilling operations held substantial compliance with terms of oil and gas lease.

The plaintiff executed an oil and gas lease on certain lands in section 20 for a term of five years from the date thereof, and as long thereafter as oil and gas, or either of them, should be produced from said land by the lessee. It was further provided that, unless actual operations for drilling were begun within 6 months from the date of the lease, and within 2½ miles of section 19 in the same township and range, and work prosecuted with due diligence until a well was completed, the lease should become null and void. After the execution of the lease, the same, together with a release, was deposited in escrow, with a letter of instructions signed by lessor and lessee, which provided that the release was to be held by the depositary for a period of 6 months; and if said lessee or his assigns failed to begin active drilling operations according to the terms of the lease within the period mentioned in the letter, the papers were to be returned to the lessor. The lessee transferred his entire interest in the lease to other parties, and afterwards, by assigning other leases to the Star Oil Company, induced the latter to drill the well within 2½ miles of section 19, and within the six months. *Held*, there was a substantial compliance with the terms of the lease and letter of instructions.

Appeal from District Court, Caddo County; Will Linn, Judge.

Action by the First National Bank of Anadarko against C. P. Smith and others, to cancel an oil and gas lease. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Asp, Snyder, Owen & Lybrand, of Oklahoma City, for plaintiffs in error.

Morris & Jameson, of Anadarko, for defendant in error.

PITCHFORD, J. This action was commenced in the district court of Caddo county, Okl., by the First National Bank of Anadarko, as plaintiff, against C. P. Smith, J. M. Hines, and the Indian Chief Oil & Gas Company, defendants, seeking to cancel and set aside a certain oil and gas lease covering the W. ½ of the N. E. ¼ of section 20, township 6 north, range 9 west, I. M., in Caddo county, Okl., and to quiet plaintiff's title in said lands so far as any alleged interest of the defendants by virtue of said oil and gas lease was concerned. The judgment of the lower court was in favor of the plaintiff, from which defendants appeal.

The lease involved was executed on the 29th day of February, 1916, and was to remain in force for a term of five years from the date of its execution, and as long thereafter as oil and gas, or either of them, should be produced from said land by the lessee.

It was further provided that if no well was commenced on the said land on or before the 1st day of March, 1917, the lease should terminate as to both parties, unless the lessee on or before that date should pay or tender to the lessor, or to the lessor's credit, in the First National Bank at Anadarko, or to its successor, the sum of \$80, which would operate as a rental and cover the privilege of deferring the commencement of a well for 12 months thereafter, and in like manner and upon like payments or tenders the commencement of a well might be further deferred for like period of the same number of months successively.

It was further provided that, unless actual operations for drilling were begun within 6 months from the date of the lease, and within 2½ miles of section 19, township 6 north, range 9 west, and work prosecuted with due diligence until a well was completed, the lease should become null and void.

The lease, with a release, was placed in the Farmers' State Bank of Cement, Okl., in escrow, together with a letter of instructions. The material clauses contained in the letter of instructions are as follows:

"(1) The lease is to be held by you until active drilling operations have been begun according to the terms of said lease, not longer than 6 months from this date, in which event you are authorized to deliver same to the lessee or assigns.

"(2) The release is to be held by you for a

period of 6 months from this date, and, if said lessee or his assigns fail to begin active drilling operations according to the terms of said lease within this period, you are authorized to return or deliver both the lease and the release of same to the lessor. Should the lessee or his assigns, after drilling operations have been begun, fail to prosecute same to completion and in good faith, then you are authorized to deliver the aforesaid release to the First National Bank of Anadarko, Okl., lessor."

The main grounds relied upon by the plaintiff, seeking the cancellation of the lease, are two: First, that there was no authority shown for the execution of the lease by vice president and cashier of the plaintiff bank; and, second, that the letter of instructions confined the drilling of the well within two and one-half miles of section 19 to lessee Smith, or his assigns of the lease in controversy.

After hearing the evidence, the court made the following findings of fact and conclusions of law:

"(1) That the lease entered into between the plaintiff and the defendant C. P. Smith was in form and contents as set out in Exhibit A, attached to the plaintiff's petition.

"(2) That said lease was by the lessor and lessee deposited in escrow with the Farmers' State Bank of Cement, Okl., the escrow instructions accompanying which were in form and contents with those set out in Exhibit B, attached to plaintiff's petition.

"(3) That active operations for the drilling of a well were not begun by C. P. Smith nor by his assignee of this lease within six months from the date thereof, and within $2\frac{1}{2}$ miles of section 19, township 6 north, range 9 west I. M.

"(4) That C. P. Smith, being the owner of a number of oil and gas leases within $2\frac{1}{2}$ miles of section 20, township 6 north, range 9 west, I. M., in Caddo county, Okl., assigned or caused to be assigned to the Oklahoma Star Oil Company leases covering an aggregate of approximately 1,800 acres to procure the said Oklahoma Star Oil Company to locate and drill a well which it contemplated drilling in the Cement field, but outside the territory last above referred to, and upon which well commonly known as the Kuntzmiller well, active operations for drilling were begun within 6 months from the date of said lease by the Oklahoma Star Oil Company, and said well was by said Oklahoma Star Oil Company prosecuted with due diligence until the same was completed as an oil well producing oil in paying quantities."

Upon the foregoing findings of fact, the trial court decided the case in the following words:

"Wherefore the court concludes as a matter of law that under the terms of the contract existing between the plaintiff and defendant C. P. Smith and his assignees the obligation rested upon the said C. P. Smith or his assignees of this identical lease to begin active operations for drilling within 6 months from the date of said lease and within $2\frac{1}{2}$ miles from said section 19, township 6 north, range 9 west, I. M.,

and that because of the failure of the said C. P. Smith or his assignees of this identical lease to so begin within 6 months, said lease became null and void at the expiration of said 6 months from the date thereof.

"It is therefore ordered, adjudged, and decreed by the court that the title of plaintiff be quieted in and to the following described real estate lying and situated in Caddo county, Okl., to wit:

"The west half of the northeast quarter of section 20, in township 6 north, range 9 west I. M."

The court made no finding as to the authority of the vice president to execute the lease, but, regardless of any finding on this point, inasmuch as plaintiff had instituted an action for the purpose of canceling a lease which purported to have been made by the plaintiff bank, the burden was on the plaintiff to show lack of authority on the part of L. W. Myers, vice president, and I. B. Cox, the cashier, to act for the bank. In the absence of any evidence in the record to the contrary, we indulge in the presumption that the trial court had sufficient evidence before it to show that the lease was either authorized by the plaintiff, or that the act of the vice president was ratified, as the judgment failed to cancel the lease on this ground. The plaintiff having alleged in its petition lack of authority for the execution of the lease, and this allegation being denied by the defendants, the burden of the issue was cast upon the plaintiff. It is not claimed that all of the evidence has been set out in the record. The certificate of the trial judge shows that the record only contains a true and correct transcript of a certain portion of the evidence of C. P. Smith.

[1] Section 5145, Revised Statutes of United States (U. S. Comp. St. § 9683), provides that the affairs of each national banking association shall be managed by not less than five directors, who shall be elected by the shareholders.

Plaintiff contends that, under the provisions of this statute, and the decision of the courts construing the powers and authority of officers of national banking associations, the vice president and the cashier in the case at bar had no power to enter into a contract for the leasing of the premises in question, unless they had been authorized to do so by a vote of the directors of the bank. This may well be accepted as the general rule of law applicable in such cases, but there are exceptions to this rule.

In *Spongberg v. First National Bank of Montpellier*, 18 Idaho, 524, 110 Pac. 716, 31 L. R. A. (N. S.) 736, Ann. Cas. 1912A, 95 the court in a very able and exhaustive opinion treats the question as follows:

"This rule, however, is not without a great many exceptions. For instance, the cashier or other officer of the bank may act without the scope of his authority, and in a matter to

which he is not authorized, and yet the bank may subsequently act in such a manner with reference to the particular transaction or subject-matter as to amount to a ratification of the unauthorized action of the cashier or other officer, or it may take such affirmative action in accepting the benefits and fruits of the transaction as to preclude it from thereafter questioning or denying the authority of the officer to act for it. It may also remain silent and inactive at a time when good faith would have impelled it to have spoken up and disclaimed the unauthorized act of its officer. In these and many other instances that might be mentioned, the unauthorized action of the cashier or other officer of the bank may become, in presumption and contemplation of law, the act of the bank itself"—citing *Zane on Banks and Banking*, par. 105; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49.

Judgment for plaintiff was rendered, canceling the lease, not for lack of authority in its execution, but for failure on the part of the lessee or his assigns to comply with the second clause of the letter of instructions.

The trial court strictly construed this clause, and held that, because the well had not been drilled within $2\frac{1}{2}$ miles of section 19 by Smith, the lessee, or by his assigns of the lease in controversy, the same should be canceled. What the plaintiff desired and required was a well within $2\frac{1}{2}$ miles of section 19.

Plaintiff owned 160 acres of land in section 20; the lease executed to Smith covered 80 acres of this 160. If the well within $2\frac{1}{2}$ miles of section 19 was drilled, and proved to be a paying well, then the remaining 80 acres owned by plaintiff in section 20 would thereby be enhanced in value, and, as a result, plaintiff would secure all the advantages expected by this clause.

[2] The evidence is that Smith owned a large number of leases in the vicinity of section 19, covering something like 1,800 acres, and assigned a number of these leases to the Star Oil Company, and by so doing induced the Star Oil Company to drill the well within $2\frac{1}{2}$ miles of section 19 and within the time specified. The transactions leading up to the execution of the lease were had between I. E. Cox, cashier of the plaintiff bank, and C. P. Smith, the lessee. The execution of the lease by Myers, vice president, and Smith, was attested by I. E. Cox. Some time after the well had been brought in, Smith, in company with a representative of one of the assignees, requested Mr. Cox to notify the Farmers' State Bank of Cement, Okl., to deliver the lease. This request was refused by Mr. Cox, who stated at the time that if this demand had been made at the expiration of the 6 months the lease would have been delivered, but he supposed that as it had not been called for at that time he had decided that the lessees did not want it. At that time, it was stated to Mr. Cox that the terms of the lease

had been complied with. This he did not deny, but refused to order the delivery of the lease, and gave as a reason for his refusing that the well had not been drilled as contemplated by the parties.

We fail to see wherein there is any ambiguity in the letter of instructions, but, conceding that there is, what did the parties have in mind at the time the lease was executed? A paying well within $2\frac{1}{2}$ miles of section 19 would be worth as much to the plaintiff whether the same was drilled by the lessee Smith, his assignee, or by the Star Oil Company.

It is a well-settled principle of law that he who does a thing through another does it himself, and, when Smith by assigning leases to the Star Oil Company induced the latter to drill what was known as the Kuntzmiller well, the second clause of the letter of instructions was fully complied with.

Section 943, Revised Laws 1910, provides that:

"A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Section 951, *Id.*, reads as follows:

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."

We therefore conclude that the judgment of the trial court should be reversed.

The defendants contend in their brief that it will not be sufficient to protect their rights to merely reverse the cause and send it back for new trial. They claim that this court can by its judgment and its decree do final and complete justice between the parties; that this action was begun on January 17, 1918, and that there were more than three years of the term of the lease unexpired at said date, and that the litigation precipitated by the plaintiff bank has entirely destroyed, for the time being, the value of said lease, either as a salable commodity, or as the basis of the organization of development capital; and ask that, in the event the judgment of the trial court is reversed, and in order that complete justice be done, plaintiff be directed to execute a new lease with like terms and covenants as in the original contract, extending the lease for a term equivalent to the time occupied by this litigation; and, if this relief is not granted, then that a decree be entered, giving the defendants a reasonable time after this litigation is ended in which to explore and develop the premises under the terms and provisions of the lease. On this question counsel have failed to cite any authority, nor have we been able to find where this identical point has ever been passed upon by any of the courts.

The lease, as we have seen, was executed

on the 29th day of February, 1916, and was to remain in force for the term of five years from the date of its execution, and as long thereafter as oil and gas, or either of them, should be produced from said land by the lessee.

We decline to express any opinion as to whether or not there is any merit in this contention. We simply reverse the judgment of the trial court and remand the cause. If the defendants have any remaining rights, either equitable or legal in the premises, the same can be fully protected by proper proceedings in the court of original jurisdiction.

All the Justices concur.

BOATRIGHT v. STATE. (No. A-3682.)

(Criminal Court of Appeals of Oklahoma.
May 26, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 1069(1), 1099(6) — Order extending time to serve case-made does not extend time for appeal; order extending time to serve case-made should specify time for appeal.

An order made by a trial court extending the time within which to make and serve a case-made does not automatically extend the time within which to file the appeal. All such orders should cover both the time within which to make and serve case-made and the time within which to file the appeal, as provided in section 5991, Rev. Laws 1910.

2. Criminal law \S 1079, 1081 — Manner of perfecting appeal stated.

An appeal, when taken by the defendant from any judgment against him, is perfected by service of a notice upon the court clerk where the judgment was entered, stating that the appellant appeals from the judgment, and by the service of a similar notice upon the county attorney (section 5992, Rev. Laws 1910), or by summons in error upon the Attorney General, unless the same is waived as in other cases (section 5997, Rev. Laws 1910), and where appellant, within the time allowed for taking an appeal, serves no notice of appeal upon the court clerk or county attorney, and no summons in error was issued and served upon the Attorney General, nor any waiver of the issuance of service ever made by him, or any general appearance entered by him, this court has no jurisdiction to entertain the appeal on its merits, and will dismiss it.

Appeal from County Court, Johnston County; O. M. Crowell, Judge.

John F. Boatright was convicted of a violation of the Prohibitory Liquor Law, and he appeals. Appeal dismissed.

Cornelius Hardy, of Tishomingo, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, John F. Boatright, was convicted on a charge that he did unlawfully have in his possession about 35 gallons of intoxicating liquor, to wit, Jamaica ginger, with the unlawful intent to sell the same. From this judgment the defendant attempted to perfect an appeal by filing in this court on January 10, 1920, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal for the following reasons:

"That judgment in said action was rendered on the 4th day of October, 1919, and that the appeal from said judgment was not lodged in this court until January 10, 1920, which was more than 60 days from the date of the rendition of said judgment, and it does not appear from the record that the trial court extended the time in which such appeal might be taken."

The statute provides:

"In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered: Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days." Section 5991, Rev. Laws.

The record shows that extensions were secured from the trial court in which to make and serve a case-made, but no order was made extending the time fixed by the statute to file the appeal in this court.

[1] In *Pinchback v. State*, 14 Okl. Cr. 302, 170 Pac. 714, this court held:

"An order made by a trial court extending the time within which to make and serve a case-made does not automatically extend the time within which to file the appeal. All such orders should cover both the time within which to make and serve case-made and the time within which to file the appeal, as provided in sections 5991 and 6007, Rev. Laws 1910. Both these sections must be complied with."

And see *Stumpf v. State*, 6 Okl. Cr. 161, 117 Pac. 648; *Hynean v. State*, 6 Okl. Cr. 341, 118 Pac. 616.

[2] The record shows merely a waiver by the county attorney of the issuance and service of summons in error. This is not sufficient to give this court jurisdiction. In *Burgess v. State*, 18 Okl. Cr. —, 197 Pac. 173, this court held:

"Where appellant, within the time allowed for taking an appeal, served no notice of appeal upon the clerk of the court or county attorney, as provided by Rev. Laws 1910, \S 5992, and no summons in error was issued and served upon the Attorney General, nor any

waiver of the issuance and service ever made by him, within section 5997, or any general appearance entered by him, the Criminal Court of Appeals has no jurisdiction to entertain the appeal on its merits, and will dismiss it."

For the reasons stated, the motion to dismiss the appeal is sustained, and accordingly the appeal is dismissed.

MATSON and BESSEY, JJ., concur.

SAXON v. STATE. (No. A-3653.)

(Criminal Court of Appeals of Oklahoma.
May 21, 1921.)

(Syllabus by the Court.)

1. Indictment and information \S 52(1), 161 (5)—Amended information in misdemeanor case need not be reverified; amendment held formal merely.

Where an information in a misdemeanor case is amended by interlineation before trial by leave of court in a formal manner only, so that the amendment did not change the material allegations of the information to such an extent as to prejudice the substantial rights of defendant on the trial, the amended information need not be reverified, and, where the original information was verified by the positive oath of the complaining witness, it was not error for the trial court to overrule a motion to quash the amended information based on the ground of no sufficient verification.

2. Indictment and information \S 132(2)—Prosecuting attorney may elect as to which offense he will prosecute.

It is discretionary with the prosecuting attorney, either before instituting the prosecution or before trial, to elect for which offense he will prosecute the accused, where the available evidence shows the commission, by the same act or transaction, of more than one offense.

Appeal from County Court, Nowata County; R. M. Godfrey, Judge.

Troup Saxon was convicted of pointing a weapon at another, and he appeals. Affirmed.

Bert Van Leuven, of Nowata, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the county court of Nowata county, wherein plaintiff in error, Troup Saxon, hereinafter referred to as defendant, was convicted of the offense of pointing a weapon at another, and sentenced to pay a fine of \$250 and to be imprisoned in the county jail for a period of three months.

It is first contended that the trial court erred in permitting the county attorney to amend the information by interlineation, changing the word "revolver" to that of "gun," without requiring the information to be reverified. The original information charged defendant with having pointed a revolver at one Dawson, and the information as amended charged defendant with pointing a gun at Dawson.

The statute on which this prosecution is based reads as follows:

"It shall be unlawful for any person to point any pistol or any other deadly weapon, whether loaded or not, at any other person or persons, either in anger or otherwise." Section 2553, Revised Laws 1910.

Section 5695, Revised Laws 1910, provides:

"An information may be amended in matter of substance or form at any time before the defendant pleads, without leave, and may be amended after plea on order of the court where the same can be done without material prejudice to the right of the defendant; no amendment shall cause any delay of the trial, unless for good cause shown by affidavit."

The record discloses that the original information was filed on the 26th day of July, 1919; that it was verified by the positive oath of the complaining witness, E. W. Dawson. That on said date defendant appeared in person, was furnished a copy of the information, was arraigned, and pleaded not guilty to the charge. That thereafter defendant, on the 8th day of September, 1919, asked permission of the court to withdraw his plea of not guilty and file a demurrer to the information and a motion to quash the same. Such permission was granted, and the demurrer and motion to quash were each overruled; whereupon, on the same date, defendant waived arraignment and pleaded not guilty. Also, on said 8th day of September, 1919, the county attorney asked leave to amend the information by interlineation, by changing the word "revolver" to the word "gun," which leave was granted over objection and exception of defendant, and defendant was then thereupon granted permission to refile his demurrer and motion to quash information, which motion to quash was overruled.

Thereafter, on the 10th day of September, 1919, the cause was called for trial, and defendant appeared in person and by attorney, and both state and defendant announced ready for trial, and each side introduced their evidence and rested, and the cause was submitted to the jury, which returned a verdict of guilty, but failed to assess the punishment. Thereafter, on the 15th day of September, 1919, after having overruled defendant's motion for a new trial and motion in arrest of judgment, the trial court sentenced

defendant to imprisonment in the county jail for a period of three months, and to pay a fine of \$250.

In the case of *French et al. v. State*, 190 Pac. 707, this court held:

"Where the amendment to the information is one of form only, not changing the nature of the charge to the material prejudice of defendant's rights; it may be made after plea entered, or after the cause is called for trial, or after the jury is impaneled."

In the same case, it is also held:

"Where the amendment is one of substance, it is, however, necessary in a misdemeanor case that the information be reverified."

It follows from the holding in the *French Case*, supra, and from prior decisions of this court to like effect, that in a misdemeanor case, if the information is amended in substance, it is necessary, where such defect is not waived, that the information be reverified.

The motion to quash specifically attacked the sufficiency of the verification of the amended information, and if the amendment made was one of substance the trial court erred in overruling the motion to quash.

[1] However, on the other hand, if the amendment was only formal, and did not change the material allegations of the information to such an extent as to prejudice the substantial rights of defendant on the trial, there was no necessity of a reverification of the information, and the action of the trial court in overruling the motion to quash was not erroneous.

A consideration of the statute upon which this prosecution is based, together with the statute permitting amendments to informations, convinces us that the amendment made in the instant case was merely formal, and did not change the material allegations of the information to the prejudice of the substantial rights of the accused. *State v. Flinn*, 31 La. Ann. 408.

It is also contended that the trial court erred in refusing to give the following instruction:

"You are instructed that the words 'pointing a gun' as used in the statute, mean and are synonymous with the words 'aiming a gun,' and the using of a gun with which to commit an assault and battery upon or beat up another does not constitute an offense under this statute."

[2] It is contended that there is no evidence to show that the gun was pointed as contemplated by the statute, but was used as a club or bludgeon with which to commit an assault and battery upon prosecuting witness. With this contention we cannot agree. We think the evidence shows that the gun was both pointed at the prosecuting witness, and was used also as a bludgeon. It was

discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense. This principle is elementary. However, there could be no conviction of an offense other than that charged, or a lower degree thereof, or of an offense necessarily included therein, although the evidence may disclose the fact of defendant's guilt, by the same acts, of an offense not charged or included within the charge.

Judgment affirmed.

DOYLE, P. J., and BESSEY, J., concur.

McKINNEY v. STATE. (No. A-3796.)

(Criminal Court of Appeals of Oklahoma.
May 25, 1921.)

(Syllabus by Editorial Staff.)

1. Larceny \S 55—Evidence insufficient to sustain conviction of larceny by fraud.

Evidence in a prosecution for grand larceny by fraud held insufficient to sustain a conviction.

2. Criminal law \S 419, 420(1)—Hearsay evidence held inadmissible.

In prosecution for grand larceny of the proceeds of cotton, evidence as to the weight of cotton in the field, when it appeared that the parties only weighed a portion of the cotton, and that the remainder was weighed by other parties, and reported to them, held hearsay and inadmissible.

Appeal from District Court, Wagoner County; Benjamin B. Wheeler, Judge.

John McKinney was convicted of grand larceny, and he appeals. Reversed.

S. M. Rutherford and Branson & Alcorn, all of Muskogee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for the State.

PER CURIAM. The information in this case charged that plaintiff in error, John McKinney, together with O. C. McKinney, H. L. Armstrong, D. M. Brown, Roy Vann, and Ella Nicodemus, did commit the crime of grand larceny in that they did willfully, wrongfully, unlawfully, and feloniously take, steal, and carry away by fraud, without the consent and against the will of the true owners, the sum of \$27.40, arising out of the sale of cotton by Ike Willis to C. H. Kingham and E. F. Case, partners, doing business under the firm name of Kingham & Co., said money being the personal property of said Kingham & Co.

A severance was granted, and upon his separate trial the jury found the defendant, John McKinney, guilty of the crime of grand larceny by fraud, as charged in the information, but failed to agree upon the punishment. After the overruling of the motion for a new trial, and a motion in arrest of judgment, defendant was sentenced to imprisonment in the penitentiary for the term of two years and six months. He appeals from the judgment.

[1, 2] The Attorney General has filed the following confession of error:

"To constitute larceny by fraud, it is contended by plaintiff in error, the taking must be accomplished by the party charged from the owner of property, in which the owner voluntarily parts with possession only, but retains the right of property in the subject-matter, and that the design to convert the property to the use of the taker, or some one else, must be active at the time of the taking. In other words, the owner must part with the possession of the property alone, reserving the ownership therein, and the possession must be fraudulently obtained with the then intent on the part of the person taking it to convert it to his own or another's use, in order to constitute the offense of larceny. If the owner parts with both possession and title, due to the deception and artifice of the taker, then the offense constitutes obtaining money under false pretense, and not larceny by fraud. The rule laid down in this connection by Mr. Russell, in his work on Crimes, quoted in note to *Buck v. State*, 2 Am. & Eng. Ann. Cas. 1010, is as follows: 'If, by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with, not only the possession of the goods, but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses.'

"The syllabus of the case reads: 'If one obtains possession of the property of another by fraud, and the owner intends to part with the title as well as the possession, the offense is that of obtaining property by false pretenses; but if the possession is fraudulently obtained, with intent on the part of the person obtaining it to convert it to his own use, and the owner intends to part with the possession merely, and not the title, the offense is larceny.'

"Larceny by fraud has been defined by this court in the case of *Bivins v. State*, 6 Okl. Cr. 521, 120 Pac. 1033, quoting: 'Where the owner of personal property voluntarily parts with the possession of the same for a particular purpose, and the person who receives the possession avowedly for that purpose has at the time a fraudulent intention to make use of such possession as a means of converting the property to his own use, and does so convert it, the crime is larceny.'

"In the instant case, the owner parted with his money for a distinct purpose, i. e., that of having it applied to the payment for a specified number of pounds of cotton—not so many

pounds of cotton and so many pounds of some other substance. Suppose the cotton buyer had intrusted the defendant with his check book for the purpose of buying cotton and defendant had, at the time, the intention to pay owners of the cotton for water or other foreign substance contained therein, then the offense certainly would amount to larceny by fraud under the rule in the *Buck Case*. The basic facts are not different in the instant case. The offense is larceny.

"After carefully reviewing the testimony in the case, the writer is of the opinion that the evidence upon which a conviction was had is the testimony of the farmer who weighed his cotton in the field, kept it dry until marketed at the gin of defendant, and that, upon weighing same at the gin, it weighed 212 pounds more than in the field, for which excess weight he obtained the sum of money alleged to be the subject of the larceny in this case. This testimony is undisputed. There is no testimony, however, in the entire record which, by circumstance or otherwise, connects the defendant, John McKinney, with the transaction in question, and there is no evidence that he instructed the overweight, or had knowledge thereof. The court instructed the jury on circumstantial evidence, and the only circumstances shown in the case are the marketing of the cotton in question, which was overweighted at the gin, and in addition thereto, the testimony of a number of other farmers whose cotton was overweighted at the same gin during the same season. This latter testimony was introduced to show intent. The prosecuting witness, Kingman, also testified that he lost money up to the time a new weigher was placed in charge of the scales at the gin, by order of the corporation commission, and that after that time he ceased to lose. This, in substance, constitutes the complete testimony of the state against the defendant, and in the opinion of the Attorney General, the same is insufficient to support a verdict of guilty under the rule announced by the court, that, if there is any evidence reasonably tending to support the verdict of the jury, it will not be disturbed. If there was slight evidence even remotely connecting the defendant with knowledge of the intention to overweigh the cotton, and to aid in fraudulently obtaining for the owner of the cotton the money of the cotton buyer, the verdict could stand on the facts, but, in the absence of even slight testimony on this point, we think there is a lack of proof.

"The court permitted parties to testify, over the objection of defendant, in the trial as to weight of cotton in the field, when the facts show that the parties only weighed a portion of the cotton, and that the remainder was weighed by other parties, and reported to them, and upon that basis they testified to the difference in weight in the field and at the gin. This, we think, was purely hearsay testimony, and erroneously admitted."

After a careful examination and consideration of the record, we are of the opinion that the confession of error is well founded, and should be sustained. The judgment of the trial court is therefore reversed.

SMISER v. STATE. (No. A-3685.)

(Criminal Court of Appeals of Oklahoma.
May 25, 1921.)

(Syllabus by the Court.)

1. Criminal law §1099(6)—District judge assigned to hold court outside district not authorized to grant extension of time to prepare case-made.

A district judge, who has been assigned by order of the Chief Justice to hold court in a county outside of the district in which he is elected, has no authority, after the expiration of the time fixed in the order assigning him to hold court in said county, to grant an extension of time in which to prepare and serve case-made, in a case tried before him while lawfully holding court in such county.

2. Criminal law §1102—Case-made not served within time fixed will be stricken.

Where the case-made is not prepared and served within the time fixed by a valid order of the court or judge, the same will be stricken and the appeal considered on transcript of the record when such a transcript is attached to petition in error, and the appeal is perfected within the statutory period.

3. Criminal law §1088(1)—Papers constituting record on appeal enumerated.

The record proper includes the following papers: (1) The indictment and copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given and refused; (4) a copy of the judgment.

4. Criminal law §1122(3) — Instructions involving evidence cannot be considered on appeal where evidence not before court.

Where the alleged errors in the giving of and refusal to give requested instructions involve a consideration of the evidence, and the evidence is not before the court in the appeal, the appellate court cannot determine the merits of the trial court's action in such respects.

5. Criminal law §1122(4), §1163(1)—Injury as well as error necessary to reverse.

It is well established that error alone is not sufficient to authorize the reversal of a judgment of conviction in a criminal cause under the statutory provisions of this state, but error plus injury is required, and the burden is upon the appellant to affirmatively establish that the error, if any, was prejudicial to his substantial rights.

Appeal from District Court, Atoka County; A. A. McDonald, Assigned Judge.

Garnett Smiser was convicted of manslaughter, and he appeals. Affirmed.

J. G. Ralls, of Atoka, for plaintiff in error.
S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Garnett Smiser, attempts to appeal from a judgment of conviction of manslaughter rendered

against him in the district court of Atoka county on the 18th day of July, 1919. The attempted appeal is lodged in this court by filing on the 15th day of January, 1920, a purported case-made, and also a duly certified transcript of the record, with petition in error attached.

The Attorney General has filed a motion in effect to strike the case-made and consider the appeal on the transcript alone. The Attorney General's motion is as follows:

"It is disclosed by page 7 of the case-made that this case was tried before Hon A. A. McDonald, judge of the district court of the Twenty-Seventh judicial district of this state, under an order of the Chief Justice to hold court at Atoka in the Twenty-Sixth district for two weeks beginning Monday, July 7, 1919, and including Saturday, July 19, 1919. Judgment was rendered and a motion for a new trial overruled on July 18, 1919. (Record, 215.) In the order overruling the motion for a new trial plaintiff in error was given 90 days from that date in which to prepare and serve case-made, and the 90 days expired on the 16th day of October, 1919. The case-made was not served upon the county attorney or upon counsel for the state until the 29th day of October, 1919 (Record, 225), which was 13 days after the time allowed had expired. On page 222 of the record is a purported order to extend the time in which to have the case-made prepared, which order is entered on October 1, 1919, giving plaintiff in error until November 1st of that year in which to prepare and serve case-made, and which order was signed by Judge McDonald.

"It is our contention that this order attempting to extend the time in which to prepare and serve case-made is a nullity for the reason that Judge McDonald had no authority to sign the same. This court in numerous cases has laid down the rule that the regular judge of the district court, and not a judge pro tempore, is the only judge who may extend the time in which to prepare and serve case-made, and that an extension made by a judge pro tempore is void. *Raspberry v. State*, 4 Okl. Cr. 613, 103 Pac. 865; *Steen v. State*, 5 Okl. Cr. 295, 114 Pac. 343; *Dobbs v. State*, 5 Okl. Cr. 475, 114 Pac. 358, 115 Pac. 370; *Johnston v. State*, 6 Okl. Cr. 354, 118 Pac. 674.

"On page 226 of the record is a certificate of the court clerk to the effect that the record is a true transcript of the pleadings, motions, and proceedings had in the cause. Therefore the only matters in the record which may be properly considered by this court are the indictments, the court minutes of the trial, the instructions given by the court, the indorsements thereon, if any, the verdict of the jury, and a copy of all orders and judgments of the court on the case. *Jones v. State*, 9 Okl. Cr. 189, 130 Pac. 1178."

Counsel for defendant has replied to the motion, and, while admitting that the assigned trial judge made an order attempting to extend the time in which to serve the case-made after his term as assigned judge had expired for holding court in Atoka coun-

ty under the order of the Chief Justice of the Supreme Court, nevertheless counsel contends, under authority of *Curlee et al. v. Ruland*, 47 Okl. 519, 149 Pac. 1149, the assigned judge, being a regular district judge and a state officer, had authority and jurisdiction to make said order.

The case of *Curlee et al. v. Ruland*, supra, is not directly in point, but has reference to the authority of an assigned judge to sign, settle, and certify to the correctness of a case-made in a cause tried before him, while assigned to hold court in another district than his own and after the expiration of the time fixed by the Supreme Court for holding court in the outside district.

It is evident from the decision in *Curlee et al. v. Ruland* that the Supreme Court makes a distinction as to the authority of an assigned district judge to sign, settle, and certify to the case-made after the expiration of the time fixed for holding court in the district other than his own, and the authority of such judge to grant additional extensions of time to make and serve case-made after the expiration of the time fixed in the order of the Supreme Court; for, in speaking of the case of *Dobbs v. State*, 5 Okl. Cr. 490, 114 Pac. 358, 115 Pac. 370, decided by this court, the Supreme Court in the body of the opinion in the *Curlee Case* say:

"The precise question decided in that case [*Dobbs Case*] was that the trial judge, who had been assigned to hold court outside of his district, after he had vacated the bench, and after an order allowing an extension of time made by him had expired, was without power to grant an additional extension of time to make and serve case-made, which holding is in harmony with the former decisions of this court."

In the later case of *First National Bank of Mountain Park v. School District No. 65, Tullman County*, 63 Okl. 233, 164 Pac. 102, the Supreme Court, speaking by Hardy, Justice (the justice who wrote the opinion in *Curlee et al. v. Ruland*, supra), held:

"A district judge who has been assigned by order of the Chief Justice to hold court in a county outside of the district in which he is elected has no authority, after the expiration of the time fixed in the order assigning him to hold court in said county, to grant an extension of time in which to prepare and serve case-made, in a case tried before him while lawfully holding court in such county."

To the same effect is the decision of the Supreme Court in *Osborne v. Chicago, Rock Island & Pacific Railway Co.*, 45 Okl. 817, 147 Pac. 301.

[1] The decisions of this court and of the Supreme Court both support the contention of the Attorney General that the assigned judge was without authority, after the expiration of the time fixed in the order assigning him to hold court in Atoka county, to grant an extension of time in which to

prepare and serve a case-made. These decisions were rendered long prior to the time the purported order made by the assigned judge extending the time for such service was entered in the instant case.

[2] The motion of the Attorney General to strike the case-made is therefore sustained, and the purported case-made is stricken from the files.

This leaves the appeal to be considered upon the transcript of the record alone.

[3] The record proper only includes the following papers: (1) The indictment and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given or refused and the indorsements, if any, thereon; (4) a copy of the judgment. Section 5960, Revised Laws 1910; *Reed v. U. S.*, 2 Okl. Cr. 652, 103 Pac. 371; *Humphrey v. State*, 3 Okl. Cr. 506, 106 Pac. 978, 139 Am. St. Rep. 972; *Day v. State*, 7 Okl. Cr. 276, 123 Pac. 436.

The only matters in the record, therefore, which may be properly considered by the court under this appeal are the foregoing papers, which constitute the record proper. *Day v. State*, supra.

Counsel raise no question involving a consideration of the information or judgment or anything that could be raised as shown by the minutes of the trial. Counsel do, however, contend that the trial court erred in giving certain instructions in the general charge to the jury, and in refusing to give other instructions requested by counsel for defendant.

[4] An examination of the record discloses that counsel for defendant requested the court to give certain instructions on abstract propositions of law involving the principles of reasonable doubt and the presumption of innocence. An examination of the record also discloses that these questions were properly and sufficiently covered in the general charge.

Counsel for defendant also requested the trial court to give an instruction upon circumstantial evidence. If the conviction were based solely upon circumstantial evidence, the refusal to give this instruction would have been erroneous. *Rutherford v. U. S.*, 1 Okl. Cr. 194, 95 Pac. 753; *Matthews v. State*, 8 Okl. Cr. 676, 130 Pac. 125.

On the other hand, were the evidence not entirely circumstantial, the refusal to give this instruction would not have been erroneous. *Hendrix v. U. S.*, 2 Okl. Cr. 240, 101 Pac. 125; *Price v. State*, 9 Okl. Cr. 359, 131 Pac. 1102; *Star v. State*, 9 Okl. Cr. 210, 131 Pac. 543.

In any event the question involves a consideration of the evidence, and, as the evidence is not before us in this appeal, we necessarily are precluded from a determination of the merits of the court's action in this respect.

It is also contended that the trial court

erred in giving a certain instruction relative to the law of self-defense. The particular instruction complained of apparently places too great a burden upon defendant to substantiate the defense of self-defense, and for that reason is not a correct statement of the law on that subject, and in a case where self-defense was relied upon and there was evidence to substantiate the same, the giving of the instruction over the objection and exception of defendant would be reversible error.

However, the Legislature of this state, by section 6005, Revised Laws 1910, has absolutely stripped this court of authority to reverse a judgment of conviction "on the ground of misdirection of the jury, * * * unless, in the opinion of the court, * * * after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

Even if the defense of self-defense were interposed, and defendant's own evidence disclosed that he was guilty of the crime for which he was convicted, this court has repeatedly refused to reverse such a conviction because of errors in the instructions. *Fitzsimmons v. State*, 14 Okl. Cr. 80, 166 Pac. 453; *Maynes v. State*, 6 Okl. Cr. 487, 119 Pac. 644.

It follows, therefore, that in order to give effect to section 6005, supra, in dealing with the question of whether or not the giving of the instruction complained of constituted reversible error, the court would have to consider the transcript of the evidence to determine whether or not the trial probably resulted in a miscarriage of justice, or whether or not there was any substantial merit in the defense interposed. Without the record of the evidence before us, a determination of the merits of this question would be merely speculative.

Giving an erroneous instruction on self-defense would not constitute reversible error where there was no evidence to authorize even the giving of an instruction on self-defense (*Smith v. State*, 14 Okl. Cr. 250, 174 Pac. 1107), as in the foregoing case this court held that it was proper even to refuse an instruction on the law of self-defense where there was no evidence to warrant its giving.

Supposing, as heretofore stated, that defendant's own evidence disclosed his guilt of the crime, an erroneous instruction on self-defense would not be prejudicial. Supposing again that there was no evidence to authorize the giving of an instruction of self-defense, it is equally apparent that an erroneous instruction on that subject would not be prejudicial.

[5] It is well established that error alone is not sufficient to authorize the reversal of a judgment of conviction in a criminal cause

under the statutory provisions of this state, but error plus injury is required, and the burden is upon the appellant to affirmatively establish that the error, if any, was prejudicial to his substantial rights. Without the evidence before us in this case, we cannot say that there could be no supposed state of the evidence, under the issue of self-defense, which would render the giving of the instruction complained of harmless. The burden is on defendant to show that under the issues the instruction complained of was not only erroneous, but in addition thereto prejudicial to him.

Having failed to properly bring this cause before the court by case-made, the court is not empowered to construe the instruction as applied to the evidence; and under the circumstances, therefore, by reason of the existing statutes of this state, considering the appeal upon the transcript of the record alone, the judgment must be affirmed.

It is so ordered.

MATHEWS v. STATE. (No. A-3326.)

(Criminal Court of Appeals of Oklahoma.
April 7, 1921. Rehearing Denied
June 13, 1921.)

(Syllabus by the Court.)

1. Criminal law §99—Where court acquires jurisdiction whether means used to bring him within reach of process is violation of laws of another state, not subject of inquiry.

In a criminal case the courts of this state will not inquire as to whether the laws of some other state have been violated in transporting an accused person into the jurisdiction of this state. If the court lawfully acquires jurisdiction of the person after he is within reach of its processes, the means used to bring him there will not be a subject of inquiry.

2. Criminal law §427(1)—Conspiracy to commit crime charged may be shown, although not charged in indictment.

It is a general rule that upon the trial of one accused of a crime evidence is admissible to prove a conspiracy to commit the crime charged, although the conspiracy is not charged in the indictment. This is not permitted for the purpose of allowing a conviction for a crime not charged, but to lay a foundation for the admission of evidence.

3. False pretenses §28—Information charging false pretenses to a banking corporation held sufficient as to character of crime charged.

A statement contained in an information, to the effect that the false pretenses charged were made to a banking corporation, as distinguished from its officers and agents, is sufficient to give the accused the necessary information as to the scope and character of the crime charged. A corporation is an artificial

person, made so by statute, and cannot act or be influenced except through its officers and agents.

4. False pretenses §36—Information for false pretenses resulting in bank's purchase of worthless paper need not state that bank bought it.

It is not necessary for the information to state that by reason of the false pretenses the bank bought the worthless commercial paper of which complaint is made. It makes no difference whether the bank parted with its money through a sale of the commercial paper, or whether it was hypothecated for that purpose. The gist of the offense is the procuring of the money, or something of value, by means of the false pretenses.

5. Jury §33(1), 75(2)—Accused has right to exclusion of incompetent jurors, but not to inclusion of particular persons; excusing juror before examination is in sound discretion of court.

The right of the accused in the selection of the jury is one of exclusion of incompetent jurors, and not one of inclusion of particular persons who are competent. No fixed rule can be applied to the numerous reasons why a juror may be excused from the regular panel before examination in the case, and whether a juror should be excused before being examined in any case rests in the sound discretion of the court, and the exercise of such discretion will not be disturbed unless it is shown that such discretion has been abused, to the actual prejudice of the complaining party.

6. Criminal law §1166½(6) — Asking jurors whether if convinced by instructions and evidence they would hesitate to find defendant guilty held not prejudicial error.

In the examination of jurors, where no attempt is made to state in advance what the instructions would be or what the facts would disclose, it was not prejudicial error to permit the state to ask certain prospective jurors whether, if they were convinced by the instructions of the court and the evidence beyond a reasonable doubt of the guilt of the defendant, they would hesitate to find the defendant guilty. The purpose of such questions was doubtless to ascertain whether the jurors would accept the instructions of the court as the law of the case.

7. Jury §92—That prospective juror in prosecution in false pretenses to a bank is a depositor therein held not to disqualify.

The mere fact that a prospective juror is a depositor in the bank interested in the prosecution of the defendant will not disqualify such juror, where it is not shown that his business relations are such as might influence his verdict or cause the bank to oppress him or place him at the mercy of the bank.

8. Jury §99(3)—Juror held not disqualified because he had heard a fraud had been committed.

Where a juror, from what he had heard or read, believed that a fraud had been committed, but had no recollection or opinion as to who had perpetrated the fraud, and had formed and expressed no opinion as to the guilt of

the defendant, he is not disqualified by the mere fact of his belief that some person, to him unknown, had committed the fraud.

9. Criminal law §419, 420(1)—Insolvency of bank issuing worthless paper held provable by hearsay.

Where it is claimed that a banking corporation was systematically engaged in issuing fraudulent and worthless commercial paper, the fact of the insolvency of such corporation may be shown by statements and records of public officers whose duty it was to inquire into and examine its fiscal affairs, and this may be supplemented by reports of commercial agencies, and by information obtained from bankers and others, in the nature of hearsay evidence.

10. Criminal law §97(1) — Formulation of conspiracy in another state held not to deprive courts of jurisdiction where defendant apprehended within its territorial jurisdiction.

The fact that conspiracy is formulated in another state, and that the defendant, a co-conspirator, was not within this state prior to the commission of the overt act of which complaint is made, will not deprive the courts of this state of jurisdiction to try such defendant when later apprehended within its territorial jurisdiction. Every person participating in an unlawful conspiracy is deemed to be a principal, and is punishable as such, although he may not have been present or within the jurisdiction of the court when the overt act was consummated.

11. Criminal law §427(3)—Order of evidence immaterial if ultimate prima facie case made.

It is immaterial in what order testimony predicated upon a conspiracy is introduced, if the series of facts and circumstances shown in evidence ultimately make a prima facie case of conspiracy. A conspiracy may, and generally must, be proved by a number of independent acts, conditions, and circumstances tending to show an unlawful common purpose of the conspirators.

12. False pretenses §22—Caveat emptor inapplicable where trust company's worthless time certificates were sold to deceive.

Where it appears that a trust company issues worthless commercial paper, denominated "Time Certificates," and these certificates were ingeniously designed and calculated to mislead and deceive persons of ordinary prudence, and where the circumstances surrounding the sale of one of these certificates were purposely arranged to deceive, the rule of caveat emptor will not apply.

Appeal from District Court, Payne County; John P. Hickam, Judge.

J. Dawson Mathews was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

J. M. Springer and E. G. Wilson, both of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. On the 24th day of October, 1917, plaintiff in error, J. Dawson Mathews,

hereinafter referred to as defendant, was convicted of the crime of obtaining money by false pretenses from the Oklahoma State Bank of Cushing on the 19th day of March, 1917, and was sentenced to confinement in the state penitentiary for a term of three years. From this judgment and sentence he appeals.

It appears from the evidence on the part of the state: That at and before the date of the offense charged one J. Greeley Jones was operating a purported banking institution in Houston, Tex., known as the Commonwealth Trust Company, with a reported capital stock of \$250,000; that the defendant, for some time prior to the alleged offense, appeared to be in some way interested in this trust company, and spent much of his time at its offices, and advised and directed some of its business transactions; that the defendant was one of the principal customers of this concern, in buying and disposing of its worthless securities in the form of "time certificates," purchased in the name of J. A. Brown, for defendant's own benefit and profit, between the 15th day of February and the 5th day of March, 1917, of the total amount of \$175,000; that the defendant was a man of very limited means and resources, and that he obtained these certificates by exchanging for them oil stocks that were worthless, and known by him at the time to be worthless.

That the place of business of this Commonwealth Trust Company was in two rear rooms on the fourth floor of the Beatty Building in Houston, Tex.; that the office force of the institution consisted of a bookkeeper, who also exercised the functions of cashier, teller, and stenographer; that the concern had no assets of any value, excepting the office furniture and fixtures of the probable value of \$300.

That the defendant procured these time certificates—presumably and ostensibly certificates of deposit—to be issued to J. A. Brown, a fictitious person not in being; that the defendant assumed to act for J. A. Brown under a power of attorney, executed in his favor in 1914, and defendant, conspiring together with others, indorsed these time certificates to whoever could be induced to buy, and, among others, sold a certificate in the amount of \$5,000, due six months from date, to the State Bank of Cushing, Okla., on March 19, 1917.

That these time certificates were without value, and that the trust company was wholly insolvent, and that the scheme and plan of the defendant and his confederates in selling these time certificates to innocent purchasers amounted to a mere confidence game, by means of which unsuspecting banks and others were fleeced out of large sums of money, in the belief that they were purchasing time certificates of deposit issued by a reputable, solvent banking institution.

That the defendant, at different times before and after the alleged offense, caused a number of these time certificates to be sent by express to G. C. Wisdom and others in Oklahoma City; that on the 15th day of March, 1917, G. C. Wisdom and Charles H. Garnett appeared at the Oklahoma State Bank at Cushing, and represented to the officers of the bank that they were contemplating closing a transaction of the sale and purchase of an oil lease, and that they had a certificate of deposit for the sum of \$5,000, issued by the Commonwealth Trust Company of Houston, Tex., to J. A. Brown and indorsed by him to G. C. Wisdom, and that they desired to cash the same, representing to the bank that the certificate of deposit was regular, and that the Commonwealth Trust Company was a solvent, going concern, and that the indorsement and transfer were regular and valid.

The bank at Cushing did not cash this certificate on this day, but wrote a letter to the Commonwealth Trust Company, inquiring about its validity. In reply the trust company wrote to the bank that the certificate would be good if it bore the indorsement of J. A. Brown, and that the indorsement of Mr. Wisdom would be the only transfer necessary to convey good title to the bank; that the certificate and the indorsement of J. A. Brown were both genuine; that they did not care to discount their paper nor to anticipate payment at that time. Upon the strength of the representations made by Wisdom and Garnett and the information received in the letter from the trust company, the bank had the time certificate indorsed and transferred to them by Wisdom and Garnett, and paid to them for the certificate of deposit the sum of \$4,750, believing that the certificate was valid, and that the trust company was a solvent, going concern.

The testimony shows that at the request of the Attorney General of the state of Texas a bank examiner made an investigation of the affairs of this trust company, and found that it had no assets of any value, and that the affairs of this trust company were a little later placed in the hands of a receiver, and that the receiver could find no assets sufficient to pay the costs of the receivership.

Defendant admits that he purchased these time certificates with a small amount of cash, and the assignment to the trust company of certificates of stock of the Monte Carlo Oil Refining Company. Defendant claims that in good faith he sold these time certificates so procured from the trust company to Wisdom, and to any others who would buy, for from 7 to 20 per cent. of the amounts named in the respective certificates, but that he had no connection with nor interest in their disposal by those who purchased from him, and was not acting in concert with Wisdom or others; that he had no connection with nor interest in the transfer

of the particular certificate bought by the Cushing bank from Wisdom and Garnett; that at that time he was not in Oklahoma, and that he had not been in Oklahoma for years previous; that his connection with this and other like certificates ended as soon as he parted with such certificates and received the money for them from the persons to whom they were sold; that previous to these transactions he was engaged in selling and dealing in stocks and securities for J. A. Brown, under a power of attorney issued in 1914; and no showing was made that he had ever had an accounting or settlement with Brown; that Brown was a man of upwards of 70 years of age, occupying a rented farm in Texas; that he had not heard from him for months or years, but, so far as he knew, he was still living.

The evidence shows that this defendant was arrested in Houston, Tex., and, without a requisition, was forced to come to Oklahoma under arrest, after which he was informed against, tried, and convicted in this case.

A more complete recitation of the facts brought out in evidence would make an interesting and entertaining story, but would serve no useful purpose as a precedent to guide lawyers and judges in the trial of future cases. Suffice it to say that from an examination of the entire testimony and the similarity of names and methods used by the parties J. Greely Jones and J. Dawson Mathews were emulating the example and perhaps surpassing the manipulations in high finance of J. Rufus Wallingford of fiction.

In his brief the defendant urges 12 assignments of error, as follows:

(1) The court below erred in overruling the motion of the defendant to quash the information.

(2) The court below erred in overruling the demurrer of the defendant to the information.

(3) The court below erred in discharging and releasing jurors without just cause, over the objection of the defendant, and without an examination of such jurors in open court.

(4) The court below erred in permitting the state to commit the jurors on their voir dire to the theory that the instructions of the court should be considered by the jury as having probative force, in that they were requested to say, in answer to questions asked by the state, that if they were convinced by the instructions and the evidence beyond a reasonable doubt of the guilt of the defendant they would not hesitate to find him guilty.

(5) The court below erred in permitting improper, incompetent, irrelevant, hearsay, and illegal evidence in behalf of the state, over the objections of the defendant.

(6) The court below erred in overruling the challenge of the defendant to jurors A.

H. Ahrberg and A. M. Greiner and Dairymple.

(7) The court below erred in its instructions to the jury.

(8) The court below erred in refusing to give proper instructions to the jury, which were requested in writing by the defendant.

(9) The court below erred in refusing to direct a verdict in favor of the defendant.

(10) The verdict of the jury and the judgment of the court are not supported by the evidence, and are contrary to the evidence.

(11) Prejudicial errors of law occurred at the trial, and were duly excepted to at the time by the defendant.

(12) The court below erred in overruling the motion of the defendant for a new trial.

[1, 10] Under the first assignment of error counsel for defendant contends that the court had no jurisdiction of the defendant, for the reason that he was brought into this state without his consent, by force and without process of extradition. In support of this contention, defendant in his brief refers to section 29, article 2, of our state Constitution, providing that—

"No person shall be transported out of the state for any offense committed within the state, nor shall any person be transported out of the state for any purpose, without his consent, except by due process of law; but nothing in this provision shall prevent the operation of extradition laws, or the transporting of persons sentenced for crime, to other states for the purpose of incarceration."

Defendant claims that, in the absence of proof, there is a presumption that the Constitution and laws of the state of Texas are the same as in this state. Assuming that this is true, in a criminal case the courts of this state will not inquire as to whether the laws of some other state have been violated in transporting an accused person into the jurisdiction of this state; and, if the court lawfully acquired jurisdiction of a person after he is within the reach of its process, the means used to bring him there will not be a subject of inquiry. *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *State v. May*, 57 Kan. 428, 46 Pac. 709; *Brooklin v. State*, 26 Tex. App. 121, 9 S. W. 735; *Ex parte Davis*, 51 Tex. Cr. R. 608, 103 S. W. 891, 12 L. R. A. (N. S.) 225, 14 Ann. Cas. 522, and note; *Commonwealth v. Ramunno*, 219 Pa. 204, 68 Atl. 184, 14 L. R. A. (N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818; *Pettibone v. Nicholl*, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047.

We do not mean to be understood as approving the practice of detectives or officers of the law in kidnapping or removing a person accused of crime from one jurisdiction to another without due process of law. A person so transported has his remedies, and may obtain redress in the jurisdiction where his rights and liberty were violated.

Second. The defendant urges that the court erred in overruling the demurrer of the defendant to the information, for the reason that the information in this case charges the offense of obtaining money by false pretenses and conspiracy. The information was in two counts, the first charging the crime of false pretense, and the second count charging the same offense, but pleading some of the evidence tending to show that the defendants had conspired and confederated to commit the offense, and pursuant to that conspiracy or confederation did commit the crime. Both counts charge the commission of the same offense, viz., false pretense, but the second count contains allegations of a conspiracy leading up to the commission of the crime, and the allegations may be regarded as surplusage only. The state elected to stand upon the first count, but that did not deprive the state of the right to show that a conspiracy did exist, culminating in the commission of the crime charged.

[2] In order to connect the defendant with the crime of false pretense, under the circumstances in this case, and in order to show the intent and purpose of the persons interested in the sale of these time certificates, it was permissible to show that a conspiracy existed between them to sell these worthless certificates to innocent parties. It is a general rule that upon the trial of one accused of a crime evidence is admissible to prove a conspiracy to commit the crime charged, although the conspiracy is not charged in the indictment. This is not permitted for the purpose of allowing a conviction of a crime not charged, but to lay a foundation for the admission of evidence. *Irvin v. State*, 11 Okl. Cr. 301, 146 Pac. 453; 5 R. C. L. 1087, 1088; *State v. Ruck*, 194 Mo. 416, 92 S. W. 706, 5 Ann. Cas. 976, and note; *State v. Ryan*, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862; *Spies v. People*, 122 Ill. 1-12, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, and note.

It has been uniformly held by the courts of this state and of other states that testimony tending to show the commission of the crime charged is not inadmissible because it also discloses the commission of another and different crime. *Irvin v. State*, supra, and cases therein cited.

[3] It is further insisted that the information is defective and insufficient because it is alleged therein that the false pretenses were made to the Oklahoma State Bank at Cushing, as distinguished from its officers, and that the bank relied thereon and was deceived thereby, and by reason thereof parted with its money. It is true that a banking corporation is an artificial person, but section 2929, R. L. 1910, provides that the word "person" includes corporations. A corporation cannot act in a business capacity except through its officers and agents. We think the language of the information, in this re-

gard, sufficiently gave the accused the necessary information of the scope and character of the crime charged, and that the naming of the officer to whom the false pretenses were made was not necessary. *State v. Turley*, 142 Mo. 403, 44 S. W. 267; *State v. Hulder*, 78 Minn. 524, 81 N. W. 532; *Roberts v. People*, 9 Colo. 458, 13 Pac. 630.

[4] The defendant urges further that the information is defective for the reason that it does not set out specifically that the bank bought this particular time certificate. The correct rule applying to this part of the information, supported by abundant authority, is stated in 19 Cyc. 430, as follows:

"No particular form of words is necessary; allegations that 'by means of the false pretense' or 'relying on the false pretense,' or the like, is sufficient where it is apparent that the delivery of the property was the natural result of the pretense alleged. The same general rule applies when the false pretense used is a token."

It makes no difference whether the money was received from the sale of this certificate, or whether it was pledged or hypothecated for that purpose. The gist of the offense is the procuring of money or something of value by means of the false pretense. *State v. Feedback*, 3 Okl. Cr. 508, 107 Pac. 442; *Teague v. State*, 13 Okl. Cr. 270, 163 Pac. 954; *State v. Boon*, 49 N. C. 463; *Commonwealth v. Lincoln*, 93 Mass. (11 Allen) 233; *Ter. v. Underwood*, 8 Mont. 131, 19 Pac. 398; *People v. Luttermoser*, 122 Mich. 562, 81 N. W. 565; *People v. Kinney*, 110 Mich. 97, 67 N. W. 1069; *People v. Haas*, 28 Cal. App. 182, 151 Pac. 672.

[5] Third. In the third specification of error the defendant complains that the court excused two jurors, Mr. Dunn and Mr. Wheeler, from the regular panel before examination in this case. Generally the right of the accused in the selection of the jury is one of exclusion of incompetent jurors, and not one of inclusion of particular persons who are competent. No fixed rule can be applied to the numerous reasons why a juror should be excused; and whether a juror should be excused before being examined in any case rests in the sound discretion of the court, and the exercise of such discretion will not be disturbed unless it is shown that such discretion has been abused, to the actual prejudice of the complaining party. *Beatty v. State*, 5 Okl. Cr. 105, 113 Pac. 237; *Omaha So. Ry. v. Beeson*, 36 Neb. 361, 54 N. W. 557; 24 Cyc. 26.

[6] Fourth. It is claimed by the defendant that the court erred in permitting the state to commit certain jurors to the theory that the instructions of the court should be considered by them as having probative force, by permitting the state to propound to them questions to the effect that if they were convinced by the instructions of the court and

the evidence beyond a reasonable doubt of the guilt of the defendant, whether they would hesitate to find the defendant guilty. The purpose of these questions was to ascertain from the jurors whether or not they would accept the instructions of the court as the law of the case. No attempt was made to state in advance what the instructions would be or what the facts would be, so as to pledge the jurors in advance to render a verdict for the state on a given state of law and fact. These questions, fairly interpreted, did not eliminate from the consideration of the jurors questions of fact that might not be touched upon in the instructions.

[7] Fifth. Complaint is made that the court below erred in overruling the challenge of the defendant to Jurors A. H. Ahrberg, Greiner, and Dalrymple. Juror Dalrymple said that he was a depositor in the Oklahoma State Bank at Cushing, the injured party. The record shows that this juror was in other respects qualified. The mere fact that he was a depositor in this bank did not disqualify him, where it was not shown that his business relations were such as might influence his verdict or cause the bank to oppress him or place him at the mercy of the bank. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015; *Kennedy v. Holladay*, 105 Mo. 24, 16 S. W. 688.

[8] Jurors Ahrberg and Greiner both stated that from what they had heard and read in the newspapers they had formed an opinion that a fraud had been committed, but that they had no recollection or opinion as to whether this defendant was implicated in the commission of such fraud; that they had no opinion as to who was responsible for the commission of the crime charged; that they never had had, and did not then have, any opinion as to the guilt or innocence of the defendant.

An opinion must be of such a fixed character as will overcome the presumption of innocence of the accused, and the fact that a prospective juror has an opinion upon some feature of the case that will require some evidence to remove will not necessarily disqualify him. An opinion must always be one of degree, and it is for the court to determine whether the opinion entertained is of that fixed or permanent character which disqualifies him from coming to the case in a fair and impartial frame of mind, unaffected by prejudice or favor towards the accused. To render a juror incompetent on the ground of his having an impression or an opinion upon some issue in the case, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction. These two jurors had never formed nor expressed an opinion as to the guilt or innocence of the defendant in this case; from what they had heard or read they merely believed that a fraud had been committed, but

had no recollection or opinion as to who had perpetrated the fraud. It has been held by this court that a mere impression, from reading the newspapers, that a tragedy had occurred is no disqualification of a juror. *Scribner v. State*, 3 Okl. Cr. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 1014, note; *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 968; *Gentry v. State*, 11 Okl. Cr. 355, 146 Pac. 719.

In a homicide case an opinion gained from the newspapers that the accused had killed the deceased, but not as to his guilt, is not disqualifying when the only issue in the case is on self-defense. *State v. Gould*, 40 Kan. 258, 19 Pac. 739; *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036; *State v. Morrison*, 67 Kan. 144, 72 Pac. 554.

Where jurors, from what they had heard and read, had formed an opinion which would take evidence to remove, as to the fact of crime, but not as to who was the criminal, it was held no error to accept them. *State v. Haworth*, 24 Utah, 398, 68 Pac. 155.

[9] Sixth. Wide latitude is permissible in the examination of witnesses to show a conspiracy to commit a crime. Without here analyzing the testimony claimed by the defendant to be incompetent and inadmissible, we find no prejudicial error in the admission of the testimony of the receiver and the special bank examiner of the state of Texas, to the effect that this trust company had no assets, and that its commercial paper was worthless. The information gathered by these officers was derived from an examination of the books and records of the trust company, supplemented by information obtained from banks and commercial agencies, and the latter was not incompetent on account of being hearsay evidence. It has been frequently held that the question of the solvency of an individual or of a corporation, in cases of this character involving fraud, may be established by hearsay evidence. *Greenleaf on Evidence* (16th Ed.) vol. 1, § 190b; *Jones on Evidence* (2d Ed.) § 206; *Ellis v. State*, 188 Wis. 513, 119 N. W. 1110, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022; 8 R. C. L. 633; 10 R. C. L. 962.

[11] The claim made by defendant that certain evidence was inadmissible until after proof of a conspiracy had been established is not correct. A conspiracy to defraud is necessarily or usually made up of a series of facts and circumstances, and it is sufficient if the facts and circumstances shown in evidence are finally connected so as to make a prima facie case of conspiracy. If that is ultimately done, it is then immaterial in what order testimony predicated upon a conspiracy is introduced.

A conspiracy, leading up to the commission of the crime charged need not be established by direct evidence, but may and generally must be proved by a number of independent acts, conditions, and circumstances. The very existence of a conspiracy is generally

a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful common purpose.

It is not necessary to prove that the conspirators came together and actually agreed to pursue their purpose by common means, one performing one part and another another. If one concurs in a conspiracy, no proof of an agreement to concur is necessary to make him guilty. It is not even necessary that a person, to be criminally liable, should be acquainted with the others engaged in the conspiracy, though to hold one liable as a participant it must be shown that he did some act or made some agreement showing his intention to commit the crime; and one who joins the conspiracy after its formation is liable as a conspirator just as much as those with whom the conspiracy originated. 1 R. C. L. 133; 5 R. C. L. 1088, 1063; section 2104, R. L. 1910; *Spies v. People*, 122 Ill. 1-12, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Robinson v. U. S.*, 172 Fed. 105, 96 C. C. A. 307; *U. S. v. Newton (D. C.)* 52 Fed. 275; *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; *Pettibone v. Nichols*, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047.

It therefore follows that if J. Dawson Mathews, collusively with G. C. Wisdom and others, placed these worthless time certificates in circulation, and, directly or indirectly, sent certain of them, by express or otherwise, to Wisdom for the purpose of passing them on to innocent purchasers, and both being cognizant of the fraudulent character of the paper, J. Dawson Mathews became criminally liable for the overt acts of Wisdom and any other person entering into the conspiracy in furtherance of the original plan.

[12] Seventh. The defendant insists at great length that the court erred in his instructions to the jury and in his refusal to give the instructions offered by the defendant. To analyze these instructions in detail would be, for the most part, a repetition of what we have heretofore stated in this opinion. We have carefully examined the instructions given by the court, and we hold that, taken as a whole, they fairly state the law applicable to the evidence before the jury. A false pretense may be made either expressly or by implication, and the Oklahoma State Bank at Cushing had a right to assume that this time certificate of deposit, or promissory note, or whatever it should have been called, was issued in due course by a legitimate bank or trust company in good faith. Where it is shown, as in this case, that these certificates were worthless, and were ingeniously designed and calculated to mislead and deceive the purchaser, and would deceive a person of ordinary prudence, and the circumstances surrounding the sale

were purposely arranged to deceive, the rule of caveat emptor will not apply. 19 Cyc. 401-403; *State v. McDonald*, 59 Kan. 241, 52 Pac. 453; *Commonwealth v. Stone*, 4 Metc. (Mass.) 43; *People v. Luttermoser*, 122 Mich. 562, 81 N. W. 565; *State v. Southall*, 77 Minn. 297, 79 N. W. 1007; 1 McClain, *Crim. Law*, 674; 11 R. C. L. 838.

Elighth. Complaint is made by the defendant of the alleged errors in the admission of improper testimony, of conduct of counsel for the state, and of side remarks made by one of the witnesses, but in the opinion of this court, after a careful examination of the entire record, none of the things so complained of amounts to prejudicial error.

The judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(22 Ariz. 384)

SAWYER et al. v. PABST BREWING CO.
(No. 1843.)

(Supreme Court of Arizona. May 27, 1921.)

1. Corporations ¶3—Corporations classified as "de jure" and "de facto" and corporations not sufficiently organized to come within latter class.

Corporations may be divided into three classes: First, de jure corporations, where the organization is entirely and legally perfected; second, de facto corporations, where there has been a bona fide attempt to organize a corporation and a user of corporate powers, but the organization is defective; and, third, corporations not sufficiently organized to come within the latter class.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, De Facto Corporation; De Jure Corporation.]

2. Partnership ¶41—Defendants, who with another undertook to carry on a business through an existing corporation, not liable as partners.

Where defendants, in connection with the president and treasurer of a duly organized but dormant corporation, undertook to carry on business through the corporation depositing to its credit money for stock, defendants are not, though the reorganization was never perfected, liable as partners to plaintiff, who extended credit to the corporation; it appearing that plaintiff knew nothing of defendants' connection, but had previously done business with the president and treasurer, and that the arrangement increased the assets liable for plaintiff's claim.

3. Partnership ¶55—Admission by layman held not to make him liable as partner.

Where defendants, in connection with the president and treasurer of a duly organized but dormant corporation, on advice of their attorney undertook to do business through the corporation under its name, and paid in moneys for stock, held that an admission by one of the de-

defendants that the three were partners will not establish liability, as partners, in view of the intricacy of the question and the differences of the courts in such a matter.

Appeal from Superior Court, Maricopa County; Andrew S. Gibbons, Judge.

Action by the Pabst Brewing Company, a corporation, against Ed A. Sawyer, George A. Olney, and others. From a judgment for plaintiff, the named defendants appeal. Remanded, with directions that the judgment be modified by striking out any recovery against appellants.

The Pabst Brewing Company sued the Arizona Mercantile Company, alleging it to be a partnership consisting of Sawyer, Olney, and Wolpe. The Mercantile Company and Wolpe defaulted. Defendants, Sawyer and Olney, joined in an answer to the complaint, in which they alleged that the goods for the value of which plaintiff sued were sold and delivered to the Arizona Mercantile Company, a duly organized and existing corporation doing business in Arizona. They also alleged that they were not partners with the Mercantile Company or with Wolpe; that they had, at the special insistence and request of the Mercantile Company and its president, Wolpe, made, from time to time, advances to the Mercantile Company for the purpose of carrying on its business, and, to the extent of such advances, were creditors of such Mercantile Company.

The case was tried before a jury, which found the issues in favor of the plaintiff, and thereafter judgment was entered thereon. At the close of the evidence, both plaintiff and defendants asked for an instructed verdict. The defendants assign as error the refusal of the court to instruct the jury to return such verdict, and also the giving of certain instructions.

The facts, briefly stated, are: Defendant Wolpe, prior to April, 1917, had been engaged in the selling in Arizona of a drink known as Pablo, which he had bought from the plaintiff. About that time he solicited the other defendants to join him in the business of buying and selling soft drinks, including Pablo, to which they consented. It was agreed among them that their operations would be carried on by a corporation. They went together to the office of Mr. George S. Stoneman, a practicing attorney of Phoenix, and submitted to him the matter of making proper arrangements, and while in his office Wolpe suggested that he was president and treasurer of the Arizona Mercantile Company, an already organized and existing corporation, and it was thereupon mutually agreed that they would take over that corporation and carry on their business enterprise through it. There was some discussion as to the shares that each of the parties

would receive, and how the business was to be managed. Wolpe was to take to Stoneman's office the minutes and by-laws of the Arizona Mercantile Company, and a meeting of the stockholders was to be arranged for the purpose of reorganization. Stoneman advised them that they could not issue stock or elect a new board of directors until a meeting of the stockholders had been called, and that he would attend to the issuing of the stock to the three of them in proper proportions as soon as such meeting was had. They were advised by Stoneman that they could conduct the business under the name of the Arizona Mercantile Company pending the reorganization, although, as he says, "I expressed some disapproval." The Arizona Mercantile Company had theretofore been engaged in the wholesale liquor business under the management and control of Wolpe, who was its president and treasurer. It had liquidated its business, and at the time had no assets and owed no debts. At this meeting it was definitely settled that defendants, Sawyer and Olney, would invest in the enterprise \$1,500 each, and that Wolpe would put into the concern whatever stock he had on hand, estimated to be worth \$1,500 or \$1,600, and that stock of the corporation would be issued to them later on. Sawyer and Olney thereupon deposited in the bank to the credit of the Arizona Mercantile Company \$1,500 each. The business was thereafter conducted under the management of Wolpe in the name of the Arizona Mercantile Company. In that name it bought goods from plaintiff from April, 1917, to September, valued at \$12,128, and paid it all except \$1,212.80. The corporation was not reorganized, and no certificates of stock were ever issued to defendants, Sawyer, Olney, or Wolpe. The plaintiff knew no one in its dealings except the Mercantile Company and Wolpe, and did not learn of Sawyer's or Olney's connection with the business until some time in August, when it discovered that the Mercantile Company was in failing condition. When this fact became known, Olney, who was on the ground, took steps, along with an agent of plaintiff, in investigating, collecting, and conserving the assets of the concern, and it is in evidence that he on one occasion stated that he, Sawyer, and Wolpe were partners in the soft drink business. Wolpe owned or had in his name one share of stock of the par value of \$100. There were outstanding, besides the Wolpe share, two other shares. Wolpe had been in charge of and controlled the Arizona Mercantile Company for some seven years before the soft drink business started. While it appears that the Arizona Mercantile Company was a subsidiary corporation to Melzer Bros., who had formerly carried on business in Phoenix, Wolpe testified he was in fact the owner of the Mercantile Company. It is

in evidence that Wolpe, Olney, and Sawyer never intended to form a partnership, but believed they were operating as a corporation.

Baker & Whitney, of Phoenix, for appellants.

Townsend, Stockton & Drake, of Phoenix, for appellee.

ROSS, C. J. (after stating the facts as above). [1] It is the contention of defendants on this appeal that the above facts clearly show that they were not a partnership, and that the court, therefore, erred in its refusal, at the close of the evidence, to instruct the jury to return a verdict in their favor.

"As to ability to transact business, corporations may be divided into three classes: First, *de jure* corporations, or those where the organization is entirely and legally perfected; second, *de facto* corporations, where there has been a bona fide attempt to organize a corporation and a user of corporate powers, but the organization is defective; third, corporations not sufficiently organized to come within the latter class." *Alder Slope Ditch Co. v. Moonshine Ditch Co.*, 90 Or. 385, 176 Pac. 593.

In cases where parties associated together to carry on a business have been sought to be held as partners, notwithstanding they have thought themselves to be a corporation, the decisive question is always as to whether what they have done, or caused to be done, toward organization is sufficient to constitute them a corporation *de facto* or *de jure*. The courts are not agreed as to what acts will constitute a *de facto* corporation, largely, we think, because the incorporating laws of the states differ, but they unite in agreeing when the acts done, although falling short of constituting a *de jure* corporation, are sufficient to constitute a *de facto* corporation, the associates are not individually liable on contracts entered into by the corporation. In the present case we are not bothered with the question as to whether the Arizona Mercantile Company was a *de facto* or a *de jure* corporation. It is conceded by both parties to be of the latter character. It was properly and legally chartered, fully organized, and, under its articles of incorporation, empowered to carry on the business undertaken, and, had the board of directors or the stockholders authorized the stock subscriptions that its president and treasurer accepted, the transaction could not be questioned. Appellee asserts that what was done did not effect a merging of the defendants into the dormant corporation; that there was not even a *de facto* or colorable reorganization, and the defendants merely used the Arizona Mercantile Company as a trade-name in anticipation of gaining control of the dormant corporation.

[2] As we gather it, the dominant idea in this proposition is that, because there was no

reorganization of the Arizona Mercantile Company by the defendants, they had no right to do their business under that name as a corporation. It cannot reasonably and fairly be said that the defendants arbitrarily assumed to use the name of the Arizona Mercantile Company, for the reason that its president and treasurer, who seemed to be its alter ego, and who at least had been in control of it, assumed the right and authority to accept subscriptions of stock from the defendants, and did on behalf of the corporation receive from them \$3,000 which, together with his contribution, constituted the entire paid-in capital of the company.

Wolpe was not a stranger to the Mercantile Company. He was its chief executive officer, and, as its treasurer, held its purse strings. If he did not own it, as he claimed, his relation to it was of such an intimate and commanding nature as to cause Sawyer, Olney, and Wolpe, under the advice of their lawyer, to assume to carry on the business in its name pending a reorganization and the issuing of their stock. They did not adopt the name and carry on their business in it with the intention of later incorporating, as is common in so many of the cases cited by plaintiff. On the contrary, they, in good faith and under legal advice, paid hard cash into an existing body corporate, and in its name thereafter the business was transacted. They may have expected—in fact, we know they expected—to reorganize the Arizona Mercantile Company, but their failure to do so did not make it any the less a *de jure* corporation, and did not in the least mislead the plaintiff.

Whether the company was regularly, or in strict compliance with law, prepared to accept stock subscriptions and enter into the business of buying and selling soft drinks or not, it unquestionably did so through the offices of its president and treasurer, and presumably with the acquiescence and consent of all of its officers and stockholders. In such circumstances, the corporation, having received the benefits from the stock sale, would not be permitted to retain those benefits and repudiate its obligations thereunder. This, we think, is the universal rule. *Weathersby v. Texas & O. Lbr. Co.*, 107 Tex. 474, 180 S. W. 735, 7 A. L. R. 1440, and note at page 1446.

Our research, which has been somewhat extensive, has not brought to light, nor has counsel's industry called our attention to, any cases wherein the facts were as they are in the present case. *Wesco Supply Co. v. Smith*, 134 Ark. 23, 203 S. W. 6, we think is of sufficient similarity to be referred to as authority. In that case the Arkansas Public Service Company was organized by U. S. Bratton and others, Bratton being the principal owner of the proposed corporation, and its president. He sold practically one-half

interest in the concern for \$20,500 to one Smith, to be paid at various times thereafter. Smith paid in part of the purchase money, and took control of and managed the business for a while. For debts contracted during this time, the Arkansas Public Service Company gave its notes to the Wesco Supply Company. The service company becoming insolvent, the supply company sued Bratton and Smith as partners. The lower court gave judgment in favor of Smith, and, upon appeal, the judgment was affirmed; the court using this language:

"The undisputed facts here show that appellant dealt with the service company as a corporation. Such being the case, there is no good reason why the appellant should be permitted to hold the appellee individually liable as a partner for the debts of the service company. Appellant did not deal with the appellee, but dealt with the corporation, and appellant would get all that it was entitled to in justice according to its contract, if it maintained a liability against the corporation or its individual stockholders. Appellee under the evidence was certainly not one of the original incorporators, and did not undertake by his supposed purchase of stock to become liable as a partner for the debts of the corporation, nor assume any other liability than would be incumbent upon him as a shareholder in proportion to his interest. * * * But neither does it follow that, because the incorporators or the individual stockholders might be liable under a given state of facts, one who had contracted for the purchase of stock, but to whom no stock in fact has been transferred, would also be liable as a partner. Here the undisputed evidence shows that Smith was not an original incorporator, and that he had in fact only entered into a contract for the purchase of stock."

[3] In the present case plaintiff had been selling its product to defendant Wolpe, and when the Arizona Mercantile Company took over the business plaintiff simply transferred its account from Wolpe to the Arizona Mercantile Company, with a \$4,500 or \$4,600 capital, as against the \$1,500 or \$1,600 stock of goods that Wolpe then had on hand. It had the benefit of this increased financial ability of its creditor, and dealt with it with absolutely no knowledge that defendants Sawyer and Olney were in any way at all identified with the corporation. It appears to us that, in equity, the plaintiff would secure all that it was entitled to if the obligation sued upon be held to be that of the Arizona Mercantile Company, a corporation. If Olney stated on one occasion—and this he denies—that the business was a partnership, it would not make it so if, under the facts, it was a corporation. The ordinary layman is hardly able to determine so involved and intricate a question when lawyers so radically differ.

Appellee cites the case of Bank of De Soto v. Reed, 50 Tex. Civ. App. 102, 109 S. W. 256, as sustaining its position, but in that case the question involved was as to whether the

proposed corporation was in fact a de facto corporation, and the court held that it was not under the laws of Texas. Appellee also relies upon *Forbes v. Whittemore*, 62 Ark. 229, 35 S. W. 223. In that case the purchasers of the Southwestern Arkansas College's real and personal property, after taking possession, contracted some debts and gave notes in the name of the Southwestern Arkansas College. It was held that the parties who purchased the property of the college were personally liable on the notes, and that the college was not. The court said these parties were not the agents of the college, nor members of the college. "In their contract with it, each party preserved its individuality, neither being merged into the other." And further observed that there was no organization of the purchasers into a corporation; that they were not a de facto corporation, and that the assumption of the name of the corporation did not constitute them a corporation nor give them the right to act in a corporate capacity. The facts in the case are not parallel to the facts of the present case, for several reasons; the principal one being that in the agreement it was stipulated the property should revert to the Southwestern Arkansas College on default of payments as provided therein. The contract was not made by the president of the Southwestern Arkansas College, and did not purport to be for its benefit. On the contrary, it was an effort to charge its property without its consent and to its damage.

We conclude that the court erred in refusing to instruct the jury to return its verdict in favor of defendants Sawyer and Olney, upon their motion at the close of the evidence. The cause is therefore remanded, with directions that judgment be modified by striking out any recovery against defendants Sawyer and Olney.

BAKER and McALISTER, JJ., concur.

(22 Ariz. 393)

SAWYER et al. v. MANITOU MINERAL WATER CO. (No. 1842.)

(Supreme Court of Arizona. May 27, 1921.)

Appeal from Superior Court, Maricopa County; A. S. Gibbons, Judge.

Action by the Manitou Mineral Water Company, a corporation, against Ed A. Sawyer, George A. Olney, and others. From a judgment for plaintiff, the named defendants appeal. Reversed and remanded, with directions.

Baker & Whitney, of Phoenix, for appellants. Townsend, Stockton & Drake, of Phoenix, for appellee.

ROSS, C. J. This is a companion case to No. 1843, *Sawyer and Olney v. Pabst Brewing Co.*, just decided, 196 Pac. 118. The parties have filed a stipulation that the decision

and judgment in the last-named case should be controlling in the disposition of this case. In accordance therewith, the judgment will be reversed, and the cause remanded, for disposition as is ordered in the Pabst Brewing Company Case.

BAKER and McALISTER, JJ., concur.

(22 Ariz. 394)

COHEN v. FIRST NAT. BANK OF NOGALES. (No. 1848.)

(Supreme Court of Arizona. May 27, 1921.)

1. Banks and banking §126—Notice and deposit slip held to show intent to give depositor credit for amount of check.

A printed notice, sent by mail by bank which received check drawn on it by mail from depositor: "We beg to acknowledge receipt of your favor of 8-6. We have entered to your credit \$3,567.50. All other items than those drawn on this bank are credited subject to final payment"—and the making of a deposit slip, a copy of which was inclosed with the notice, showed an intention to give the depositor absolute credit for the amount of the check.

2. Banks and banking §126—Mailing of notice of credit and deposit slip completed deposit.

When drawee bank mailed notice of credit of amount of check drawn on it, together with copy of deposit slip, the transaction was closed, and it became a completed contract, whether or not the letter containing the notice and deposit slip actually reached the depositor, and the bank could not subsequently retrace its steps, notwithstanding that it had not stamped the check "Paid" or debited the drawer's account with the amount thereof; such matters not concerning the depositor.

3. Banks and banking §126—Giving credit for check same as receiving deposit of money.

Where a check drawn on a particular bank is presented to that bank for general deposit, and the bank gives the depositor credit therefor, the relation between the bank and the depositor is that of debtor and creditor, the giving of the credit being practically and legally the same as if the bank had paid the money to the depositor, and had received it again on deposit.

4. Banks and banking §126—No written acceptance of check necessary to hold drawee bank crediting it to depositor.

Where depositor presented check to drawee bank and the amount thereof was credited to him, the transaction was not an acceptance of the check that must be in writing under Civ. Code 1913, § 4277, such transaction being payment of the check, and not mere acceptance.

5. Appeal and error §173(7)—Want of authority of agent cannot be raised first on appeal.

Want of authority on the part of an employee to extend credit of bank cannot be raised

for the first time on appeal by the bank from a judgment holding it liable for the amount of a deposit, represented by a check drawn on the bank by one having insufficient funds.

6. Banks and banking §106—Employee held to have authority to extend credit.

An employee of a bank whose duty was to answer correspondence and prepare mailing matter, and to send out printed notices of credits given for checks received by mail, had authority to extend credit for a check drawn on the bank, and sent to it by mail for deposit; the notice being a printed form and the name of the cashier of the bank being printed thereon.

7. Estoppel §90(1)—Depositor not estopped by telegram and retention of check returned on claiming credit therefor.

Where bank credited depositor with check drawn on it, but, on discovery of insufficient funds to cover the check, returned the same to the depositor, held that retention of the check by the depositor and telegrams to the bank to hold drawer's funds, etc., did not operate as an estoppel to claim the credit given, as the bank could have recovered on the check as against the drawer, although it remained in the depositor's possession.

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

Action by Henry Cohen against the First National Bank of Nogales. Judgment for defendant, and the plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

An unusually full statement of facts is essential to an understanding of this case. They are substantially as follows: On August 6, 1919, Henry Cohen sent by mail, from his place of residence, Culiacan, Mexico, to the First National Bank of Nogales, situated at Nogales, Ariz., a check on said bank for \$3,567.50, payable to his order and drawn by Octavo Gaxiola. The check was indorsed by Cohen, "Pay to the order of First National Bank of Nogales." In the letter inclosing the check Cohen requested that the same be placed to his credit, and that he be advised by return mail. At the time both Cohen and Gaxiola were depositors in the bank. The letter and check were received by the bank on Saturday, August 9, 1919. Upon receipt of the bank's mail it was opened by Mr. Grover Marsteller, assistant cashier of the bank, and by him passed to Miss Barney, who at the time was acting in the absence of the regular mail clerk, and whose duty it was to acknowledge receipt of letters, make out deposit slips of inclosed items, etc., and pass the items to the tellers and bookkeepers of the bank. Miss Barney addressed a letter to Cohen, in which she inclosed a printed form of acknowledgment. The form was prepared by the bank, and used by the bank in acknowledging the receipt of remittances from its

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customers. The form was as follows, the blanks therein being filled in by Miss Barney:

"Nogales, Arizona, 8-9, 1919.

Henry Cohen, Culiacan, Sin.—Dear Sir: We beg to acknowledge receipt of your favor of 8-6. We have entered to your credit \$3,567.50.

"All other items than those drawn on this Bank are credited subject to final payment.

"Very truly yours,

"By EMB. Theron Richardson, Cashier."

The name "Theron Richardson, Cashier," was printed, being part of the printed form. The letters "E. M. B." were written or typed by Miss Barney. Miss Barney also, at the same time, made out a deposit slip in form as follows:

Deposited in the First National Bank, Nogales, Arizona, by Henry Cohen.

(Please list each check separately.)

Currency
Gold
Silver

(Mail Aug. 9, 1919)

Checks
L 8-6 \$3,567.50
(American money.)

A copy of this deposit slip was also sent to Cohen by Miss Barney in the same letter in which the printed form was inclosed. Miss Barney took the check and the deposit slip so made out by her to a teller. This teller made a notation of the check on his sheet, then placed the check on one spindle and the deposit slip on another. Later on the same day a bookkeeper came to the teller's cage and got all the checks and deposit slips on the spindles, which by that time the teller had assorted alphabetically. The checks and deposit slips were divided amongst the bookkeepers. There were three bookkeepers: No. 1, who handled all accounts from A to F; No. 2, who handled accounts from G to O; and so on. The deposit slip to Cohen went to bookkeeper No. 1, and the check of Gaxiola went to bookkeeper No. 2. Bookkeeper No. 1, when he came to the letter C, posted, under the name of Cohen, the amount which the deposit slip showed as a deposit made by Cohen on that day; that is to say he credited the account of Cohen with the amount of the deposit slip, \$3,567.50. Bookkeeper No. 2, who actually received the Gaxiola check when he reached Gaxiola's account, saw there was not sufficient funds to Gaxiola's credit to pay the check, so he did not post up the check in the account of Gaxiola, but marked the check "Ins," meaning insufficient funds, and placed it aside in "suspense" for instructions; he having no authority to allow overdrafts. This was all done on Saturday, August 9, the day the check was received. Monday, August 11, on the opening of the bank, the clerk in charge of the Gaxiola check called the attention of the vice president to the check and the state of Gaxiola's account. The vice president directed that the check should not be paid, and that a telegram be sent to Cohen, advising him the

check was not good. The item of the check was thereupon charged back to the account of Cohen. On the same day a telegram was sent by the bank to Cohen, advising him that the check was not paid for lack of funds. A letter was also mailed to Cohen, with the check inclosed. The letter also advised that the check was not paid for want of funds. Cohen received the telegram on August 12, and on the same day wired the bank as follows:

"If you returned Gaxiola check, hold money to cover it. If not paid in three days, wire me and I will leave for there."

To this telegram the bank, on August 13, wired in reply:

"Your wire. No funds deposited to cover Gaxiola check which we returned."

After these telegrams had reached Cohen he received, by mail, the letter of acknowledgment dated August 9, which Miss Barney had sent, inclosing the printed form and deposit slip. On August 14, Cohen wired the bank as follows:

"I cashed Gaxiola check with metallic gold so he could pay export on garbanzos. If you think it won't be paid, wire me so I can get there and attach same."

To this the bank replied by wire:

"Yours yesterday. We recommend you take steps to protect your interest."

On August 19, Cohen went to the bank and asked for a statement of his account. This was given to him. The statement shows, under the head of "Deposits" the following: "August 9, \$3,567.50"—and under the head of "Checks in Detail" the following: "Aug. 11, \$3,567.50," being the credit and debit of the Gaxiola check, copied from the ledger of the bank. On August 22, 1919, Cohen drew a check on the bank, in favor of himself, for \$3,567.50, and presented same for payment. The bank refused to pay it on account of insufficient funds. Cohen then instituted this suit against the bank. The account of Octavo Gaxiola as it appeared in the ledger of the bank showed that the balance to the credit of Gaxiola on August 9, 1919, when the bank received the check, and thereafter, did not exceed \$49.66. The check was never stamped "Paid" by the bank.

Duffy & Purdum, of Nogales, and Flanigan & Murry, of Bisbee, for appellant.

Frank J. Barry and W. L. Kinder, both of Nogales, and Selim M. Franklin, of Tucson, for appellee.

BAKER, J. (after stating the facts as above). This is an appeal from a judgment of the superior court of Santa Cruz county, in favor of the bank. The action is to recover the sum of \$3,567.50, claimed to have been on deposit with the bank, to the credit of the plaintiff.

While the facts in the case, as will be observed from the foregoing statement, are a little unusual, we see no difficulty in the application of one or two very plain principles of law which have been long established.

[1, 2] The natural and obvious meaning of the language used in the notice which the bank sent to the plaintiff, through the mail, is that credit had been given to the plaintiff to the extent of the amount of the check. No ingenuity of interpretation, or stretching of the meaning of the words, can bring the language into harmony with any other hypothesis. That the bank intended to give the plaintiff credit for the amount of the check is plainly evinced, not only by the notice and deposit slip, but is further demonstrated by the fact that on the same day that the letter was sent the bank entered a credit upon its books, in favor of the plaintiff, for the amount of the check. As a matter of law, when the bank mailed the notice and deposit slip, the transaction was closed. In the eye of the law it became a completed transaction. Thus it is stated in 13 C. J. 300:

"Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated, and the contract is complete from the moment the letter is mailed or the telegram sent."

See, also, 6 R. C. L. 610-613.

The result of the foregoing rule is that it is immaterial whether the letter of acceptance actually reaches the offerer (6 R. C. L. 612), and it may be added that it is also immaterial whether the letter is delayed in the mails two or three days. 13 C. J. 301.

However, as we understand the argument of counsel for the bank, a distinction is sought to be drawn where a check is sent through the mail to a bank to be deposited, and where the holder of the check appears in person in the bank and offers to deposit it. But in principle there can be no such distinction. There can be no question that a contract can be made between persons who are at a distance from each other by and through the mail. By treating the post office as the agency of both parties, courts manage to harmonize the legal notion that it is necessary that the minds of the parties should meet. 6 R. C. L. 612.

But nevertheless the bank contends that the transaction in this case was not completed. It is argued that the steps taken by the bank were only tentative and preliminary, and that final credit for the check was never given to the plaintiff. As already pointed out, the bank plainly evinced the intention to pay the check by mailing the letter with the inclosures. It is true that a mere intention to pay is not equivalent to payment, but we are here confronted with a situation where the bank executed its intention. It is also true that the proper records were to be made

upon the books, but payment of the check or giving credit therefor (which is equivalent to payment) was effected at the time the letter was posted, and was valid even without any record. So far as respected the plaintiff, it was not essential to the completion of the contract that the bank should have stamped the check "Paid" or debited the Gaxiola account with the amount of the check. These steps did not concern the plaintiff; they were matters pertaining to the system of bookkeeping conducted by the bank for its own convenience and to expedite its own business.

The bank was not obliged to take the check or send the letter, but if it chose to do both it must stand by the contract thereby made. Under the completed transaction the relation between the parties was that of banker and depositor, and the bank became the debtor to the plaintiff for the amount of the general deposit placed to his credit. And its liability could be discharged only by payment of the debt. After the discovery that the funds in the Gaxiola account were insufficient to take care of the check, the bank attempted to retrace its steps. This it could not do. It was too late. The transaction was already completed. The discovery could not operate to change the nature of the contract or discharge the bank from liability. Consequently marking the check with the letters "Ins." indicating the insufficiency of funds in the Gaxiola account, and charging back the amount of the check to the plaintiff's account, were immaterial acts, and of no effect. And the subsequent action of the bank in telegraphing the plaintiff that the check was worthless and returning it to him were also ineffective and powerless to discharge the liability of the bank. It may be, if the condition of the Gaxiola account had been examined before the letter was mailed, credit would not have been given, but the bank did not see fit to make the examination. It waived all inquiry and sent the letter. Manifestly the present dilemma of the bank is due wholly to its own laches.

[3] The law is firmly settled that where a check, drawn on a particular bank, is presented to that bank for general deposit, and the bank gives the depositor credit therefor, the relation between the bank and the depositor is that of debtor and creditor, since the giving of credit under such circumstances is practically and legally the same as if the bank had paid the money to the depositor and had received it again on deposit. The transaction is thus complete, and cannot be rescinded except for fraud or in case of mutual mistake. Tiffany on Banks and Banking, pp. 38, 39; 2 Morse on Banks and Banking, par. 569.

"When a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money, and

the bank cannot recall or repudiate the payment because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though, when the payment was made, the officers labored under the mistake that there were funds sufficient. In such a case the bank could have received the check conditionally, and have come under obligations to account to the holder for it, only in the event that on an examination of the accounts of the drawer it was found he had funds to meet it, or in the event that he provided funds for its payment. Or it could have asked for time to examine the accounts, that it might determine whether it would accept and pay or dishonor the check. It would have been within the option of the holder to have accepted or rejected either of these propositions. But when the holder presented the check with his passbook, that the check might be entered as a deposit to his credit, it was a request for the payment of the check; and there can be no distinction between a request for payment in moneys and a request for payment by a transfer to the credit of the holder." 3 R. C. L. 526.

The court says in *Bank v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766:

"In *Morse's* well-considered work on Banking, p. 321, it is said: 'But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.' We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason."

In the more recent case of *American National Bank of Nashville v. Miller*, Agent, 229 U. S. 517, 83 Sup. Ct. 888, 57 L. Ed. 1810, the Supreme Court of the United States, speaking through Mr. Justice Lamar, says:

"There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual function of collecting and crediting, the transaction is closed, and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course. * * * In the present case it was as though an officer of the Macon Bank had presented the check to the teller of the Nashville Bank, and on receiving the money had paid it back over the counter for deposit to the credit of the Macon Bank."

In *Oddie v. National City Bank of New York*, 45 N. Y. 735 (6 Am. Rep. 160), Chief Justice Church, in stating the opinion of the court, says:

"Financial business is transacted at banks in large amounts, with great rapidity, but according to definite and certain rules, which are well understood and acted upon by those

engaged in that business. Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business.

"In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine.

"In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter."

The Chief Justice further said, in the course of the opinion:

"Here the plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiffs with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the passbook of the plaintiffs, and entered upon the books of the bank."

To the same effect are *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482; *Security National Bank of Sioux City, Iowa, v. Old National Bank of Battle Creek, Mich.*, 241 Fed. 1, 154 C. C. A. 1; *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. 729, 6 L. R. A. 191, 16 Am. St. Rep. 342; *Woodward v. Savings & Trust Co.*, 178 N. C. 184, 100 S. E. 304, 5 A. L. R. 1561; *City National Bank of Selma v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *American Exchange National Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171, and note; *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N. E. 670.

We are cited to the cases, *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 66, 21 Am. Rep. 697, and *Ocean Park Bank v. Rogers*, 6 Cal. App. 678, 92 Pac. 879, as supporting the contention of the bank that no credit

was actually given. *National Gold Bank v. McDonald* was a case in which a depositor presented a check drawn in his favor upon the plaintiff's bank. He was credited in his bank book for the amount of the check, but when the day's business was reviewed it was discovered that the drawer had no funds on deposit. Accordingly the bank charged the depositor's account with the amount of the check. It was held that the transaction of itself did not import an agreement by the bank to accept the check as cash. The substance of that decision is that a bank has until the close of business hours for the day to determine whether or not final credit will be given for a check drawn upon and payable by itself. The facts of that case and *Ocean Park Bank v. Rogers* are almost identical. Neither case goes so far as to hold that no agreement is possible whereby the bank in which a check is deposited may receive it as cash. Laying aside the thought that these cases appear to be out of line with the general current of authorities, we do not think that they are applicable to the facts of the present case. In these cases the act of charging back the checks to the account of the depositors was done on the same day that the credit was given. Here the amount of the check was charged back to the account of the plaintiff on the second day (including Sunday) after it was received and the letter to the plaintiff was mailed. If under the California cases the bank had the right to charge back the item of the check to the plaintiff's account at the end of the day's business upon which the check was received, surely that right cannot be said to go on ad infinitum.

[4] The bank seems to rely upon the proposition that the transaction was only an acceptance of the check, and that under the Negotiable Instruments Law of this state (section 4277, Civil Code) such an acceptance must have been in writing and signed by some officer of the bank in order to be valid. But we think the bank loses sight of the fact that payment and acceptance are essentially different.

"Payment is a natural, expected and intended end of a check. Acceptance strengthens the vitality of a check and serves to prolong rather than to terminate the life of it. * * * Payment ends the life of a check. Acceptance reinvigorates it." *Hunt v. Security State Bank*, 91 Or. 362, 179 Pac. 248.

See, also, *Guthrie National Bank v. Gill*, 6 Okl. 560-565, 54 Pac. 434-436.

Here there was actual payment. We know of no rule of law that requires that such payment must be evidenced by a written instrument signed by some officer of the bank.

[5, 6] The bank argues that it is not liable in this case for the amount of the check, because Miss Barney, the young girl who mailed the letter and inclosures, had no authority to extend the credit of the bank.

The argument is unsound for two very good reasons. In the first place, want of authority on the part of Miss Barney was not pleaded. The question has been raised for the first time since the case reached this court. In the second place, it is not questioned but that Miss Barney was an employee of the bank. Her duties were to answer correspondence and prepare mailing matter. The letter of advice sent to the plaintiff in its printed form was supplied by the bank to its employees for the very purpose for which this one was used. It is not questioned but that Miss Barney was authorized to prepare the letter and send it. It would be monstrous to hold that because the name of the cashier of the bank was printed the bank was not liable. The paper was the paper of the bank; its form was prepared by the bank, and used by the bank in notifying its customers of the receipt of remittances. The paper speaks for itself; therefore it was the bank extending credit, and not Miss Barney.

[7] We are unable to perceive why the telegrams sent by the plaintiff to the bank or the retention of the check by him operated as an estoppel, as claimed by the bank. The elements of an estoppel have been concisely stated to be as follows:

"To constitute it, the person sought to be estopped must do such act or make such admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822.

The bank returned the check to the plaintiff. It voluntarily parted with its possession. It would seem that it was the duty of the bank to request the return of the check if it considered it to be of any value. There is, however, no pretense whatever that the bank suffered any loss or changed its attitude to its disadvantage in any way by reason of the telegrams or the retention of the check. The bank could have recovered on the check as against Gaxiola, although the check had remained in plaintiff's possession. The doctrine of estoppel can have no application to this case.

We have reached the conclusions stated in this decision with a great deal of reluctance. It seems to be one of those cases where a party has the right to stand upon his legal rights no matter how selfish and harsh such conduct may appear to be. While we may not condemn the conduct of the plaintiff, we are not compelled to approve it. The case is decided as it is because we think it would be an extremely pernicious thing to throw doubt upon the scope of the doctrine governing negotiable paper. These doctrines are of immense value to every form of industry. To

seek too readily for exceptions from the well-settled rule of this branch of law in pursuit of a supposed equity would tend to impair the value of the principles of commercial law which depend largely upon their certainty. As much as this was said by Judge Cooley in the case of *First National Bank v. Burkham*, 32 Mich. 328, which case is often cited in opinions dealing with the subject.

The judgment is reversed, with directions to enter a judgment for the plaintiff, Cohen, for the amount of the check, \$3,567.50 and costs.

ROSS, C. J., and McALISTER, J., concur.

(22 Ariz. 409)

ARNETT v. CLACK. (No. 1896.)

(Supreme Court of Arizona. May 27, 1921.)

1. Bills and notes §315—Any defense against payee available in action by bona fide purchaser of nonnegotiable instrument.

Any defense the maker of a nonnegotiable instrument may have to an action brought by the payee will avail in an action by the assignee of the payee, or any subsequent holder, and it makes no difference that the plaintiff is a bona fide purchaser for value before maturity.

2. Bills and notes §155—When payment of note is "contingent" event.

If payment of a note is something that is certain to happen, as opposed to something that may or may not occur, it is not a contingency within the meaning of Civ. Code 1913, par. 4149, subd. 4, providing that an instrument payable upon a contingency is not negotiable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contingent.]

3. Bills and notes §155—Promissory note becoming due at option of holder on default in payment of interest negotiable.

A promissory note otherwise negotiable is not rendered nonnegotiable because of uncertainty as to time of payment by a stipulation that the principal and interest may become due and collectable at the option of the holder upon default in the payment of interest, under Civ. Code 1913, par. 4146, and paragraph 4149, subsec. 3.

4. Courts §95(2)—Opinions of foreign courts construing Negotiable Instruments Law to be followed.

The construction placed upon the Uniform Negotiable Instruments Law by courts of the states which have adopted it should be followed unless clearly erroneous.

Appeal from Superior Court, Mohave County; E. Elmo Bollinger, Judge.

Action by Lee Arnett against G. H. Clack. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Ross H. Blakely, of Kingman, and Weldon J. Bailey, of Phoenix, for appellant.

C. W. Herndon, of Kingman, for appellee.

McALISTER, J. This suit was brought by Lee Arnett to collect three promissory notes, totaling \$500, the first of which is in the following words and figures:

"\$166.70. Portland, Oregon, June 15, 1915. July 1, 1916, after date, for value received, I promise to pay to the order of Ruby & Bowers, at the Merchants' National Bank of Portland, Oregon, one hundred and sixty-six 70/100 dollars, in gold coin of the United States of America, with interest in like gold coin at the rate of 8 per cent. per annum from date until paid. Interest to be paid semiannually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectable at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, I promise and agree to pay such additional sum, in like gold coin as the court may adjudge reasonable for attorney's fees in said suit or action. Due ——. No. 1867. G. H. Clack."

The other two are identical, except as to the time of payment, the second being due July 1, 1917, and the third July 1, 1918. It is alleged that Ruby & Bowers, the payee, sold, assigned, transferred, and set over unto plaintiff, Lee Arnett, on July 5, 1915, the said notes for a valuable consideration, and that he ever since has been and now is their owner and holder in due course.

The answer admits the signing of the notes, but denies that they were signed for value, and alleges that they were without any consideration whatsoever; the defendant having received nothing in exchange for them. Their assignment and transfer to the plaintiff for a valuable consideration is denied, as well as the fact that he is now, or has ever been, their owner and holder in due course. The case was submitted to a jury, and upon its verdict judgment was entered for the defendant.

The question presented by the record is the correctness of the trial court's holding, both in passing on the admissibility of certain testimony and in its instructions to the jury, that the notes are not negotiable because they contain the following provision:

"Interest to be paid semiannually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectable at the option of the holder of this note."

In giving his reason for the ruling, the learned trial judge stated:

"A negotiable promissory note, under the statute of Arizona, is an unconditional promise in writing to pay a certain person at a fixed and certain time, and, by the clause in the notes of these pleadings, that time is fixed at one time when the defendant fails to pay the interest, and then it adds to that and says 'at the op-

tion of the holder.' Well, now, how can this defendant know when the holder of that note is going to make up his mind to bring suit? He may think that he will bring suit this month, or next month, or next year. I have stated that this defendant could not possibly determine and no one else determine, except the holder of that note."

[1] Following this holding appellee was permitted to introduce evidence showing that he received no consideration for the notes in that they were given as his portion of the price of a stallion purchased by him and others for breeding purposes, and that a fair trial of the animal proved him entirely worthless for this purpose for which a written warranty was given appellee and his associates by appellant's assignor at the time of the deal. The introduction of this evidence was objected to by appellant upon the theory that he was a bona fide purchaser for value before maturity without notice, and that the notes were negotiable, and therefore not subject to the defense of a lack of consideration as against him. The admission of the evidence was proper, however, if the court was correct in holding the notes non-negotiable; for it is a well-known principle of the law of promissory notes that any defense the maker of a nonnegotiable instrument may have to an action brought by the payee will avail in an action by the assignee of the payee, or any subsequent holder, and it makes no difference that the plaintiff is a bona fide purchaser for value before maturity. *Wettlauser v. Baxter*, 137 Ky. 362, 125 S. W. 741, 26 L. R. A. (N. S.) 804; *Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393; 2 R. C. L. 838, par. 12; 8 C. J. 52, par. 54.

[2, 3] We have been unable, notwithstanding the equities in favor of appellee in this particular case, however, to reach the conclusion that a note, otherwise negotiable, is rendered nonnegotiable because of uncertainty as to time of payment, by a stipulation that the principal and interest may become due and collectable at the option of the holder upon default in the payment of interest. To make an instrument negotiable under the law of this state, it must, by the provisions of paragraph 4146, subsec. (3), Revised Statutes 1913, "be payable on demand or at a fixed or determinable future time," and paragraph 4149 defines what is meant by determinable future time as follows:

"An instrument is payable at a determinable future time within the meaning of this title which is expressed to be payable: (1) At a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of the happening be uncertain, (4) an instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

The notes in question are not payable upon a contingency, as contended by appellee, for the reason that the time of payment must surely come. The happening of the contingency here claimed—default in the payment of interest by the maker and exercise thereupon by the payee or holder of his option to declare the principal due—only has the effect of hastening the time of payment, not defeating it; and under the authorities, if the contingent event is something that is certain to happen, as opposed to something that may or may not occur, it is not a contingency within the meaning of subdivision (4) of said paragraph 4149.

"What is meant by the provision in section 4 of the Negotiable Instruments Law that an instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect is that an instrument that stipulates no fixed or determinable future time at which it must be paid in any event, but is payable upon a contingency that may never happen, is not an unconditional promise to pay." *Bonart v. Rabito*, 141 La. 970, 78 South. 168; *Chicago Railway Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

"The true test of the negotiability of a note seems to be whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event." *Cota v. Buck*, 7 Metc. (Mass.) 588, 41 Am. Dec. 464.

The date of payment is specified in each of the notes "at a fixed and determinable future time," as required by subsection (2), above, and collection before that time cannot be made unless the maker defaults in the payment of interest, the payee or holder until then having no control over the time of payment, and—

"what is meant by the provision that to be a negotiable instrument a promissory note must be payable at a fixed or determinable future time is that some date must be either fixed or determinable at which the holder of the note may insist upon payment, unless then it shall have been already paid." *Bonart v. Rabito*, above.

A note of this kind is less subject to the charge of uncertainty than one maturing on or before a certain date, for then the time of payment depends entirely upon the volition of the maker and yet by the statute itself such a note, if payable to order or bearer, is made negotiable; its holder must accept payment when tendered by the maker, though his right to enforce payment at maturity if it has not been paid is not dependent upon any contingency. As said by the court in *Phelps v. Sargent et al.*, 60 Minn. 118, 71 N. W. 927:

"The test, as regards the time of payment, whether an instrument is a promissory note, is whether it provides a certain time when it must be paid at all events, and the right of

the holder to enforce payment becomes absolute. *Mattison v. Marks*, 31 Mich. 421; *Jordan v. Tate*, 19 Ohio St. 586; *Woollen v. Ulrich*, 64 Ind. 120. Now, the note in question names a definite time when it must be paid. It contains no agreement that it shall not be paid on the due day, upon the happening of a specified contingency. The contingent optional clause in this note simply enables the holder, at his volition, to enforce payment sooner, if the maker defaults in the payment of interest, precisely as the maker of a note payable on or before a certain date may, if he so wills, sooner tender payment. The instrument in question is a negotiable promissory note."

Most all of the authorities hold with the Minnesota court that a provision that the principal is to become due upon default in payment of any installment of interest does not render a note nonnegotiable. 1 *Daniel*, Neg. Inst. par. 48; *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 263, 10 Sup. Ct. 999, 34 L. Ed. 349; *Cowing v. Cloud*, 16 Colo. App. 326, 65 Pac. 417; *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160, affirming 83 Ill. App. 100; *Clark v. Skeen*, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Mackintosh v. Gibbs*, 81 N. J. Law, 577, 80 Atl. 554, Ann. Cas. 1912D, 163; *Hollinshead v. John Stuart & Co.* (*Hollinshead v. Globe Invest. Co.*) 8 N. D. 35, 77 N. W. 89, 42 L. R. A. 659; *Merrill v. Hurley*, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; *Cunningham v. McDonald*, 98 Tex. 316, 83 S. W. 372; *De Hass v. Roberts* (C. C.) 59 Fed. 853, reversed on other grounds in 70 Fed. 227, 17 C. C. A. 79, 28 U. S. App. 559, 30 L. R. A. 189; 3 R. C. L. 906, par. 97; 8 C. J. 139, par. 240. A note payable by installments is by statute negotiable, although the whole is to become due upon the failure of the payment of an installment or of the nonpayment of interest. Paragraph 4147, Revised Statutes 1913, subd. (3). It is also held that the negotiability of a note is not destroyed by a provision which, in effect, makes it payable in whole or in part at a date earlier than that named at the option of the maker. *Independent School Dist. v. Hall*, 113 U. S. 135, 5 Sup. Ct. 371, 28 L. Ed. 954; *National Salt Co. v. Ingraham*, 143 Fed. 805, 74 C. C. A. 479; *Cowing v. Cloud*, 16 Colo. App. 326, 65 Pac. 417; *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. 363.

The Negotiable Instruments Law of this state, so far as it affects this case—

"is only declaratory of a general rule of the law merchant that the negotiability of a note is not destroyed by a provision therein that it may become payable on the happening of a stipulated event over which the payee or holder has no control at an earlier date than the date first stated, on which, if not paid sooner, the note must be paid. On that principal it is settled beyond all controversy that a promissory

note payable on a fixed date is not rendered nonnegotiable by a stipulation therein that it shall become due if default be made in the payment of an installment of interest or in the payment of another note of the same series." *Bonart v. Rabito*, above.

The cases decided, therefore, before the adoption of the Negotiable Instruments Law are in point on the questions involved in this case, and, while they are somewhat divided, yet the great weight of authority favors the view expressed herein. Moreover, we have not been able to find any case decided directly upon the Negotiable Instruments Law, unaffected by other statutory provisions, which holds to the contrary, though there are some which have expressed the opposite view, but they were decided before the Negotiable Instruments Law was adopted by the states in which the decision was rendered, or upon statutes somewhat modifying it, or on stipulations in the note different from the one in question.

[4] Arizona, along with all the other states and territories of the Union, except two, Georgia and Texas, according to Brannan's Negotiable Instruments Law (3d Ed.) pp. xiv, xv, issued in 1919, has enacted the Negotiable Instruments Law as recommended by the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation in the United States. Most of the states have adopted it in the identical form in which it was recommended, though a few of them have made some modifications. This movement was prompted by the great need, apparent for a long while to those conversant with the situation, of making as nearly uniform as possible the law in the various states and territories of the Union on the subject of negotiable instruments in order that much of the uncertainty attending the use of commercial paper might be relieved, and to effectuate this purpose even substantially uniformity in its construction, as well as uniformity in its enactment, is necessary. The construction, therefore, placed upon its provisions by the courts which have adopted it in its entirety, or that portion applicable to the case in hand, should be followed unless clearly erroneous. *Century Bank of City of New York v. Breitbart et al.*, 89 Misc. Rep. 308, 151 N. Y. Supp. 590; *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okl. 342, 125 Pac. 464.

The ruling of the court admitting evidence showing a lack of consideration for the notes upon the theory that they were nonnegotiable was error. The judgment is therefore reversed, and the case remanded, with directions that any further action taken be had in line with the views herein expressed.

ROSS, O. J., and BAKER, J., concur.

(59 Mont. 594)

A. H. AVERILL MACHINERY CO. v. FREEBURY BROS. et al. (No. 4352.)

(Supreme Court of Montana. May 4, 1921.)

1. Chattel mortgages ⇨173(1), 267—Mortgagee in possession as purchaser at void sale could maintain replevin against third party.

As respects the right of mortgagee, purchasing and taking possession of the mortgaged property at foreclosure sale, to maintain claim and delivery for the property against persons claiming it solely by virtue of an alleged superior title emanating from an entirely independent source, if the foreclosure sale was so irregular as to render it void, the mortgagee still retained the rights of a mortgagee in possession of the property, under a mortgage provision giving it the right to possession, and that was sufficient to enable the mortgagee to bring the action.

2. Chattel mortgages ⇨173(4) — Burden of proof in replevin stated.

The burden was upon the mortgagee suing in claim and delivery to prove it was entitled to possession at the time of commencement of the action, but, having done this by showing possession delivered to it as purchaser on foreclosure sale, the burden was upon defendants to prove a superior claim.

3. Statutes ⇨121(7) — Amendment of prior act held constitutional, though act amended not enumerated in title of amendatory act.

Rev. Codes, § 2684, authorizing the county treasurer to seize and sell personal property for delinquent taxes, amending Pol. Code 1895, § 3941, vesting such power in the county assessor, held constitutional, though the amended section was not enumerated in the title of the amendatory act, having been incorporated in Rev. Code 1907; and this section and section 2683 entirely supersede section 2657, relating to the same subject.

4. Taxation ⇨417—Duty of owner of property assessed to "unknown owners" to notify assessor of its ownership or to pay taxes thereon.

Where a county assessor, pursuant to Rev. Codes, § 2517, assessed to unknown owner a traction engine belonging to plaintiff, which the year before was assessed to plaintiff, and sold the same for delinquent taxes, it was the duty of the latter, knowing that the property was subject to assessment, to notify the assessor of its ownership or to pay the taxes.

5. Taxation ⇨417—Sufficient compliance with statute authorizing assessment of personal property to "unknown owners" where reasonable doubt as to ownership of property and assessor used reasonable diligence to ascertain name of owner.

Where, pursuant to Rev. Codes, § 2517, authorizing the assessment of personal property to "unknown owners" when the name of the owner is unknown, there is reasonable doubt as to the ownership of the property, and the assessor uses reasonable diligence to ascertain the name of the owner, there is a sufficient compliance with the statute.

6. Taxation ⇨417—Assessments under statutes authorizing assessment to "unknown owners" of personal property effectual against property regardless of owner.

Assessments under statutes such as Rev. Codes, § 2517, authorizing the assessment of personal property to unknown owners when the name of the owner is unknown, are intended to be effectual against the property regardless of the owner, placing it in this respect upon the footing of a proceeding in rem.

7. Taxation ⇨582—Issue of bill of sale to one who purchased bid from highest bidder at tax sale divests title of owner as if issued to highest bidder.

Where at a sale of property for delinquent taxes A., the highest bidder, sold his bid to F., to whom the bill of sale was issued, there being no collusion, the issue of the bill of sale divested the owner of the property of all title as effectually as if the bill had been issued to the highest bidder.

Commissioners' Opinion.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

Action by the A. H. Averill Machinery Company against Freebury Bros., a copartnership, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

F. A. Ewald, and O'Leary & Doyle, all of Great Falls, for appellant.

W. E. Arnot, of Conrad, and Norris, Hurd & Rhoades, of Great Falls, for respondents.

POORMAN, C. This is an appeal by plaintiff from a judgment rendered against it by the court, sitting without a jury, in a claim and delivery action. The property in dispute is described in the complaint as "one 32-horse double Minneapolis traction engine, No. 9060, and all of the parts and fixtures attached thereto, a part thereof, or in any wise thereto belonging." All of the defendants except John Doe, who does not appear, unite in an answer admitting that plaintiff is an Oregon corporation, engaged in the sale of traction engines and other farming machinery and implements, admit the copartnership alleged to exist between Arthur Freebury and Harry Freebury, and deny generally and specifically all other allegations of the complaint. At the close of plaintiff's evidence, the defendants moved "for judgment dismissing this action and a finding by the court in behalf of the defendants," etc. This motion was sustained as to the defendant W. S. Arnot, and the trial proceeded as to the other answering defendants. The cause having been finally submitted, the court subsequently rendered its judgment against the plaintiff and in favor of all of the answering defendants, to the effect that plaintiff take nothing and that defendants recover their costs.

It appears from the evidence that appellant was the owner of a chattel mortgage on the

property in question, and, default having been made in some of the conditions thereof, the sheriff of Teton county, Mont., at the instance of appellant, and under and by virtue of a power of sale contained in the mortgage, took the engine from the possession of the mortgagor, at his ranch in said county, and moved the same several miles to a place a short distance west of the city of Conrad, in said county, and, after notice given, sold the same on October 18, 1914, at public auction; the appellant becoming the purchaser at such sale. This mortgage and the purchase of the property at the foreclosure sale constitute appellant's sole claim to ownership and right of possession of the property in question. The respondents claim the property by reason of purchase of the same at a sale thereof on September 29, 1916, by the county treasurer of said county, for delinquent taxes alleged to be due on assessment made in the year 1916. This tax sale is the sole source of respondents' claim to ownership and right of possession.

The engine referred to in the mortgage is described therein as "one 32-horse double Minneapolis traction engine, No. 9060, and all of the parts and fixtures attached thereto, a part thereof, or in any wise thereto belonging." In the foreclosure proceedings the engine is referred to as No. 960; in the bill of sale issued by the county treasurer the engine is referred to as bearing the number 6090. Each party maintains that his adversary committed a fatal error in the use of the wrong number. The number is not the only means of identifying the property, nor the only description given. Furthermore, it is the Fitzpatrick engine moved by the sheriff in 1914 to the place where it was found by the assessor in 1915 and 1916, sold by the county treasurer in 1916, taken possession of by the respondents, and was in their possession at the time this action was commenced, and, for aught this record shows, all these numbers may have appeared on this engine or on some of the parts thereof. No one was deceived by the use of these various numbers, and there is not any doubt of the identity of this particular piece of property.

[1] Much discussion is had in the briefs relative to the regularity of the mortgage sale. The mortgagee was the purchaser at the foreclosure sale, and possession was delivered to it. The respondents' sole claim of right is by virtue of an alleged superior title emanating from an entirely independent source. Hence, if the foreclosure sale was so irregular as to render it void, the appellant, as to these respondents, still retained the rights of a mortgagee in possession of the property, under a provision in the mortgage which gave it the right to that possession, and that is sufficient, so far as this case is concerned. *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *Henry Jennings & Sons v. Weinberger*, 75 Or. 556, 146 Pac.

1087; *Park v. Parsons*, 10 Utah, 830, 37 Pac. 570; 11 C. J. 718, note 90.

[2] It is true that the burden was upon the appellant to prove that it was entitled to the possession of the property at the time of the commencement of the action (*Woods v. Latta*, 35 Mont. 9, 88 Pac. 402), but having done this, the burden was upon the respondents to prove a superior claim.

If the tax title is valid, then the claim of the respondents is superior to any other claim or title having its origin prior thereto. If the tax title is invalid, then the respondents have no standing in this cause.

[3] Appellant attacks the constitutionality of section 2684, R. C., for the reason that section 3941 of Pol. Code 1895, is not enumerated in the title of the amendatory act (chapter 119, Laws 1903). But this question has been decided adversely to the contention of the plaintiff by the adoption of the Revised Codes of 1907. (*Wheeler & Motter Mercantile Co. v. Moon*, 49 Mont. 307, 141 Pac. 665), and the section has since been referred to by the Supreme Court as a part of the law of this state (*City of Butte v. Bennetts et al.*, 51 Mont. 27, 149 Pac. 92, Ann. Cas. 1918C, 1019). Section 2657, R. C., relating to the same subject, is entirely superseded by the provisions of section 2683 and section 2684. *State v. Bradshaw*, 53 Mont. 96, 161 Pac. 710.

[4] Some statements are made relative to the constitutionality of section 2517, R. C., which provides that personal property may be assessed to "unknown owners" when the name of the owner is unknown, but appellant seems to base his argument on his claim that it would be an invasion of appellant's constitutional rights to apply that section to the facts in this case.

It is the duty of the assessor to "ascertain the names of all taxable inhabitants, and all property in his county subject to taxation" (section 2510, R. C.), and when the ownership is unknown it must be assessed to "unknown owners" (section 2517, R. C.). This property was assessed to appellant in 1915. Appellant was notified at its office in Cascade county and paid the taxes. The engine remained in the same place—that is, in open territory west of Conrad—and was "found" there by the assessor in 1916, and assessed to "unknown owners," after he had "asked a great many people in Conrad as to who the owner of this Minneapolis engine in 1916 was." And the names of some of the parties of whom inquiry was made are given. This inquiry seems to have been somewhat extended. The assessor did not make inquiry of implement dealers, nor correspond with the manufacturer, nor refer to the previous assessment list. The owner of real estate may usually be ascertained by examining the record, but not of personal property. As to the assessor, his knowledge of the ownership of personal property must rest in memory or

in evidence. If given the name, he may ascertain what property was assessed in that name, but, if given the property, he has no means of finding the name except by an examination of the entire assessment for the year, and then there may be duplicates.

The appellant was in the business of selling this kind of property. One of its witnesses, Mr. Morris, testified that he had the engine sold once, but could not recall the date. The engine was apparently not in the care or custody of any one and had not been for more than a year. It bore the impress more of abandoned property than of owned property. The appellant knew this property was subject to assessment and taxation; knew that it did not own real estate in that county; knew that the treasurer might seize and sell the property for taxes. It might have notified the assessor of this ownership; it might have paid the taxes; but it did nothing until on February 20, 1917, when possession was demanded. No offer was made to pay any taxes. Some duty rests on the property owner. *Larson et al. v. Peppard*, 38 Mont. 128, 99 Pac. 136, 129 Am. St. Rep. 630, 16 Ann. Cas. 800.

[5] It seems quite clear that from the facts in this case there was reasonable doubt as to the ownership of this property, and that the assessor used reasonable diligence in endeavoring to ascertain the name of the owner. It is entirely idle to say that property whose ownership is unknown, or, if the owner is known, cannot be found for the purpose of serving notice, is for that reason rendered exempt, or rather immune, from taxation.

[6] Assessments under statutes such as these are intended to be "effectual as against the property regardless of the" owner, "placing it in this respect upon the footing of a proceeding in rem." *O'Grady v. Barnhisel*, 23 Cal. 293. In this connection, we also refer to *Birney v. Warren*, 28 Mont. 64, 72 Pac. 293.

[7] Appellant further complains that at the tax sale W. S. Arnot was the highest bidder, and that a bill of sale was made to A. J. Freebury. It appears from the record that Mr. Arnot was the highest bidder, and that Mr. Freebury gave him \$5 for his bid, and he thereupon requested the bill of sale be issued to Mr. Freebury. But, had it been issued to Mr. Arnot, it would have divested the appellant of all title (section 2661, R. O.), and it could not do more than that if issued to Mr. Freebury. Nor is there any evidence in this case to sustain any charge of collusion. The value of the property is variously estimated, all the way from \$75 to \$1,200.

No reversible error appearing in this case, we recommend that judgment be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(60 Mont. 179)

BATCHOFF v. BUTTE PACIFIC COPPER CO. et al. (No. 4234.)

(Supreme Court of Montana. January 20, 1921.
Rehearing Granted May 23, 1921.)

1. Death ⚡46—Complaint by administrator held to state cause of action.

In an action against a master under Rev. Codes, § 6486, for the death of an adult servant, the administrator's complaint setting out the facts and the heirs, the father and mother of deceased, and the damage to each, held to state facts sufficient to constitute a cause of action.

2. Death ⚡11—Right of action is statutory.

The right of action for injuries causing death did not exist at common law, but is statutory and must be controlled and limited by the statute.

3. Death ⚡42—Administrator's complaint not improper in showing damages suffered by each heir.

The right of action under Rev. Codes, § 6486, for an adult's death, is solely for the benefit of the heirs, and it is immaterial whether the action is brought by the personal representative who acts merely as trustee or by the heirs; for the action is in either case substantially the same and the damages are identical, and it is proper for the administrator to set out in the complaint the damages suffered by each heir.

4. Death ⚡49(2)—Administrator's complaint held to show interest of surviving father and mother as heirs.

An administrator's complaint under Rev. Codes, § 6486, for the death of an adult, stating that he died unmarried and intestate leaving his father and mother and naming them, they being necessarily his heirs in view of section 4820, subd. 2, sufficiently states the fact of their being heirs interested in the cause of action.

5. Dismissal and nonsuit ⚡60(2)—Statute permitting dismissal for neglect to demand judgment after verdict or final submission held inapplicable to default.

The provision of Rev. Codes, § 6714, subd. 6, that an action may be dismissed "when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months," is not applicable to a default where there was no verdict and the case was not submitted to a jury and not finally submitted to the court until presentation of the required proof on the day of the entry of the judgment.

6. Evidence ⚡10(6)—Court will take judicial notice of distance between two cities in same state.

Upon a question arising under the statute extending time to answer upon mailing of a notice according to distance of party, the court will take judicial notice that the distance from Anaconda to Helena is 97 miles.

On Rehearing.

7. Judgment ¶119—Entry of default judgment prior to lapse of statutory time after mailed notice held premature, but not void as beyond court's jurisdiction.

Rev. Codes, § 6594, providing that, on overruling demurrer to complaint where time is given to answer, such time runs from service of order except when the defendant is in court, and section 7148, providing that, in case of service by mail, service is complete at time of deposit, but that, where an act is to be done by the adverse party, the time within which such right may be exercised is extended one day for every 25 miles' distance, apply whether the order specifically provides that the answers shall be made within a given number of days or on or before a definite date, and default taken before expiration of such time is premature, but is not without jurisdiction.

8. Appeal and error ¶870(3)—Order denying motion to vacate default judgment being appealable, bill of exceptions thereon cannot be considered on appeal from judgment alone.

Under Rev. Codes, §§ 6787, 6788, 7112, an order denying motion to vacate default judgment, made after judgment being appealable, exceptions thereon cannot be considered on appeal from the final judgment alone.

Appeal from District Court, Deer Lodge County; George B. Winston, Judge.

Action by D. A. Batchoff, as administrator of the estate of Dimitre Stoycoff Gancheff, deceased, against the Butte Pacific Copper Company and another. Judgment by default for plaintiff, and the defendants, after denial of motion to set aside the default and the judgment, appeal from the judgment. Affirmed.

F. W. Mettler and E. G. Toomey, both of Helena, for appellants.

Maury, Wheeler & Melzner, of Butte, for respondent.

REYNOLDS, J. This action was brought by D. A. Batchoff, as administrator of the estate of Dimitre Stoycoff Gancheff, deceased, to recover damages for the death of the deceased, alleged to have been caused by the defective condition of a certain mining shaft due to negligence of defendants.

To the amended complaint defendants filed demurrer, which demurrer was overruled on the 2d day of September, 1916. In the order overruling the demurrer, defendants were granted to and including the 1st day of October, 1916, within which to serve and file answer. Neither defendant, nor either of their attorneys, was present in court at the time of the entry of the order overruling the demurrer, nor was any notice served upon them, or either of them, by the attorneys for plaintiff. On the 2d day of September, 1916, the clerk mailed to attorneys for defendants a postal card advising them of the order and

of the time within which they were required to answer. The attorneys for defendants deny having received any such notice. On the 3d day of October, no answer having been filed, default was entered against defendants. On the 11th day of May, 1917, judgment on default was entered in favor of plaintiff and against defendants. Thereafter defendants made motion to set aside default and the judgment, and tendered an answer setting forth a defense upon the merits. This motion was overruled. Appeal is taken to this court from the judgment.

The demurrer to the amended complaint was made on the grounds that there was a misjoinder of parties plaintiff, for the reason that it was sought to join with D. A. Batchoff, as administrator of the estate of Dimitre Stoycoff Gancheff, deceased, the father and mother of said deceased; that the causes of action were improperly united in the complaint, in that the cause of action in favor of plaintiff, D. A. Batchoff, as administrator, was improperly united with the cause of action in favor of each the father and mother of the deceased; and that the amended complaint was ambiguous in that it could not be determined therefrom what damages were sought in behalf of the estate, what damages in behalf of the father of the deceased, and what damages in behalf of the mother of the deceased. The demurrer also rested upon the general ground that the amended complaint does not state facts sufficient to constitute a cause of action.

[1] From an examination of the amended complaint, the court is satisfied that it does state facts sufficient to constitute a cause of action under section 6486, Revised Codes, which provides as follows:

"When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

[2] It is urged by appellants that under said statute there exists an action in favor of the personal representative of an estate for damages for the death of a person not a minor, and also in favor of the heirs at law of the deceased, and that in the amended complaint in question, it is impossible to segregate the damages that are claimed by the administrator, from those that are claimed by the heirs at law of the deceased. It is also contended that even though the names of the father and mother do not appear in the title of the case, yet, inasmuch as the amended complaint seeks to recover damages suffered

by them, they are substantially parties to the proceeding. Under the theory of appellants, as above mentioned, arises the alleged improper joinder of parties and improper joinder of causes of action.

Under the common law, any action for damages due to personal injuries would abate with the death of the party injured and no action at all could lie if the injury resulted in death. By reason of the apparent injustice of such a rule, statutes have been enacted whereby the cause of action survives the death of the party injured, and in case the injury produces death, then the cause of action survives to his personal representative or heirs at law. The right of action being statutory, it must be controlled and limited by the statute and its proper interpretation.

[3] In the case of *Melville v. Butte-Balalava Copper Co.*, 47 Mont. 1, 130 Pac. 441, is given a review of the history of legislation in this state whereby right of action is granted to the personal representative or heirs at law of the deceased for damages resulting in death. It appears that this statute was probably copied from the Code of Civil Procedure of California, as amended by the Act of March 24, 1874 (Cal. Code Civ. Pro. § 377). The Supreme Court of that state has had this statute under consideration in several cases and has uniformly held that the right of action is solely for the benefit of the heirs of the deceased; that the provision whereby action may be brought by the personal representative of the deceased does not confer any right of action upon the estate of the deceased, but that the personal representative, in so bringing such an action, is acting merely as a trustee for the benefit of the heirs; that under either method of procedure, the action, in substance, is entirely for the benefit of the heirs; that the proceeds thereof cannot be considered any part of the estate of the deceased; and that, in fact, a proceeding cannot be sustained at all under this statute in case it does not affirmatively appear that the deceased died leaving heirs surviving him. Consistently with the principles above set forth, the same court holds that an action by the personal representative is a bar to any action by the heirs of deceased, and vice versa. *Munro v. Pacific Const. etc. Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811; *Ruiz v. Santa Barbara Gas & Elec. Co.*, 164 Cal. 188, 128 Pac. 330; *Slaughter v. Goldberg, Bowen Co.*, 26 Cal. App. 318, 147 Pac. 90; *Hirsch v. James S. Remick Co.*, 38 Cal. App. 764, 177 Pac. 876; *Tann v. Western Pac. Ry. Co.*, 39 Cal. App. 377, 178 Pac. 971; *Hartigan v. Southern Pac. Ry. Co.*, 86 Cal. 142, 24 Pac. 851.

In the case of *Ruiz v. Santa Barbara Gas*

& Electric Co., *supra*, the court expressed itself in these words:

"It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs."

In the case of *Tann v. Western Pacific Ry. Co.*, *supra*, the court, in considering the sufficiency of a complaint based upon said statute, used the following words:

"Undoubtedly, the complaint does fail to state a cause of action if it fails to allege that deceased was an adult and left an heir, or heirs, an allegation absolutely essential in an action of this character."

In *Hartigan v. Southern Pacific Ry. Co.*, *supra*, the Supreme Court of California uses this language:

"When the personal representative of the deceased brings an action to recover damages for the act or negligence causing death, if another action is afterwards brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second, action."

It will therefore be seen from the foregoing authorities that it is immaterial whether the action is brought by the personal representative or by the heirs of the deceased, for the action is substantially the same action and the damages recoverable are identical. Such being the case, there cannot be anything improper in setting out in the complaint in question the damages alleged to have been suffered by the father and mother of the deceased.

[4] It is contended that the amended complaint fails to state that the father and mother of the deceased were in any way interested in the cause of action, for it does not specifically allege that they were the heirs at law of deceased. The amended complaint alleges that—

"Said Dimitre Stoycoff Gancheff died unmarried, intestate, leaving surviving him his father, by name Stoicko Gancheff, aged 63 years, and a mother, by name Penka Stoicko Gancheff, aged 60 years."

It appearing from the foregoing that the deceased died unmarried and intestate, his father and mother would necessarily be his heirs at law under the statutes of succession. Rev. Codes, § 4820, subd. 2. As such is the necessary inference from the language used,

it must be held that the amended complaint sufficiently states that fact.

[5] It is contended by defendants that the judgment was entered without jurisdiction, for the reason that it was not entered for more than six months after the entry of default. This contention is based upon Revised Codes, § 6714, subd. 6, which reads as follows:

"An action may be dismissed or a judgment of nonsuit entered in the following cases: * * *

(6) By the court, when after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."

It will be noted that the obligation to enter judgment within the period of six months above mentioned is six months after verdict or final submission. While default was entered on the 3d day of October, no verdict was ever rendered, as the case was not submitted to the jury; and the case was not finally submitted to the court until the 11th day of May, 1917, the date of the entry of judgment. Proof being required in such cases as this, upon which to base the entry of the judgment, judgment could not have been entered upon the default. Since it was entered upon the same day that proof was submitted, the statutory restriction does not apply.

[8] It is also contended that the judgment was entered without jurisdiction, for the reason that the default was prematurely entered. The statute provides that when a demurrer to a complaint is overruled and time is given for answer, the time so given runs from service of notice of the order, except when the defendant is in court. Rev. Codes, § 6594. In this case neither defendant nor either of defendants' attorneys was in court at the time the order was entered; so the time for answer commenced to run from the time of service of notice of the order. Service of the notice was made by the clerk by mail, under the provisions of section 7148 of the Revised Codes, which statute is as follows:

"In case of service by mail, the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address. The service in any case is deemed complete at the end of forty days from the date of its deposit in the postoffice."

Conceding, for the purposes of this case, that service of notice could be made by the clerk by mailing a postal card (although it is doubtful whether or not such service could be deemed a legal service), service was complete

at the time of the deposit of the notice in the postoffice, which in this case was the 2d day of September, 1916. Such service was complete upon deposit, even though the notice was never actually received by defendants' attorneys. *Griffin v. Board of Commissioners of Walworth Co.*, 20 S. D. 1117, 104 N. W. 1117. The statute, however, provides that if, within a given number of days after such service a right may be exercised or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every 25 miles distance between the place of deposit and the place of address. The question arises as to whether or not the time for answer was extended by this provision of the statute beyond the 1st day of October, 1916, inasmuch as the place of deposit of the notice was Anaconda, and the place of address, Helena. The distance between the two places is about 97 miles, of which fact the court may take judicial notice.

The statute uses the expression "within a given number of days after such service," and it is contended that, inasmuch as the order in this case did not specifically provide that answer should be made within a given number of days but on or before a definite date, such provision of the statute does not apply. It is the opinion of the court, however, that by the enactment of this provision of the statute it was the intention of the Legislature to give to a party living at a distance from the place of mailing additional time for performing the act to be done equivalent to one day for each 25 miles distance. It is substantially the same thing whether the order requires the act to be performed within a limited number of days, or on or before a definite date; and there can be no reason why, if the rule should be applied in one case, it should not be also applied in the other. The reasonableness of such a construction is apparent when it is considered that if the statute is not so construed, one may literally comply with the statute and absolutely prevent the other party from exercising his right, by giving a notice so late that the other party could not act upon it within the time required by such an interpretation. In this particular case, if notice had been deposited upon the 30th day of September, 1916, the notice would be complete upon that date and before the time required for answer, and yet it is evident that the defendants would not have been given any opportunity whatever to make such answer.

It is therefore the opinion of the court that under the provisions of this statute, the time of defendants for answer was extended to and included at least the 4th day of October, 1916. Under this construction of the statute, the default was prematurely entered, was without jurisdiction, and the judgment

which followed was likewise without jurisdiction and void.

For the reasons above mentioned, the judgment is reversed, and the cause remanded, with directions to the lower court to set aside the default and permit the defendants to file their answer as of the time of its tender.

Reversed and remanded.

BRANTLY, C. J., and COOPER and HOLLOWAY, JJ., concur.

GALEN, J., being disqualified, takes no part in the decision of this case.

On Rehearing.

REYNOLDS, J. [7] In the original opinion in this case, it was stated that—

"The default was prematurely entered, was without jurisdiction, and the judgment which followed was likewise without jurisdiction and void."

While under the facts stated in the opinion it was error to prematurely enter the judgment, yet such entry was not without jurisdiction, but was error within jurisdiction. It was voidable but not void. 23 Cyc. 745; 12 Cyc. 755; 2 Freeman on Judgments, pars. 532, 542; Cook v. Mix, 10 Conn. 565; Drew v. Claypool, 61 Mich. 233, 28 N. W. 78; Anheuser-Busch Brewing Ass'n v. McGowan, 49 La. Ann. 630, 21 South. 766; Mitchell v. Aten, 37 Kan. 33, 14 Pac. 497, 1 Am. St. Rep. 231; People v. Dodge, 104 Cal. 487, 38 Pac. 203; O'Rear v. Lazarus, 8 Colo. 608, 9 Pac. 621; Remnant v. Hoffman, 11 Pac. 319; Gwillim v. First Nat. Bank of Colorado Springs, 13 Colo. 278, 22 Pac. 458; Ross v. Wellman, 102 Cal. 1, 36 Pac. 402; Hole v. Page, 20 Wash. 208, 54 Pac. 1123.

[8] On rehearing, the question considered is the right of this court to review, upon the record as submitted, the error of the court in prematurely entering judgment. There is nothing in the judgment roll showing the premature entry of the judgment, but it is in all respects fair upon its face. After judgment was entered a motion, supported by affidavits, was made to vacate the default and judgment on the ground that the same had been prematurely entered. The motion was denied and bill of exceptions was settled upon this motion; no appeal, however, was taken from the order of the court denying the motion, but appeal was taken from the judgment only. Appellants contend that even though the bill of exceptions was settled in connection with the motion, yet, inasmuch as the bill of exceptions points out the premature entry of the judgment, it reveals an error made by the court before judgment, and therefore is available to them on the appeal from the judgment. In support of this

contention, the appellants rely largely upon the statute defining what constitutes the record on appeal, being section 7112, Revised Codes, which reads as follows:

"On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll or of such parts thereof as may be necessary to be considered on the appeal, and of any bill of exceptions upon which the appellant relies. Any statement of the case settled after the decision of the motion for a new trial, when the motion is made upon the minutes of the court, as provided for in section 6796 (1173), or any bill of exceptions settled as provided for in section 6787 (1154) or in section 6788 (1155), or used on the motion of a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."

The particular language relied upon is found in the first sentence, in which it is stated that appellant must furnish the court with a copy of the judgment roll and of any bill of exceptions upon which the appellant relies. The statute provides that immediately after entering judgment, the clerk must attach together and file certain papers therein mentioned, including all bills of exceptions taken and filed, which shall constitute the judgment roll. Rev. Codes, § 6806. It is argued that inasmuch as the statute includes within the judgment roll all bills of exceptions taken and filed, and inasmuch as the Legislature provided in section 7112 that the record on appeal shall consist of the judgment roll and any bills of exceptions upon which the appellant relies, it intended to include any bills of exceptions so relied upon, no matter when or for what purpose it was settled, and that therefore a bill of exceptions prepared upon motion to vacate default and judgment is such a bill of exceptions as is so contemplated. However, in determining this question it is necessary to consider the whole of section 7112. It is to be noted that in the latter part of the section it is provided that—

"Any bill of exceptions settled as provided for in section 6787 (1144) or in section 6788 (1155), or used on the motion of a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."

It must be remembered that the judgment roll must be made up immediately upon the entry of the judgment, and it therefore can contain only such bills of exceptions as were on file at the time of the entry of the judgment. Section 6788 provides that bills of exceptions may be settled after judgment, covering matters occurring upon the trial. Such bills of exceptions, not being filed at the time of the entry of the judgment, cannot be deemed a part of the judgment roll; but, inasmuch as they contain exceptions to

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 69 Cal. xv.

(60 Mont. 70)

the proceedings before the entry of judgment, they are material in considering any appeal from the judgment. Reading the section 7112 in its entirety, it is our opinion that it was the intention of the Legislature in providing for judgment roll and bill of exceptions, to include only such bill of exceptions as was settled under either section 6787 or 6788. As the bill of exceptions in question was not settled under either section, nor used on a motion for new trial, it cannot be used on appeal from the judgment.

Appellants have also cited in support of their contentions the case of *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 L. R. A. 147, but the cited case is not applicable. In that case the motion to set aside default was made before judgment, and under the statutes of California no appeal could be taken from the order overruling such motion. In this case, however, the motion was made after judgment and the order denying the motion is an appealable order. Rev. Codes, § 7098. If this court should consider a bill of exceptions made on motion to set aside judgment and default on an appeal from the judgment, then such action would to a great extent nullify the provisions of the statute providing for appeal from orders made after judgment. As appellants had a clear right of appeal from the order denying their motion to set aside default and judgment, it would be improper for this court to consider the matters shown upon such motion when no appeal had been taken from the order.

We are reluctant to refuse to consider matters which appellants have attempted to bring before this court in a bona fide effort to present alleged errors for review, but it is not a question of our disposition in the matter, but a question of the power or lack of power of this court. Where the rules of practice are clear and unambiguous, such as exist in regard to the right of appeal from an order vacating judgment and default, we do not feel that this court should step aside from the issues properly presented to save appellants from the results of their action in mistaking their remedy. It is the conclusion of the court upon review of the above-mentioned statutory provisions that, on appeal from the judgment, matters contained in the bill of exceptions cannot be considered.

We therefore are compelled to reverse the order heretofore made, and affirm the judgment.

Affirmed.

BRANTLY, O. J., and COOPER and HOLLOWAY, JJ., concur.

GALEN, J., deeming himself disqualified, takes no part in this decision.

STATE v. SCHRACK et al. (No. 4377.)

(Supreme Court of Montana. May 16, 1921.)

1. Criminal law — § 552(3) — Rule as to sufficiency of circumstantial evidence stated.

Where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

2. Larceny — § 55—Evidence insufficient to sustain conviction for cattle theft.

In a prosecution for larceny of a calf, evidence held insufficient to sustain conviction.

Commissioners' Opinion.

Appeal from Eleventh Judicial District Court, Flathead County; T. A. Thompson, Judge.

Harvey Schrack and George Rogers were convicted of larceny, and from judgment of conviction, and from orders denying motions in arrest of judgment, and for a new trial, defendants appeal. Judgment and orders reversed, and cause remanded, with directions to dismiss information.

Logan & Child, of Kalispell, for appellants.
S. C. Ford and Wellington D. Rankin, Attys. Gen., for the State.

SPENCER, C. Defendants were charged in the district court of Flathead county with the larceny of one steer calf, the property of A. M. Moore. Trial was had and defendants convicted. Motions in arrest of judgment and for a new trial were denied. Defendants appeal from the adverse order in each instance and from the judgment.

It appears from the evidence that about June 29, 1917, the defendants went through Niarada in Flathead county, traveling north through the Little Bitter Root Canyon, upon a fishing excursion. They were seen going and returning. Over a considerable portion of the territory lying between Niarada and Marlon, through which defendants traveled, and particularly near what is known as Lang's Hill, many head of cattle grazed, nearly all of which belonged to A. M. Moore. On July 3, 1917, Charles Carlson was driving a herd of Moore's cattle toward the home ranch situated about six or seven miles south of Marlon, when he discovered, a few rods from the road, the hide and part of the entrails of a calf recently butchered. The hide still had portions of all four legs and "considerable bone" attached, but the head missing and a hole in the side, apparently from removal of the brand. The age of the calf was less than a year—what is called a "short yearling." This hide was taken to A. M. Moore's and turned over to the deputy sheriff, who retained possession until trial.

Moore identified the hide as that of one of his calves. On July 3d, the condition of the hide indicated that the animal had been recently killed. On July 8th, the deputy sheriff of Flathead county, armed with a search warrant, went to defendant Schrack's place "looking for veal." He found in a keg in the roothouse some "veal" and removed and took with him a portion—"what I figured a piece of the left shoulder." Upon the trial this piece of the shoulder and the hide were exhibits in the case. On July 8th, when defendant Schrack's place was searched, conversation was had between defendant and wife and the deputy sheriff as to the ownership of the veal found in the roothouse and the circumstances under which it was killed, as well as the disposition made of the hide and part of the meat. Other conversations with defendant Schrack developed inconsistent statements about the same subject-matter, but in none of his conversations, either with the deputy sheriff or others, was the larceny of the animal in question discussed, except to the extent that defendant denied killing any calves or cattle upon his trip up and return from the Bitter Root Canyon. Upon the trial, witness Martin, deputy sheriff, produced the "piece of shoulder" and "the piece with the hoof on" (part of the hide), and the following appears in the record:

"Q. You may show the jury which one of those pieces is the piece you got from Schrack. A. This one (indicating). I didn't saw it off. Q. It was sawed off, all right. Show them the other part of the exhibit. Place the two together. (Witness puts the two pieces together.)

"By Mr. McDonald: The piece with the hoof on, is the one piece. The other piece, the piece he got at Schrack's."

There is no testimony to show whether the two pieces fit or not.

The evidence discloses further that about July 6 or 7, 1917, in a conversation between witness Joe Shilts and defendant Schrack, the defendant made the following statement:

"This time they got me for killing a steer instead of a deer, and I will leave it go at that, and it will only cost me \$40."

And the day previous to the trial defendant Schrack said to the same witness:

"Well, all I told you, that they had me for killing a steer instead of a deer."

The foregoing epitome views the evidence in the light most unfavorable to the defendant Schrack.

Defendant Rogers accompanied Schrack on the trip to the Bitter Root and return. In addition to this fact, witness Martin testified that defendant Schrack told him they used Schrack's team and Rogers' wagon, from which we conclude there is no evidence to

justify a suspicion of his guilt, much less his conviction.

[1] The state sought and secured conviction entirely upon circumstantial evidence. The approved rule in such cases is that—

"Where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other, and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." *State v. Slothower et al.*, 56 Mont. 230, 182 Pac. 270; *State v. Woods*, 54 Mont. 193, 169 Pac. 39.

[2] Having in mind this rule, together with the further declaration so long recognized by this court that "mere suspicions or probabilities, however strong, are not sufficient basis for a conviction" (*State v. Brower*, 55 Mont. 349, 177 Pac. 241; *State v. Selff*, 54 Mont. 165, 168 Pac. 524; *State v. McCarthy*, 36 Mont. 226, 92 Pac. 521), we conclude that the testimony supports nothing more than the merest suspicion of defendant Schrack's guilt, and warrants less as to defendant Rogers. Removing from the record the evidence of the deputy sheriff, who produced "the part of the shoulder" and "the part of the hide with the hoof on," the trial is void of even suspicion against Schrack.

In view of the foregoing, we think consideration of other assignments unnecessary and deem the evidence insufficient to justify a conviction, and recommend that the judgment and order appealed from be reversed and the cause remanded, with directions to the court below to dismiss the information.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order of the lower court be reversed, and the cause remanded, with directions to dismiss the information.

(60 Mont. 17)

ZANOS v. GREAT NORTHERN RY. CO. (No. 4356.)

(Supreme Court of Montana. May 9, 1921.)

1. Trial \Leftrightarrow 315—"Quotient verdict" not sustained.

Verdict reached by adding amounts voted by the jurors and dividing by 12, cannot be sustained, being a quotient verdict.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Quotient Verdict.]

2. Trial \Leftrightarrow 256(1) — One desiring fuller instruction should request it.

Generally, an instruction which in appropriate language calls the jury's attention to the subject-matter to be considered, and which fairly states and presents the questions to be determined, is sufficient under Rev. Codes, § 6746, and a party who desires a more specific instruction must tender one or tender a modification of the one given.

3. Trial \Leftarrow 256(13) — Instruction on impairment of earning power held sufficient in absence of tender of more specific instruction.

In a personal injury action, instruction that, "If you find from the evidence that his capacity to earn money in the future is certain to be impaired by reason of his injuries, if any, you should compensate him for such impairment," held sufficient, under Rev. Code, § 8068, in absence of the tender of a more specific instruction.

4. Damages \Leftarrow 158(1) — Evidence of rupture held warranted by pleadings.

The allegation that both cars passed over plaintiff, "striking and injuring the plaintiff's back all the way up near the spinal column, and thereby mashing the plaintiff's chest down against the rail so that they broke plaintiff's bottom ribs on the right side, and mangling and injuring said plaintiff's stomach and back and liver, and mashing plaintiff's knee against the rail, and otherwise injuring the body of this plaintiff," held to warrant evidence of a rupture as a part of the injuries sustained.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Socrates Zanos against the Great Northern Railway Company. From judgment for plaintiff, and from an order denying motion for new trial, defendant appeals. Judgment and order reversed, and cause remanded.

H. C. Hopkins, of Butte, and I. Parker Veazey, Jr., of Great Falls, for appellant.

H. S. Maury, of Butte, for respondent.

POORMAN, C. C. This is an appeal by defendant from an order overruling its motion for a new trial, and also from a judgment entered against it on a verdict for plaintiff, in an action for damages resulting from personal injuries alleged to have been sustained by plaintiff, then an employé of defendant company, and caused by the alleged negligence of other employés of defendant.

So far as material to the questions here considered, the facts alleged are to the effect that the plaintiff and other employés of defendant were going to their work upon a roadbed of defendant company upon a hand car, provided for that purpose by the defendant, when they were overtaken by a gasoline car under the control, management, and operation of the section foreman, conveying other employés engaged in the same kind of work, to the place of labor. It is alleged that the gasoline car violently collided with the hand car; that plaintiff was thrown off across the rails, both cars passing over him, "striking and injuring the plaintiff's back all the way up near the spinal column, and thereby mashing the plaintiff's chest down against the rail, so that they broke plaintiff's bottom ribs on the

right side, and mangling and injuring said plaintiffs' stomach and back and liver, and mashing plaintiff's knee against the rail and otherwise injuring the body of this plaintiff," and it is alleged that all this was caused by the negligence of the defendant and its servant.

The specification of errors contains the assignment that "the verdict returned was a quotient verdict." In support of its motion for a new trial, the appellant filed in the district court the affidavits of six of the jurors as to the method pursued in reaching the verdict. Their affidavits are lengthy, are substantially the same in form, and do not vary materially in substance. The juror J. J. Connolly, in his affidavit, states that after the case was submitted to the jury, he was selected as the foreman thereof; that the jury first determined by a vote that a verdict for damages in some amount should be returned for the plaintiff. Juror William Molthen then suggested that, in arriving at the amount of the verdict, each of the jurors should vote the amount of damages which he thought plaintiff entitled to; that a clerk be appointed to take down the amounts so voted by the 12 jurors, and that the sums so voted should by the clerk be added together, and the total divided by 12, and the quotient so obtained should be written into the form of the verdict by the plaintiff, and that the same should be returned into court, as the verdict of the jury in the case. This arrangement was agreed to by all of the jurors, and Molthen was selected as the clerk. The amounts were then written by the several jurors, the clerk added the same, and reached the total sum of \$42,000. This sum was divided by 12, and the quotient, \$3,500, was then written in the form of the verdict, which was signed by the foreman, and the same was returned as the verdict of the jury; that no other proceedings were had or vote taken on the part of the jury in the adoption of this verdict, and that the affiant voted for a much smaller sum than he believed the plaintiff entitled to, for the reason that he believed the other jurors would vote for very high amounts, and he desired to keep the amount to be arrived at as low as possible.

Jurors William J. Day, William Molthen, Carl Sternberg, Thomas McFadden, and Jacob Baker made similar affidavits. Subsequently the juror William Molthen made and filed another affidavit, in which it is stated that after the sum total of the amounts voted by the jurors was divided by 12, the quotient was not \$3,500, "but a larger amount, which affiant does not remember, and thereupon, and after such quotient was obtained, the said jurors refused to accept the same as their verdict, as being an

amount too high in proportion to the damages sustained by plaintiff, and that all of the jurors then and there agreed not to abide by such result, and did not abide by such result, but they and each of them agreed that the sum of \$3,500 would be a proper and sufficient verdict, and after said verdict was agreed upon as aforesaid, J. J. Connolly, foreman of the jury, wrote in the form of verdict for the plaintiff the sum of \$3,500, which said verdict was duly returned into the court." Affiant further states that the verdict was arrived at in the manner stated in this subsequent affidavit, and not otherwise.

This subsequent affidavit does not deny that the agreement was made, as stated in the former affidavits, nor does it deny that the sum total was \$42,000, but denies that the quotient obtained was \$3,500. If the sum total was \$42,000, and the divisor was 12, and the quotient arrived at was any other sum than \$3,500, the error was in the division. But even if his subsequent affidavit had been contradictory in all respects of the former affidavits, it would still remain as five against one and the other affiants, and also this affiant Molthen stated that in their votes they had named a sum smaller than they believed plaintiff entitled to, in other words, that they were acting under the influence of the preagreement and prearrangement at the time they voted on the amount.

[1] That this is what is called a "quotient verdict" is clearly sustained by the facts presented, and that it cannot be sustained is also apparent. Comment is unnecessary; the whole proposition is thoroughly discussed and clearly analyzed by the former decisions of this court and by other courts. *Gordon v. Trevarthan*, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452; *G. N. Ry. Co. v. Benjamin*, 51 Mont. 167, 149 Pac. 968; *Wright v. Union Pac. Ry. Co.*, 22 Utah, 338, 62 Pac. 317; *International Agri. Corp. v. Abercrombie*, 184 Ala. 244, 63 South. 549, 49 L. R. A. (N. S.) 415; *Tex. Midland Ry. Co. v. Atherton* (Tex. Civ. App.) 123 S. W. 704; *Whisenant v. Schawe* (Tex. Civ. App.) 141 S. W. 146; *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; *Harrington v. Butte, Anaconda & Pac. Ry. Co.*, 36 Mont. 478, 93 Pac. 640, may also be referred to.

At the trial, the plaintiff tendered an instruction defining "negligence." The court modified the instruction and gave it as so modified. The definition of "negligence" heretofore approved by this court is:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done."

Birsch v. Citizens' Elec. Co., 36 Mont. 574, 93 Pac. 940.

Neither the instruction offered nor the one given complies strictly with this definition. The offered instruction contains both the words "average" and "ordinarily." The instruction given contains neither of these terms. The definition adopted by the court contains the word "ordinarily," but not the word "average," but the instruction of the court given as "5-A" is substantially correct. Substance cannot be sacrificed to undue nicety in phraseology and too great critical exactness in the use of words.

[2, 3] Appellant also objects to court's instruction No. 3, and very strongly contends that the instruction is erroneous in several particulars. It may be stated as a general rule that where an instruction, in appropriate language, calls the attention of the jury to the subject-matter to be considered, and fairly states and presents the questions to be determined, it is sufficient. Section 6746, R. C., does not require more than this of the court's own motion. If, in such a case, a more specific instruction than that given is desired by a party, it is his duty to tender one, or to tender a modification of the one given. It is not sufficient merely to demand that the court do it. This instruction meets with these requirements, and no other was offered. So far as the trial of this case was concerned, this instruction was not erroneous. However, if an instruction, correct in other matters and more complete in the particulars here referred to, had been tendered, it would have been the duty of the court to give it. The instruction contains this statement:

"If you find from the evidence that his capacity to earn money in the future is certain to be impaired by reason of his injuries, if any, you should compensate him for such impairment."

This statement is authorized by section 6068, R. C., but in the instruction no rule or guide or suggestion was made to the jury as to how it was to comply with this requirement. This matter was once before this court, and has been quite recently thoroughly discussed, analyzed, and determined by other courts, and we go no farther here than to call attention to those decisions. *Bourke v. Butte Elec. & Power Co.*, 33 Mont. 267, 289, 83 Pac. 470; *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 387; *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283; s. c., 78 Mich. 687, 44 N. W. 152; *Secord v. Schroeder Lbr. Co.*, 160 Wis. 1, 150 N. W. 971.

[4] At the trial the plaintiff was permitted to introduce evidence relative to a rupture, as a part of the injuries sustained by him. The defendant at that time contended

that the evidence was improper because this particular injury was not within the pleadings. This question may arise on a new trial of this cause. No objection was made to the complaint on the ground that it was not sufficiently specific. We believe that the allegations of the complaint are broad enough to admit this evidence. *Jenkins v. Northern Pac. Ry. Co.*, 44 Mont. 304, 119 Pac. 794.

Because of the error committed by the jury in the method of arriving at the verdict, we recommend that the judgment of the district court, and also the order overruling appellant's motion for a new trial, be reversed, and the cause remanded for a new trial.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order overruling the motion for a new trial are reversed, and the cause remanded for a new trial.

(60 Mont. 56)

CASEY v. NORTHERN PAC. RY. CO.
(No. 4327.)

(Supreme Court of Montana. May 16, 1921.)

1. Master and servant §278(18) — Evidence held insufficient to sustain verdict for locomotive engineer injured in collision.

In an action for injuries to an engineer who jumped from his engine just before it collided with a train ahead of him, plaintiff's testimony, which contradicted itself as to essential details, and which was contradicted by his own witness and by the harmonious testimony of the other employees offered by defendant, held insufficient to sustain the verdict for plaintiff, notwithstanding the refusal of the trial court to set aside the verdict.

2. Evidence §588 — Jury cannot disregard unimpeached testimony supported by all circumstances in the case.

Juries may not arbitrarily and capriciously disregard the testimony of witnesses which is unimpeached in any of the usual modes known to the law and is supported by all the circumstances in the case.

3. Appeal and error §1005(3) — Conflicting evidence which sustains verdict must be substantial.

To make applicable the general rule that an order denying a new trial on the ground of insufficiency of the evidence to sustain the verdict will not be reversed where the evidence is conflicting and there is some evidence to support the verdict, the conflict must be real, and the supporting evidence substantial.

4. New trial §69 — Jury's determination of credibility of witnesses is not conclusive.

While it is primarily the province of the jury to pass upon the credibility of the witnesses and the weight to be given their testimony,

the determination of the jury is not conclusive, since insufficiency of the evidence is a statutory ground for a motion for a new trial, and in passing on the motion it is the duty of the trial court to weigh the evidence to determine its sufficiency, and, if a new trial is denied, the appellate court must then determine whether there is substantial evidence to warrant the verdict, and it will not abdicate its authority in favor of the jury's findings.

5. Appeal and error §1005(2) — Verdict upheld by trial court should be set aside where sustaining evidence conflicts with physical facts.

The advantageous position occupied by the jury and the lower court in weighing the testimony of witnesses who appear before them does not prevent a reversal of the order denying a new trial on the ground of insufficiency of the evidence, where the testimony supporting the verdict is highly improbable or incredible or is inherently impossible in view of the physical facts.

6. Evidence §588 — Improbability of testimony otherwise unimpeached may justify disregarding it.

Though a witness is not discredited by direct evidence impeaching him or contradicting his statements, the inherent improbability of his testimony may deny it all claims to respect.

7. Appeal and error §989 — Plaintiff's case may be judged by portion of his conflicting testimony least favorable to him.

In determining whether plaintiff's testimony is sufficient to support a verdict in his favor, it is not unfair to plaintiff to judge his case by that portion of his self-contradictory testimony which is least favorable to him.

8. Evidence §574 — Verdict based on estimates of distances conflicting with expert measurements cannot be sustained.

A verdict based on estimates of distances given by plaintiff in his testimony, especially if such estimates demonstrated he was without capacity for judging distances, cannot be sustained where estimates were contrary to measurements made by a civil engineer.

Appeal from District Court, Gallatin County; Ben. B. Law, Judge.

Action by William B. Casey against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals from the judgment and from the order denying its motion for new trial. Reversed, with directions to dismiss the complaint.

Gunn, Rasch & Hall, of Helena, and W. S. Hartman, of Bozeman, for appellant.

Miller, O'Connor & Miller, of Livingston, for respondent.

HOLLOWAY, J. On the evening of March 1, 1917, Northern Pacific freight train No. 1713, west bound, left Winston at 8:03 for East Helena, followed immediately by engine No. 1288, which had assisted the train

from Townsend to Winston, and at the latter place had been cut off. The distance from Winston to East Helena is 15.9 miles, but on account of train troubles No. 1713 did not reach the East Helena yard limits until 8:52. The train was required to take the siding and moved to and a few feet past the switch before it came to a stop. There were some 64 cars in the train, and the caboose stood a short distance east of the yard limit board. Engine 1288 stopped from 45 to 50 feet east of the caboose. Twenty-six minutes after train 1713 left Winston, another west-bound freight No. 1746, also left Winston for East Helena, with a load of 1,550 tons (28 loaded cars and six empties), and somewhere near 9 o'clock ran into engine 1288, forcing it forward into the rear of train 1713. Just before the collision, William B. Casey, the engineer in control of train 1746, jumped from his locomotive, fell, and sustained injuries. He brought this action to recover damages, and charged the railway company with negligence in failing to give timely warning that train 1713 was standing upon the main line track and extending eastward of the yard limit board.

The answer denies any negligence on the part of the company, or its agents and servants in charge of train 1713, and alleges negligence on the part of the plaintiff in approaching the yard limit board at an excessive rate of speed. The trial resulted in a verdict in favor of plaintiff, and from the judgment entered thereon and from an order denying a new trial defendant appealed.

Of the several assignments of error but one requires consideration. Is the evidence sufficient to sustain the verdict?

It is established by the evidence without controversy that it was the duty of the rear brakeman on train 1713 to exercise reasonable care to give full protection to train 1746 by warning signals; that he did warn it with his lighted lantern and a lighted fusee, and that the signals were seen by the plaintiff before the collision occurred; that it was the duty of plaintiff to approach the yard limits with train 1746 under such control that he could stop if necessary; and that plaintiff knew that he was required to take the East Helena siding to permit train 222 to pass upon the main line track.

It is conceded that a considerable distance east of the yard limit board the track runs through a cut; that west of the cut the track curves to the south, then runs straight for some distance, and then curves slightly to the north; and that plaintiff could not see the rear lights on train 1713 or on engine 1288 until he reached the straight track.

In order to determine whether the brakeman was negligent in failing to warn plaintiff at a sufficient distance from engine 1288 that by the exercise of ordinary care train 1746 could have been stopped and the collision avoided, the answer to each of the following

inquiries is of primary importance: (a) Where was the rear end of train 1713 with reference to the yard limit board, and where was engine 1288 when the collision occurred? (b) Where was the brakeman when train 1746 came into view? (c) Where does the straight track begin from the east? (d) Where is the cut referred to in the evidence? (e) How far was plaintiff from engine 1288 when the signals were first seen? (f) At what rate was plaintiff running his train?

(a) In his complaint plaintiff alleges that the rear end of train 1713 was 75 feet east of the yard limit board, and again he alleges that it was 275 feet east of that point. Upon the trial he testified that it was 5 car lengths east of the yard limit board and that the cars average 50 feet in length. He alleges that the rear of engine 1288 was 350 feet east of the board, and that his train collided with it 400 feet east of that board.

(b) Plaintiff testified that he saw the lighted fusee in the brakeman's hand and the rear lights on engine 1288 at the same instant; that when he first saw these signals the brakeman was 4 or 5 car lengths east of the rear of engine 1288 and was going east. Later he testified that immediately after the collision he met the brakeman 4 car lengths east of the front of train 1746. The undisputed evidence is that the impact drove the caboose of train 1713 westward to the yard limit board a distance of 250 feet according to plaintiff's testimony, so that, if the second statement above is true, the brakeman was not as far east when the collision occurred as he was when plaintiff first saw him, though he was traveling eastward all the time. At an investigation held at Livingston four days after the collision, at which the train crews were present and several witnesses, including the plaintiff, were examined touching the cause of and responsibility for the collision, the plaintiff then stated that immediately after the collision he met the brakeman about the middle of train 1746, and he testified that the train consisted of 34 cars. At the same investigation he testified: "I say Brakeman Moorehead was not over 10 car lengths behind helper" (engine 1288).

(c) Plaintiff contented himself with giving estimates of the distances. He did not undertake to locate definitely the point where the straight track commences from the east, but inferentially he fixed it at 350 feet east of the rear of engine 1288, for he testified that he saw the signals when he first came upon the straight track, and that he was then 7 car lengths from engine 1288. By actual measurements the distance from the yard limit board to the point where the straight track commences from the east is 1,600 feet in round numbers. If the rear of engine 1288 was 350 feet east of the yard limit board, as alleged in plaintiff's complaint, then the straight track actually commences 1,250 feet

east of the rear of engine 1288, instead of 350 feet, as estimated by plaintiff.

(d) Plaintiff also estimated that the rear of engine 1288 was 20 car lengths, or 1,000 feet, west of the cut. The measurements disclose that the distance between the west end of the cut and the rear of engine 1288 is 2,326 feet, assuming that engine 1288 was stationed at the point fixed by plaintiff in his own testimony. Plaintiff testified that the cars average 50 feet in length, but a check of his own train from the wheel report disclosed that they averaged 44.3 feet in length.

(e) Plaintiff alleges in his complaint that when he first observed the signals or received warning that a train was on the main line track east of the yard limit board he was only 150 feet from the rear of that train. Upon the trial he testified first that he was 7 car lengths away, and later testified that he was 11 car lengths away when he jumped from his engine, and that he jumped after he observed the signals and after he had set the brakes. At the investigation at Livingston he stated that he did not believe that he was over 15 or 16 car lengths away. Marchington, the fireman on Casey's locomotive and a witness for plaintiff, testified that the brakeman was 15 or 16 car lengths away when he first saw the signals. If the brakeman was 4 or 5 car lengths east of the rear of engine 1288, as plaintiff testified, then train 1746 was from 19 to 21 car lengths from engine 1288 when the signals were first seen.

(f) Plaintiff testified that he had exceeded 30 miles per hour on straight track after he left Winston. At Livingston he stated that he averaged about 28 or 29 miles per hour from Placer, through Louisville and to the cut. Upon the trial he testified that when he first applied the brakes in the cut he was going 20 miles per hour, and later testified that he was running 25 miles per hour, and again that when he applied the brakes he reduced his speed to 25 miles per hour. He testified that when he first saw the signals he had reduced his speed to 15 miles per hour and could have stopped his train and avoided the collision if he had had 11 car lengths distance within which to do it. He also testified that he was 11 car lengths away from engine 1288 when he jumped, and that he jumped because he saw he could not stop in time to avoid the collision, and that, with the brakes set, his train was still going about 6 miles per hour when it struck engine 1288. He also testified that, if his train had been running 25 miles per hour, he could have stopped in 18 or 19 car lengths (900 to 950 feet); but he failed to stop within 1,250 feet or 25 car lengths.

Whatever other controversy may arise over the rate at which train 1746 was traveling when the collision occurred, the fact remains that the impact was sufficient to practically destroy engine 1288 and to drive it forward (though the brakes on it were set), demolish-

ing the caboose and one car in train 1713, derailing five or six other cars, and carrying the broken caboose to the yard limit board, a distance of 275 feet according to plaintiff's own theory.

Plaintiff testified that the brakeman was only 4 or 5 car lengths east of the rear of engine 1288 and should have been back 7 car lengths further than he was "to have flagged my train so as to give me time in which to stop. * * * If he had been 11 cars back of the rear engine No. 1288, I could have stopped my train." Again he testified that the brakeman should have gone "beyond the cut to have given us the necessary advice as to the position of the train on the main line." The first statement would place the brakeman 550 feet east of the rear of engine 1288; the last one would require him to be approximately half a mile from that point.

Plaintiff testified that after the collision he went to his locomotive "and stayed on it until it was towed into Helena." Later he admitted that his locomotive "was in shape so that it could go on in its own power"; and it is admitted that his engine did go into Helena on its own power and pulled train 1746.

During the first day of the trial of this case plaintiff was examined at length by his own counsel and cross-examined by counsel for the railway company, during which examination he referred to the fact that immediately after the collision he had a conversation with the brakeman, but did not tell what was said. On the second day of the trial he was recalled by his counsel and then testified as follows:

"When I got up after that fall, I started for my engine, and as I was on the way to the engine I met the flagman of train 1713 west, between where I got up and the rear end of their train, about 4 car lengths from the head end of my engine. I had a conversation with the flagman at this time; I said to him, 'Why didn't you get back to stop me?' and he said, 'I would, but I didn't know what we were doing here.' He said, 'We expected to move every minute, and when I saw you coming I beat it back.' That was the excuse he gave me for not getting back to flag us."

When asked why he had not given this testimony the previous day while he was on the witness stand, he replied, "I was never asked the question." At the investigation at Livingston he testified that he had the conversation with the brakeman, but his version of the conversation then was as follows:

"I talked to him and asked him why he gave me such a short flag, and then I walked to the head end."

Although no complaint is made in the pleadings of the braking apparatus on train 1746, plaintiff testified that when he set the brakes preparatory to jumping "the emer-

agency didn't work; * * * the braking apparatus on the train was not in good shape." At the investigation at Livingston he stated that he had a very good braking train, had no trouble stopping it at any place, and that the brakes handled the train very well. Plaintiff admitted that the investigation was held at the time and place mentioned; that he was present and examined as a witness; that the questions were asked by the superintendent and the evidence taken by the stenographer. He does not deny that he made the answers given above. He testified:

"I was in such pain when I was up there and I was sick, and I don't remember what I did say."

He admitted that soon after the investigation he was discharged by the railway company, the reason assigned being his "action in the collision at East Helena," but he assumed to assign a different reason as the one which actually prompted his discharge.

So far as any attempt was made to sustain the charge of negligence against the crew of train 1713, the plaintiff's testimony stands alone. The evidence for defendant may be stated briefly as follows: Grannis, the conductor on train 1713, testified that as soon as his train came to a stop he sent Brakeman Moorehead back east with a lantern and lighted fusee to signal train 1746; that the flagman was 10 or 12 car lengths east of the rear of train 1713 when he met engine 1288; that he was about 30 car lengths away when train 1746 came in sight; and that he (the witness) walked forward along his train 30 car lengths after it stopped and before the collision occurred.

Jones, the engineer on 1288, testified that he met the flagman about 12 car lengths east of the caboose of train 1713; that he answered the signal and spoke with the flagman; that the flagman continued on eastward and was about the "point of the curve" when train 1746 came in sight; that when he first saw the signal at about the mile post he had his fireman drop a lighted fusee on the track, but it fell into soft snow and was smothered, and he had another—a yellow light—dropped, and it continued to burn. Barton, the fireman on 1288, testified to the same facts.

Cole, the conductor on 1746, testified that he was sitting in his caboose when the collision occurred; that he immediately went to the west door of the caboose and looked out and saw the flagman from 2 to 5 car lengths west of him. Cole's train consisted of 34 cars and occupied 1,550 feet of track, so that, if his testimony is true, the flagman was from 26 to 30 car lengths east of the point of collision when the trains came together.

Moorehead, the brakeman and flagman, testified that immediately after train 1713 stopped he started back with a lantern and lighted fusee; that he met engine 1288 when

he was 10 or 12 car lengths east of the rear of train 1713; that he spoke with Engineer Jones and kept on going; that he saw the fusee thrown out by 1288, and that he was from 30 to 35 car lengths from his own caboose when train 1746 passed him; that he received no recognition of his signal from Engineer Casey and threw his fusee at the cab window as the engine passed; that he was about 2 car lengths west of the caboose on train 1746 when the collision occurred; that he went forward and talked with Conductor Cole and then started back west; that he met Casey about the middle of train 1746; that Casey "asked me if I was flagging, and I told him that I was, and he said, 'Couldn't you get back any farther to stop me,' and I said, 'I got just as far as I could get with the time I had, Casey.' That is all the conversation we had at that time." He denied that the conversation as given by plaintiff at the trial ever occurred, and testified that at the investigation plaintiff had not mentioned that conversation.

Caldwell, the engineer on train 1713, testified that, when he stopped his train, he looked back and saw the flagman going east with a lighted fusee.

Le Van, a traveling engineer or road foreman, was riding with Engineer Caldwell on the locomotive pulling train 1713. He testified that after train 1713 came to a stop and after train 1746 came through the cut he looked back and saw two burning fusees, one red one and one yellow; that the red one was farthest from him and was "away back."

The testimony discloses without substantial controversy that from five to eight minutes elapsed between the time train 1713 came to a stop and the collision occurred, and that the ground was covered with snow about eight inches deep.

In rebuttal Marchington testified that he did not see the yellow fusee thrown from engine 1288.

[1] Counsel for plaintiff insist that the evidence is conflicting, and, since the jury found upon the issues and the lower court denied a new trial, this court is without authority to interfere, but the principal conflicts arise upon the plaintiff's own testimony, rather than in the testimony of opposing witnesses. Of the testimony of the witnesses for defendant it is sufficient to say that it is harmonious, and reasonable and consistent with physical facts, but the jury disregarded it altogether and must have based the verdict solely upon the surmises, the guesses, and estimates of the plaintiff.

[2] In *Haddox v. Northern Pac. Ry. Co.*, 43 Mont. 8, 113 Pac. 1119, this court said:

"Juries may not arbitrarily and capriciously disregard testimony of witnesses, not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case."

[3] It is the general rule that an order denying a new trial upon the ground that the evidence is insufficient to sustain the verdict will not be reversed where the evidence is conflicting, if there is some evidence to support the verdict; but the rule has its foundation in the assumption that the conflict is real and the supporting evidence is substantial. In *Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203, the Supreme Court of California said:

"When a jury catches at a semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money away from one party and giving it to the other without legal cause, the trial judge should, without hesitation, set the verdict aside; and in the event of his not doing so, this court will grant a new trial."

[4] Primarily it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony, but the determination of the jury is not conclusive. Insufficiency of the evidence is a statutory ground for a motion for a new trial (section 6794, Rev. Codes), and in passing upon the motion it is the duty of the trial court to weigh the evidence, and, if it is not sufficient to sustain the verdict, a new trial should be ordered (*Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597), and, if it is not, the appellate court must then determine whether there is substantial evidence to warrant the verdict and will not abdicate its authority in favor of the jury's findings. Jurors are subject to the ordinary infirmities of human nature, and cases are sometimes presented wherein justice would be denied if the courts failed to interfere.

[5] We are not unmindful of the advantageous position occupied by the jury and the lower court in having the witnesses before them, in hearing them testify, and observing their demeanor; but, though the appearance of a witness is an aid in judging his credibility, it is not an infallible one. Disimulation is often difficult to detect, and falsehood is often garbed in the garb of truth. Whenever the surrounding circumstances make the story of a witness highly improbable or incredible, or whenever the testimony is inherently impossible, a new trial should be ordered. Physical conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them. *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178.

The corollary of the first rule above is stated cogently in *McAllister v. McDonald*, 40 Mont. 375, 106 Pac. 882. It was there held that the Supreme Court is not authorized to affirm an order denying a new trial:

(a) Where the evidence tending to support

the verdict is an isolated statement of a witness which is in conflict with his other statements; or (b) when the verdict is contrary to the great weight of the evidence, and the evidence which tends to sustain the verdict is impeached or rendered improbable by conceded facts, or is against all reasonable inferences or probabilities of the case; or (c) when the verdict, though supported by some evidence, is so utterly at variance with the real and unexplained facts that the court can say that it is clearly wrong.

[6] The rule has been stated repeatedly in this jurisdiction that a court may reject the most positive testimony, though the witness be not discredited by direct evidence impeaching him or contradicting his statements. The inherent improbability of his story may deny it all claims to respect. *McIntyre v. Northern Pac. Ry. Co.*, 56 Mont. 43, 180 Pac. 971; *Landsman v. Thompson*, 9 Mont. 182, 22 Pac. 1148; *Mattock v. Goughnour*, 11 Mont. 265, 28 Pac. 301. The credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears.

"It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment." *The Odin*, 1 Rob. Adm. 248; *Daniels v. Granite Bi-Metallic Co.*, 56 Mont. 284, 184 Pac. 836.

[7] It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to him. *Atlanta R., etc., Co. v. Owens*, 119 Ga. 833, 47 S. E. 213.

In his testimony given upon the trial of this case the plaintiff contradicted himself repeatedly; contradicted the allegations of his verified complaint; was contradicted by his previous statements, by the physical facts, by every one of defendant's witnesses, and by his own witness, Marchington. Some of his declarations are too transparent to be entitled to credence are improbable upon any supposition short of actual mental imbecility.

The correct answer to every one of the inquiries suggested in the early part of this opinion is of vital consequence, and yet we undertake to say that the jury could not find an intelligent answer to any one of them in the testimony produced by the plaintiff, and, since the verdict finds no support in the testimony of defendant's witnesses, it is without substantial evidence to sustain it, and the trial court abused its discretion in denying the motion for a new trial.

[8] Plaintiff contented himself with giving estimates and demonstrated that he was without capacity for judging distances, or

deliberately colored his testimony to meet the supposed exigencies of his case.

Erickson, a civil engineer and a witness who testified upon the trial of this case, measured the distances along the track and prepared a map which was introduced in evidence and which shows the distances between the points in controversy.

In an exhaustive note to *Lalor v. City of New York*, reported in *Ann. Cas.* 1916E, 572, the rule deduced from the authorities is stated as follows:

"It is generally agreed that proof of an actual measurement is so far superior to an estimate of the distance that no issue for the jury is raised by a conflict between the two."

The judgment and order are reversed, and the cause is remanded to the district court, with directions to dismiss the complaint and enter judgment in favor of defendant for its costs.

Reversed.

(70 Colo. 90)

PEOPLE v. WESTERN UNION TELEGRAPH CO. et al. (No. 9522.)

(Supreme Court of Colorado. April 4, 1921.)

1. Constitutional law §275(2)—Master and servant §15—Anti-coercion Act held to violate federal Constitution.

The Anti-coercion Act, making it unlawful for employer to require employees to sever their connection with or refrain from joining any labor organization or society, violates the due process clause of the United States Constitution.

2. Constitutional law §45—District court may determine whether legislative act violates federal Constitution.

A district court of the state is bound by the mandate of the federal Constitution (article 6, par. 2) to apply that instrument upon all proper occasions and hold it to be the supreme law of the land, and to determine whether or not state legislative acts violate it, notwithstanding Const. art. 6, § 1 (see *Laws* 1913, p. 678), providing that no court except the Supreme Court shall have any power to declare any law of the state in violation of the Constitution of the state or of the United States, in view of Const. art. 12, § 8.

3. States §4—State Constitution, contrary to federal Constitution, null and void.

Any section of the state Constitution which is contrary to the federal Constitution is, for that reason and to that extent, null and void.

4. Constitutional law §49½, New, vol. 12A Key-No. Series—Courts §106—Adjudication by courts of the state on federal constitutional questions final without review by vote of people.

When a federal constitutional question is raised in any of the trial courts of Colorado, the right is given and the duty is imposed on

those courts by that instrument itself (article 6, par. 2), to adjudicate and determine it, and the right so given can neither be taken away nor that duty abrogated by the state Constitution or otherwise, and any adjudication of the Supreme Court of the state on such a question cannot be reviewed by popular vote of the citizens or one of its municipalities under Const., art. 6, § 1 (see *Laws* 1913, p. 678), and the Supreme Court in passing on such a question is under the necessity, in view of Const., art. 6, § 2, to declare what effect is to be given its decision, in order that the clerk may know whether or not it be his official duty to file the decision as therein provided, and in order that reporter may know whether it is to be published with the other decisions of the court, or held in abeyance pending a possible recall.

En Banc.

Error to District Court, City and County of Denver; John H. Denison, Judge.

The Western Union Telegraph Company and others were charged by information with a violation of the Anti-Coercion Act. To review a judgment discharging them and releasing their bondsmen, the People of the State bring error. Affirmed.

In this cause an information was filed in the trial court against the defendants, charging them with a violation of chapter 5, Session Laws of 1911, known as "The Anti-Coercion Act," in that as a condition to the continued employment of one Holson they required of him a contract that he sever his connection with the Commercial Telegraphers' Union of America, and upon his refusal to comply discharged him. To this information defendants demurred on the ground that "the Anti-Coercion Act" was unconstitutional under the Bill of Rights of the state of Colorado and the Fourteenth Amendment to the federal Constitution. To the consideration of this issue the people objected on the ground that such consideration was prohibited by amended section 1, art. 6, of the state Constitution. (See *Laws* 1913, P. 678).

The objection was overruled, "the Anti-Coercion Act" held in conflict with the federal Constitution, and final judgment entered, discharging defendants and releasing their bondsmen. To review that judgment the people bring this cause here by writ of error under the mandate of section 1997, R. S. 1908, which provides:

"Writs of error shall lie on behalf of the state * * * to review decisions of the trial court in any criminal case * * * where a statute is declared unconstitutional. And whenever any act of the Legislature, upon which has been based the indictment or information in any criminal case, shall be adjudged inoperative or unconstitutional by any district or county court, it shall be the duty of the district attorney of the judicial district within which such court making such decision is situate, to sue out a

writ of error on behalf of the people of the state of Colorado from said Supreme Court to review the judgment of said district or county court in this particular. Provided, that nothing in this act shall be construed so as to place a defendant in jeopardy a second time for the same offense."

This cause was orally argued May 13, 1920. Two weeks prior thereto transcript of the record in cause No. 9823, *People v. Max*, 198 Pac. 150, this day decided, involving other phases of the questions herein raised, had been filed in this court. In both cases defendants had been finally discharged. No particular injury could therefore be done by a delay in the final determination hereof. Several members of the bar, who had given special study to the questions involved, were invited by the court to file briefs as *amici curiae* (others have since voluntarily done so), and further consideration was postponed until such time as *People v. Max* should be at issue and all briefs filed in both.

William E. Foley, Dist. Atty., and T. E. McIntyre, Asst. Dist. Atty., of Denver, for the People.

T. J. O'Donnell, J. W. Graham, and G. W. Musser, all of Denver, for defendants in error.

Melville, Melville & Walton, Thomas H. Gibson, Horace N. Hawkins, and Harvey Riddell, all of Denver, *amici curiae*.

BURKE, J. (after stating the facts as above). Three questions are here presented: The right of the trial court to hear and determine the federal constitutional question; the correctness of its judgment; and the date when our decision becomes effective. For convenience the second of these will be first considered.

[1] So much of the "Anti-Coercion Act" in question as is material here reads as follows:

"Section 1. It shall be unlawful for any corporation, company, partnership, association, individual or any employer of labor to demand as a condition of employment, or as a condition of continuing any employment, any contract, agreement or reservation, evidenced by writing or otherwise, or by condition reserved in any contract, that the person or persons so employed shall sever any present connection with or shall refrain from joining any lawful organization or society, or under any pretense whatever to prohibit, limit or restrain such employee from exercising his social, financial, fraternal or business rights in connection with or through any lawful organization or society, during his employment by any employer.

"Sec. 2. Any such contract, agreement or reservation or condition reserved shall be *prima facie* evidence of the violation of this act.

"Sec. 3. That any corporation, company, partnership, association, individual or any employer of labor, which or who shall violate any provision of this act, shall be deemed guilty of a misdemeanor, and as to any corporation such guilt

shall extend to all the officers, directors or trustees thereof and any agent or authority by which such corporation acts, as individuals, and as to any partnership or company, all persons composing the same as individuals, and as to any person the person and his agent shall be guilty as individuals, and upon conviction of any person or persons under the provisions of this act, such person or persons shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars for each and every repetition of such offense or by imprisonment of not less than ninety days nor more than six months in the county jail for the county in which such offense was committed, or by both such fine and imprisonment in the discretion of the court." Chapter 5, p. 8, L. 1911.

That this act is a plain violation of the federal Constitution has been clearly determined by the Supreme Court of the United States. *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960. In that case a decision of the Supreme Court of Kansas was reversed, and a statute of that state, in all material particulars identical with the one here under consideration, was declared a violation of the "due process" clause of the United States Constitution.

[2] Having determined that this cause was correctly decided below, it may be said that the constitutionality of the "Anti-Coercion Act" has now, at least, been passed upon by a court having jurisdiction, and it is therefore unnecessary to consider the objection of the people to the hearing on the demurrer. If so, the same situation would be presented had we held the act constitutional. Since the passage of the amendment to section 1, art. 6, we have assumed the correctness of that rule. However, there has arisen such a disparity of opinion in our trial courts concerning their power to determine constitutional questions, and such a resulting confusion among members of the bar concerning the practice, that it now becomes our imperative duty, under section 2, art. 6, of our state Constitution, which vests in the Supreme Court "a general superintending control over all inferior courts," to construe section 1, art. 6, with reference to the power of such courts where federal constitutional questions are involved.

The jurisdiction of the district court in the premises, prior to January 22, 1913, is undisputed, and is too well settled in this country to admit of argument or require the citation of authority. On that date (if ever) said section 1 became effective. It specifies the courts in which the judicial power of the state shall be vested, and then provides:

"None of said courts except the Supreme Court shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto adopted by the people in cities acting under article XX hereof as

in violation of the Constitution of this state or of the United States."

Paragraph 2, art. 6, of the Constitution of the United States provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Section 8 of article 12 of the state Constitution provides:

"Every civil officer, except members of the General Assembly and such inferior officers as may be by law exempted, shall, before he enters upon the duties of his office, take and subscribe an oath or affirmation to support the Constitution of the United States and of the state of Colorado, and to faithfully perform the duties of the office upon which he is about to enter."

[3] It is said that, notwithstanding the provision of the federal Constitution, above cited, the trial judge was precluded by amended section 1 of article 6 of the state Constitution from passing upon the question raised by the demurrer. The answer is that the trial judge was bound by the mandate of the federal Constitution to apply that instrument upon all proper occasions and to hold it to be the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." It is said that the judge's oath to support the Constitution of Colorado bound him to give effect to that clause thereof prohibiting him from declaring a legislative act contrary to the federal Constitution. The answer is that any section of the state Constitution which is contrary to the federal Constitution is, for that reason and to that extent, null and void. It is no part of the state Constitution, and no legerdemain of logic can cover it with the sanctity of a judge's oath.

The reasoning of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, 1 U. S. Decisions, 368, is as applicable to a state constitutional provision which violates the federal Constitution as it is to a federal statute which violates that instrument; and his reasoning from the standpoint of the judicial oath as unanswerable here as there. It follows that the trial court in the instant case had the right, and it was its bounden duty, to determine the federal constitutional question raised by the demurrer.

[4] The district attorney, after presenting the question of the right of the trial court to pass upon the constitutional issue, then prays:

"That the law of this state be declared and announced as it is and ought to be in this case and similar cases, that this question may be

judicially, by the opinion of this court, or popularly, under 'Recall of Decisions' by the people, or by both this court and the people, determined and settled in this jurisdiction, with directions by this court for further proceedings in accordance with such opinion or decision of this court, even though, 'that before such decision shall be binding, it shall be subject to approval or disapproval by the people, * * * by referendum petition, * * * [that] may request that such law be submitted to the people of this state for adoption or rejection * * * [and] when approved by * * * the votes cast thereon * * * shall be and become the law of this state notwithstanding the decision of the Supreme Court,' so that by either of, or by both of, such methods, 'such law shall be and become the law of this state,' as by said constitutional amendment further provided."

That prayer, taken in connection with the matters herein decided, imposes upon us a further duty under said section 2, art. 6, of the state Constitution, vesting in the Supreme Court "a general superintending control over all inferior courts." That duty is to declare what effect is to be given this decision, and involves the construction of that part of said amended section 1 of article 6, which immediately follows the portion hereinbefore quoted:

"Provided that before such decision shall be binding it shall be subject to approval or disapproval by the people as follows: Such decision shall be filed in the office of the clerk of the Supreme Court within ten days after it is finally made. If it concerns a state law it shall not be binding until sixty days after such date. Within said sixty days a referendum petition, signed by not less than five per cent. of the qualified electors, addressed to and filed with the Secretary of State, may request that such law be submitted to the people of this state for adoption or rejection at an election to be held in compliance herewith. The Secretary of State shall cause to be published the text of such law or part thereof, as constitutional amendments are published, as near as may be and he shall submit the same to the people at the first general election held not less than ninety days after such petition shall have been filed; provided that provision may be made by law for also submitting such laws or parts thereof at a special election. All such laws or parts thereof submitted as herein provided when approved by a majority of the votes cast thereon at such election shall be and become the law of this state notwithstanding the decision of the Supreme Court."

If any doubt can be said to exist as to our duty under said section 2, art. 6, to here and now interpret the foregoing language, no such doubt can exist as to the absolute necessity for so doing for the guidance and direction of the clerk and reporter of our own court. The clerk must know whether or not it be his official duty to file the decision as therein provided, and the reporter must know whether it is to be published with the other decisions of this court

or held in abeyance pending a possible recall.

Immediately following the language of section 1, last quoted, is a similar provision for the recall of decisions declaring charter provisions of home rule cities contrary to the state or federal Constitution, save that in the latter case the charter provision held unconstitutional is submitted to a vote of the citizens of said city; and it is further provided:

"All such charters, or amendments thereto, so submitted as herein provided, when approved by a majority of the votes cast thereon in said city or city and county, shall be and become the law of this state and of said city or city and county notwithstanding the decision of the Supreme Court."

We pass without comment such startling declarations as that, in case of approval by the people of a city of a section of its charter, after this court shall have declared it unconstitutional, said city charter or amendment "shall be and become the law of this state," and address ourselves to the fundamental question underlying each of these provisions for the recall of decisions on federal constitutional questions. If the people of the state be empowered, by the mere re-enactment of a statute which violates the federal Constitution, to give full force and effect to such unconstitutional legislation, then that portion of the state Constitution which vests in them such power is itself prohibited by the terms of the federal compact, and is null and void and of no force or effect whatsoever.

What the whole people of a state are powerless to do directly, either by statute or Constitution, i. e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality, or by a popular election, under the guise of a recall. The original Constitution of Colorado was a solemn compact between the state and the federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to

enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in its people to command their courts to do so. That issue was finally settled at Appomattox.

When a federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away nor that duty abrogated by the state of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the Constitution of the state of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions. The question may be brought by writ of error to this court for review, and from our judgment the cause may be taken for final determination to the Supreme Court of the United States itself. It cannot be reviewed by popular vote of the citizens of Colorado, or one of its municipalities, and any pretended constitutional provision of this state, assuming to provide such method of review, is null and void. To hold otherwise is not only to vest in the people of Colorado the power to nullify the United States Constitution, but is likewise to vest that tremendous power in every municipality of this state, having a population of 2,000 or more, which sees fit to bring itself within the terms of the home rule amendment to our Constitution.

Many authorities might be cited in support of the general principles herein announced, as many might be cited in support of the proposition that parallel lines can never meet. They would be equally useless.

It is to be observed that the validity of said amended section 1, art. 6, so far as it prohibits trial courts from holding statutes and city charters to be in violation of the state Constitution, and assumes to provide a method of recalling decisions of the Supreme Court so holding, is not herein determined.

In conformity with the views herein expressed, and for the reasons hereinbefore given, we find that the trial court had the power to determine the question which it assumed to adjudicate, that the statute complained of was in fact unconstitutional, and that this decision cannot be reviewed, suspended, or reversed by the method attempted to be provided by said amended section 1 of article 6 of the state Constitution, but stands upon the same footing as any other decision of this court. The judgment is accordingly affirmed.

SCOTT, C. J., not participating.

(70 Colo. 100)

PEOPLE v. MAX. (No. 9823.)(Supreme Court of Colorado. April 4, 1921.
Rehearing Denied May 2, 1921.)

1. Constitutional law §45—Court, when confronted with conflict between federal and state Constitutions should not refuse to act.

The limit of a court's jurisdiction under a written constitution cannot be determined until the court first ascertains what is and what is not that constitution, and it was error for district court to determine that it could not act at all on a constitutional question, in that the state and federal Constitutions were in direct conflict as to the power and duty of the court in the matter, in that his oath of office required him to uphold both Constitutions.

2. Courts §204—Supreme Court held to have jurisdiction to determine questions under constitutional provision vesting it with general superintending control over inferior courts.

Where in criminal prosecution, defendants demurred to information on ground that the statute in question violated federal and state Constitutions, and court determined that, in view of Const. art. 6, § 1 (see Laws 1913, p. 678), he did not have authority to do anything, and sustained the motion to quash and demur, and the state prosecuted a writ of error under Rev. St. 1908, § 1997, and it was claimed that lower court dismissed the cause without passing upon the issue raised, and that the writ of error must be dismissed because state court had no original jurisdiction in the matter, the Supreme Court could dispose of the question irrespective of whether the cause be considered before it under its original jurisdiction, on review, or neither, in view of Const. art. 6, § 2, vesting in it "a general superintending control over all inferior courts."

3. Constitutional law §49—Rule as to divisibility of constitutional provision same as that applied to statute.

The rule as to the divisibility of a constitutional provision, a portion of which is held void, is the same as that applied to a statute under similar conditions.

4. Constitutional law §49—Constitutional provision, denying courts power to pass on constitutional questions indivisible and null and void.

That portion of Const. art. 6, § 1 (see Laws 1913, p. 678), taking from all courts of the state except the Supreme Court the power to construe the state or federal Constitutions, is indivisible; and, for the simple reason that it is invalid as to the federal constitutional questions, it is likewise invalid as to state constitutional questions.

5. Constitutional law §259—Provision, withdrawing power from state courts to decide constitutional questions, deprives an accused of due process of law.

Const. art. 6, § 1 (see Laws 1913, p. 678), withdrawing from all the state courts except the Supreme Court power to pass on state con-

stitutional questions, is invalid as to one charged with crime under a statute, because it deprives him of due process of law, notwithstanding Laws 1913, c. 121, giving the Supreme Court power to prescribe rules of practice and procedure in all courts of record.

6. Courts §486—Cause dismissed or transferred where lack of jurisdiction appears.

Jurisdiction is invoked by the allegations of an information, petition or complaint, but if prior to final judgment a matter arises judicially which discloses that the apparent jurisdiction of the court no longer exists, the action should be dismissed for want of jurisdiction, or transferred to a tribunal having such jurisdiction.

7. Constitutional law §268—"Due process of law" affords hearing before condemnation in criminal prosecution.

"Due process of law" affords a hearing in a criminal prosecution before it condemns, and gives a judgment only after trial, and such term, as applied to the acts of the government in interfering with the title or enjoyment of a person's property, must be tested by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by the rules that pertain to the forms of procedure merely.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

8. Constitutional law §254 — Recall of Supreme Court decisions on constitutional questions held null and void.

The recall provisions of Const. art. 6, § 1 (see Laws 1913, p. 678) withdrawing from all courts of the state except the Supreme Court the power to pass on constitutional questions, are null and void, since, if the people cannot by statute or constitutional enactment deny to any person "due process of law," no more can they accomplish the same object by popular vote under the guise of the recall of a court decision.

9. States §21—What state cannot do, municipality cannot do.

What a state cannot do, it cannot authorize one of its municipalities to do.

10. Courts §42(1)—Portion of amended constitutional provision as to judicial power of state held valid.

The portion of Const. art. 6, § 1, as amended (see Laws 1913, p. 678), providing that: "The judicial power of the state as to all matters of law and equity, except as in the Constitution otherwise provided, shall be vested in a supreme court, district courts, county courts, and such other courts as may be provided by law. In counties and cities and counties, having a population exceeding one hundred thousand, exclusive original jurisdiction in cases involving minors and persons whose offenses concern minors may be vested in a separate court now or hereafter established by law"—is valid, but the remainder of such section is null and void, and no part of the Constitution.

11. Criminal law \S 1134(2), 1144(3)—On appeal from sustaining of demurrer and motion to quash, assumed that only law questions were considered; "opinion" of lower court not to be considered on appeal.

On appeal from a judgment sustaining a motion to quash information and a demurrer, where record shows that no evidence was taken and facts set forth in the motion to quash were not admitted, it must be assumed that only questions of law were considered by the court in entering the judgment, and the review must be confined to those, and the opinion of the court is not to be considered.

12. Statutes \S 114(3) — Statute relating to practice of "medicine" held sufficiently expressed in its title.

Laws 1917, c. 94, does not violate Const. art. 5, § 21, in that it contains more than one subject, not clearly expressed in the title, "An act relating to the practice of medicine in the state of Colorado," in that it deals with the practice of chiropody, optometry, etc.; "medicine" as therein used being properly defined as the art of healing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Medicine.]

13. Constitutional law \S 206(4), 230(2), 287 —Physicians and surgeons \S 2—Statute relating to licenses held not to deny due process, abridge privileges, or deny equal protection.

Laws 1917, c. 94, making it an offense to diagnose and treat diseases, injuries, and defects of human beings without a license, does not deny "due process of law," as it creates a tribunal, provides for notice and hearing, for evidence and argument, nor does it abridge the privileges and immunities of citizens, or deny equal protection of the law; such contention being included within the objection that it denies "due process."

En Banc.

Error to District Court, City and County of Denver; Henry J. Hersey, Judge.

Alfred E. Max was charged by information with unlawfully diagnosing and treating diseases, injuries, and defects of human beings without a license. From a judgment dismissing the case and discharging him, the People of the State bring error. Judgment reversed.

William E. Foley, Dist. Atty., and T. E. McIntyre, Asst. Dist. Atty., both of Denver, for the People.

John T. Bottom, of Denver (John M. Waldron, of counsel), for defendant in error.

T. J. O'Donnell, Melville, Melville & Walton, Horace N. Hawkins, Thomas H. Gibson, and Harvey Riddell, all of Denver, amici curiae.

BURKE, J. In this cause an information was filed against defendant, charging him with unlawfully "diagnosing and treating diseases, injuries, and defects of human be-

ings" without a license, in violation of chapter 94, L. 1917, p. 353. To this information defendant filed a motion to quash and demurrer, on the ground that said chapter 94 was unconstitutional, as in violation of certain sections of the state and federal Constitutions, and questioning the jurisdiction of the court to consider the same under the prohibition of section 1, art. 6 of the state Constitution (see Laws 1913, p. 678). The district attorney thereupon objected to the court's consideration of said questions, save to overrule defendant's demurrer. Upon hearing the court sustained the motion and demurrer, and entered final judgment, dismissing the case and discharging the defendant. From that judgment the people bring this cause here for review on error, under the mandate of section 1997, R. S. 1908.

We desire here to express our very great appreciation of the aid given us by the able and exhaustive briefs filed in these cases by amici curiae.

For the purpose of determining the legal questions involved, this is a companion case to No. 9522, People v. W. U. Tel. Co. et al., 198 Pac. 146, this day decided here. Although there is no connection between the two, a careful examination of the opinion in that case is essential to a full understanding of what is hereinafter said. Portions of section 1, art. 6, and section 8, art. 12, of the Constitution of Colorado, and paragraph 2 of article 6 of the United States Constitution are therein quoted, and will not be repeated here. Said section 1 prohibits all the courts of this state, except the Supreme Court, from passing upon certain state and federal constitutional questions. Its validity as to such federal questions is denied in said cause No. 9522. That decision disposes of the issue here, so far as the federal Constitution is concerned, and it will not be further discussed.

[1] There is incorporated in the record before us an "opinion" of the trial judge, from which it appears that, having found the state and federal Constitutions in direct conflict as to his power and duty, he held that his oath of office, applied thereto, resulted in judicial paralysis. In this he was in error. The limit of a court's jurisdiction under a written constitution cannot be determined until the court first ascertains what is and what is not that constitution. Had the trial judge taken this first step before contemplating the second, the difficulty would have been obviated.

[2] It is said here that, as the lower court dismissed this cause without passing upon the issue raised, there is nothing before us to review, and that, having no original jurisdiction in the matter, the writ must be dismissed. If so, the most momentous question that can be raised under our system of

jurisprudence can never be determined. The fallacy of the proposition is too apparent for discussion.

However, it is from the "opinion" only that counsel conclude that the questions were not decided. The judgment itself recites that the court "doth sustain said motion to quash and demurrer." The statute (section 1907, R. S. 1908) provides that—

"Writs of error shall lie on behalf of the state, or the people, to review decisions of the trial court in any criminal case upon questions of law arising upon * * * motions to quash, demurrers," etc.

This is a writ of error in a criminal case to review a decision of the trial court arising upon a motion to quash and a demurrer.

The diverse views of judges of the same court, as evidenced by this judgment and that rendered below in No. 9522, but emphasizes the imperative duty resting upon us as pointed out in the opinion in that case. In the "opinion" of the trial judge here it is well said:

"No relief can be expected until the Supreme Court of this state realizes the anomalous position in which this provision (section 1, art. 6) of the Constitution places the judges of the district court."

Irrespective of whether this cause is now before us on review or under our original jurisdiction, or neither, it is here in such a condition and under such circumstances, and the necessity is such that, by virtue of section 2, art. 6, of the Colorado Constitution, vesting in the Supreme Court "a general superintending control over all inferior courts," we have the right, and it is our duty, to dispose of it.

The question first to be determined is: Had the trial court in the instant case the right, and was it its duty, to decide the state constitutional question raised by the motion to quash and demurrer to the information? Having held a section of our Constitution null and void as to federal constitutional questions, we have first to determine whether or not said section is divisible so that it may still be upheld and enforced as to state constitutional questions.

The language of the section as it applies to both state and federal Constitutions prohibits the courts from adjudicating any of the laws mentioned—

"as in violation of the Constitution of this state or of the United States; provided that before said decision [i. e., of the state Supreme Court holding an act to be in violation of either Constitution] shall be binding it shall be subject to approval or disapproval by the people. * * * If it concerns a state law [i. e., holds a state law to be contrary to either Constitution] it shall not be binding until sixty days after such date. Within said sixty days a referendum petition," etc. "All such laws [i. e., laws held contrary to either Constitution] or parts thereof submitted as herein provided

when approved by a majority of the votes cast thereon at such election shall be and become the law of this state notwithstanding the decision of the Supreme Court [hence, notwithstanding they do in fact violate either state or federal Constitution, or both]."

Next follows a similar provision, as set forth in No. 9522, for the recall of decisions declaring city charter provisions of home rule cities contrary to state or federal Constitution. No distinction is anywhere made in said section between decisions holding legislation contrary to the federal Constitution and those holding such legislation contrary to the state Constitution.

[3] It thus appears that in all particulars in which this section is held void in the opinion in cause No. 9522 no distinction is made between the two classes of decisions, and no portion of the section relating to that subject can be held to have been considered by the voters as standing alone, or to have been treated as independent. It is inconceivable that the people of Colorado would ever have enacted this law had they realized that in no event could it ever be applied further than to their own Constitution, or that they would ever have considered the advisability of taking from their own courts the power to construe their own Constitution had they realized that while the Constitution of the United States stands they were impotent to deprive those same courts of power to construe that charter. The rule as to the divisibility of a constitutional provision, a portion of which is held void, is the same as that applied to a statute under similar conditions.

"Where a separation cannot be made, and the invalid provision completely detached and treated as independent, the whole act must be pronounced void." *Griffin v. State ex rel.*, etc., 119 Ind. 520, 22 N. E. 7.

That portion of the section is therefore indivisible, and, a part of it having fallen, it must all fall.

[4] It is hence apparent that, for the simple reason that said section 1 is invalid, as to federal constitutional questions and is indivisible, it is likewise invalid as to state constitutional questions. and the trial court had the power and it was its duty to adjudicate the questions presented.

[5] Moreover, said section is invalid because it deprives the defendant of "due process of law." That such a result ensues when one is prosecuted under an unconstitutional statute, and all the courts are deprived of authority to entertain his defenses, is too clear to admit of discussion. If the prohibition of this section, so far as it relates to trial courts construing the state Constitution, be upheld, where may the defense of the unconstitutionality of the statute be adjudicated? Not in the trial court, for that is prohibited. Not in the Supreme Court under its appellate jurisdiction, if the trial court was

without jurisdiction, for there is then nothing to be reviewed. Not in the Supreme Court under its original jurisdiction, unless such jurisdiction is conferred by the section itself. Section 2, art. 6 of the state Constitution provides that, "The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only," and it is not "otherwise provided in this Constitution" unless in said section under consideration.

It seems to be the position of the district attorney that the language of said section, "None of said courts except the Supreme Court shall have any power to declare or adjudicate any law of this state or city charter or amendment thereto * * * as in violation of the Constitution of this state or of the United States," is a mandate to all inferior courts to hold all such legislation constitutional. The language itself justifies that interpretation, and we are wholly without the guidance of judicial precedent, for the very good reason that no such anomalous provision has, so far as we are able to determine, ever before found its way into a written constitution. If that interpretation be correct, then the provision has thereby committed suicide. It is the pronouncement of a judgment by a constitution instead of by a court. It is an order to trial courts so to decide. It is the declaration of that instrument that, for the purpose of trials in nisi prius courts, all such legislation is, by conclusion of law, constitutional. *McNealy v. Gregory*, 13 Fla. 417.

By chap. 121, L. 1913, this court is given power to "prescribe rules of practice and procedure in all courts of record," and it is contended that under that statute it now devolves upon us to provide a method of determining those state constitutional questions covered by the provisions of said section 1 of article 6. If the proposition were otherwise tenable, it is disposed of by the fact that said section furnishes no basis therefor, in that it does not provide whether our jurisdiction in the matter be original or appellate. That question must be settled by the Constitution itself, which has removed it from the realm of "rules of practice and procedure." For these reasons said section 1 of article 6 of the state Constitution is void as in violation of the "due process of law" clause of the federal Constitution.

Again, said section deprives the defendant of due process of law because, even if a method be discoverable by which it may be enforced, it deprives him of a tribunal in which his cause may be adjudicated, and all his defenses to the charge heard and determined.

If the denial of power in the trial court to hold a law unconstitutional be interpreted as a denial also of its power to hold it constitutional, a denial of power to hear and adjudicate the question at all, then one who raises a constitutional question thereby ousts

the court of jurisdiction. His cause can never be heard, and "due process of law" is denied him.

"Jurisdiction has been defined as * * * the power to hear and determine issues of law and of fact * * * the power and authority to declare the law * * * the authority to judge or to declare the law between parties brought into court. * * *" 15 C. J. p. 723, § 13.

"As jurisdiction is the right to adjudicate concerning the subject-matter of a given case, loss of jurisdiction will result when the power of the court is terminated or the subject-matter destroyed or withdrawn." 7 R. C. L. p. 1042, § 79.

"Upon determining that it has no jurisdiction the court may not only refuse to proceed further and determine other objections or the rights of the parties, but it is also improper to decide upon the sufficiency of other matters of defense, and a judgment of dismissal for want of jurisdiction or without prejudice should be entered, after which the court has no authority to proceed." 15 C. J. p. 854, § 176.

[6] Jurisdiction is invoked by the allegations of an information, petition, or complaint; but, if prior to final judgment a matter arises judicially which discloses that the apparent jurisdiction of the court no longer exists, the action should be dismissed for want of jurisdiction, or transferred to a tribunal having such jurisdiction. *D. W. & P. Ry. Co. v. Church*, 7 Colo. 143, 2 Pac. 218.

It is therefore apparent that if the trial court in the instant case was without power to decide the constitutional question raised, one way or the other, it could only dismiss the cause because no other court existed in which it could be tried.

If the denial of power in the trial court to hold a law unconstitutional was in fact a command to hold it constitutional, then the defendant was denied due process of law because the court could not entertain his defense, however valid it might otherwise be, and said section 1 is in itself a preadjudication of every case involving a constitutional question. The amendment might with equal force have provided that in every trial involving the commission of a criminal offense a defendant, who objected to the constitutionality of the act under which he was prosecuted, should be thereupon adjudged guilty by the trial court.

In construing the phrase "due process of law," the federal courts have held that:

"Due process must, in the language of Mr. Webster, be, according to his familiar definition, the general law, or law which hears before it condemns, and which proceeds upon inquiry and renders judgment." *Ex parte Riggins* (C. C.) 134 Fed. 404, 418.

[7] "Due process of law" affords a hearing before it condemns, and gives judgment only after trial. *Ong Chang Wing v. United States*, 218 U. S. 272, 280, 31 Sup. Ct. 15, 54 L. Ed. 1040.

"Due process of law," as applied to the acts of the government in interfering with the title of enjoyment of a person's property, must be tested by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by the rules that pertain to the forms of procedure merely. "In judicial proceedings the law of the land requires a hearing before condemnation." *Chambers v. Gilbert*, 17 Tex. Civ. App. 106, 109, 42 S. W. 630.

It is evident that the term "due process of law," within the meaning of the Constitution of the United States, has a broader meaning than the process prescribed by act of the Legislature.

"Such a construction would render the constitutional guaranty mere nonsense, for it would then mean no state should deprive a person of life, liberty, or property, unless the state should choose to do so." *In re Ziebold* (C. C.) 23 Fed. 791.

It has been repeatedly held that, in governments such as ours, based upon written constitutions, "due process of law" has a broader meaning than "the law of the land" as used in Magna Charta and construed in England, where the Parliament is supreme. Yet the United States Supreme Court has said of the latter phrase that—

It was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. Ed. 559.

On the bench when that opinion was handed down sat Marshall and Story, and of the definition itself, as applied to "due process of law," Judge Cooley said:

"We have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering."

It is immaterial whether the state should choose to deprive a person of life, liberty, or property without trial by an act of the Legislature or by a constitutional provision. Either is an "arbitrary exercise of the powers of government." Either is a denial of "due process of law" and a violation of the federal Constitution.

It has been argued here that the "due process" clause of the federal Constitution is not violated if the constitutional question, raised in the trial court, may in some manner be certified to us for determination, and further proceedings below suspended until the question is adjudicated. It is said that many states have provided a similar procedure under such circumstances, and that the duty devolves upon us, under section 1997, R. S. 1908, to provide such certification. We have examined the authorities cited on that subject. With a single exception they are from

states where jurisdiction is conferred by statute, or relate to hearings in appellate courts, or concern the complete transfer of a cause from a court having no jurisdiction to one having full jurisdiction to hear and determine every issue that can be raised. That exception is the following:

"When an important and difficult constitutional question arises in an action or proceeding, pending before the district court in any county of this state, the judge of said court may, on motion of either party, or upon his own motion, cause the same to be reserved and sent to the Supreme Court for its decision." *Sess. Laws Wyo.* 1903, c. 72, p. 78.

This act does not prohibit the trial court from passing upon a constitutional question.

The power of the Legislature itself to provide such procedure has been denied. *Sanger et al. v. Truesdall et al.*, 8 Mich. 543; *Jones v. Smith et al.*, 14 Mich. 334.

If it is no denial to a defendant of "due process of law" to compel him to try a portion of his case in the district court, and a portion of it in the Supreme Court, it may, with equal validity, be provided that, should the information be filed in the district court of Weld county and his defenses be (1) the unconstitutionality of the act under which he is prosecuted, (2) an alibi, and (3) insanity, the constitutional question shall be heard only in the Supreme Court, the defense of insanity in the county court of Pueblo county, the alibi in the district court of Montezuma county, and the remainder of the cause be tried where the information was filed. Should such an outrage be permitted by the Constitution, can there be a lingering doubt in the mind of any man that the accused has been denied "due process of law"? Can those who sanction such procedure still contend that transportation of the colonists to England for the trial of offenses alleged to have been committed on this continent would have involved any violation of individual rights?

[8, 9] Having held said section 1, art. 6, null and void so far as it attempts to prohibit trial courts from adjudicating state constitutional questions, it becomes our bounden duty to say to what extent, if at all, this decision is affected by the recall provisions of said section. This is true for the same reasons as set out in our opinion in No. 9522, and for the reasons there given we are forced to declare such recall provisions null and void. If the people cannot by statute or constitutional enactment deny to any person "due process of law," no more can they accomplish the same object by popular vote under the guise of the recall of a court decision. The prohibition of the federal Constitution is against the state itself. What the state cannot do it cannot authorize one of its municipalities to do.

"Even by constitutional amendment the people cannot set apart any portion of the state

in such manner that that portion of the state shall be freed from the Constitution." *People ex rel. Elder v. Sours*, 31 Colo. 369, 385, 74 Pac. 167, 102 Am. St. Rep. 34.

Every decision of this court upholding the Twentieth Amendment to the state Constitution (see Laws 1913, p. 669) (which provides for the organization of home rule cities) is based upon the proposition that the amendment does not violate this federal law against the creation of a state within a state, and in each it is conceded by the litigants, and held by the court, that if it did so it would be null and void. What it has been repeatedly held that the Twentieth Amendment did not and could not do is now attempted by said section 1, art. 6, in that, by the simple expedient of a municipal recall of all decisions interfering with the city's absolute independence, it may escape altogether from the control of the state Constitution.

If a city of Colorado be empowered by a vote of its citizens to determine when it will and when it will not permit the state Constitution to be enforced within its borders, it is thus freed from the fundamental law of the land, and may set at defiance the whole power of the people of the commonwealth. It may enact its own Constitution, establish its own courts of general jurisdiction, provide its own Criminal Code, refuse to pay state taxes, and do any and all things which a sovereign power may do.

To uphold the municipal recall provisions of said section 1 would therefore be to overthrow the Twentieth Amendment, as in violation of this rule against the creation of a state within a state. By the exercise of the powers therein pretended to be granted a home rule city would destroy itself.

To uphold any portion of the "recall" provisions of said section 1, art. 6, is to destroy the Constitution itself by holding that the people may, by popular vote, decide whether they will or will not recognize it in a given case.

We must not be understood as saying that the people of Colorado cannot make any change in, or amendment to, their fundamental law which is not of itself a violation of the federal Constitution. They have the power to create courts and abolish them. They may confer jurisdiction upon one court and deny it to another, but they are powerless to violate the federal Constitution or strip their courts of the power to pass upon such a violation.

If the Constitution of Colorado does not guarantee due process of law to a single individual, the weakest and most forsaken ever brought before the bar of justice, even against the unanimous demand of the whole people of the state for summary punishment, then it is a violation of the supreme law of the land, and its pretended safeguards a delusion and a mockery.

If an unconstitutional statute, creating a

crime unknown to the common law, may be passed by the Legislature; if a citizen may be put upon trial thereunder; if the trial court may be prohibited from hearing his plea that the statute violates the constitutional guaranties of his state; if, when this court has so held, that statute may be reenacted by a bare majority of those voting thereon and the severest penalties be thereupon inflicted—then law has become a phantom and justice a dream, and constitutional guaranties of the sacredness of life, liberty and property,

"A tale
Told by an idiot, full of sound and fury,
Signifying nothing."

[10] It follows from what has hereinbefore been said that all those provisions of amended section 1 of article 6, of our state Constitution which purport to furnish the plan and machinery for the nullification of the decisions of this court holding state laws and city charters contrary to the state Constitution are null and void, and are not subject to the prohibition that they shall not be binding until 60 days after the date of their filing, but stand on the same footing as other decisions of this court.

Having thus, in this cause and in No. 9522, disposed of so much of amended section 1 of article 6 of the state Constitution, it is imperative to say what, if any, portion of that section remains. The first nine lines of this section and a part of the tenth read as follows:

"Section 1. The judicial power of the state as to all matters of law and equity, except as in the Constitution otherwise provided, shall be vested in a supreme court, district courts, county courts, and such other courts as may be provided by law. In counties and cities and counties, having a population exceeding one hundred thousand, exclusive original jurisdiction in cases involving minors and persons whose offenses concern minors may be vested in a separate court now or hereafter established by law."

It is perfectly apparent that so much of the section is in no way involved in the issues here presented or the questions here determined. The remainder is held null and void and no part of the state Constitution.

Defendants' motion and demurrer put in issue two questions of law: (1) That the act under which the information was filed was unconstitutional; (2) that the raising of that question ousted the court of jurisdiction.

[11] The judgment, to which alone we must look, merely sustains the motion and demurrer. The "opinion" of the court is not to be considered. If either objection to the information were good, the ruling must be upheld. We have seen that the second was not. It therefore becomes necessary to consider the first, for if the act itself was unconstitutional the judgment was correct, however wrong the reasons given. The rec-

ord shows that no evidence was taken, and the facts set forth in the motion to quash were not admitted. We must assume, therefore, that only questions of law were considered by the court in entering the judgment, and our review must be confined to those.

[12] Defendants have favored us with no briefs on these subjects, and in our opinion it is necessary to consider only the contentions.

(1) That the act is in violation of section 21, art. 5, of the state Constitution, in that it contains more than one subject, and that these are not clearly expressed in the title; (2) that it violates section 25, art. 2 of the state Constitution, and paragraph 1, art. 14, of the amendments to the United States Constitution, in that it abridges the privileges and immunities of citizens, denies the equal protection of the law, and denies "due process."

The title of this act is "An act relating to the practice of medicine in the state of Colorado." Defendants assume that "the practice of medicine" means the practice of administering drugs and nothing more; hence they maintain that this statute, which establishes a board of medical examiners and commits to their jurisdiction the admission of persons to practice medicine, the revocation of licenses, the practice of chiropody, optometry, chiropractic and midwifery, and provides penalties for its violation, is entirely beyond the scope of the title. With this contention we are unable to agree. "Medicine" as herein used is properly defined as the art of healing. See Webster's Dictionary and 27 Cyc. 466. So defined, the title includes everything covered by the act. Every provision thereof germane to this subject is valid. *People ex rel. Colo. Bar Ass'n v. Erbaugh*, 42 Colo. 480, 490, 94 Pac. 349.

The generality of the title is commendable. In *re Breene*, 14 Colo. 401, 405, 24 Pac. 3.

[13] Neither does the statute deny "due process of law." It creates a tribunal, provides for notice and hearing, for evidence and argument. In *re Lowrie*, 8 Colo. 499, 512, 513, 9 Pac. 489, 54 Am. Rep. 558.

The contention that it abridges the privileges and immunities of citizens and denies equal protection of the law is included within the objection that it denies "due process." They stand or fall together.

Constitutional objections have been raised to similar legislation in many states, but these acts are supported by the great weight of authority. See *Dillard v. Medical Board* (No. 9958) 196 Pac. 866, decided at the present term, and cases therein cited.

The judgment on the motion to quash and demurrer to the information was wrong, and is therefore disapproved and reversed. *People v. Fitzgerald*, 51 Colo. 175, 177, 117 Pac. 135.

SCOTT, C. J., not participating.

(70 Colo. 154)

PARSONS et al. v. PARSONS. (No. 10033.)

(Supreme Court of Colorado. April 4, 1921.)

1. Statute \S 85(1)—Statute relating to divorce held not unconstitutional as special legislation; "granting divorces."

Laws 1917, p. 183, \S 10, providing that the death of either party to a divorce suit within six months after findings of fact and conclusions of law are filed shall operate automatically to grant an absolute divorce to the party to whom it might have been granted had the full period expired, held not violative of Const. art. 5, \S 25, prohibiting the enactment of local or special laws for "granting divorces," since such statute is not a law for "granting divorces," within the Constitution, and since it operates uniformly on every person who is brought within the relations and circumstances provided for and therefore, is not a local or special law.

2. Constitutional law \S 55—Statute as to divorce decrees granted automatically on death of either party within six months following findings held not encroachment on judiciary.

Laws 1917, p. 183, \S 10, providing that the death of either party to a divorce action during the six months following the findings and conclusions of law shall operate automatically to grant a divorce to person to whom divorce might have been granted, had the full period expired, held not unconstitutional as an encroachment upon the judiciary, in violation of Const. art. 3.

3. Divorce \S 170—Judgment \S 502—Statute as to divorce being automatically granted on death of either party not invalid as the equivalent of a judgment against a deceased party; judgment against deceased person not open to collateral attack if court had jurisdiction.

Laws 1917, p. 183, \S 10, providing that the death of either party to a divorce action before the expiration of the six months following the filing of the findings of fact shall operate automatically to grant a divorce to the party to whom it might have been granted had the full six-month period expired, held not invalid on theory that the statute is the equivalent of a judgment against a deceased party, since such judgments are not void or open to collateral attack where the court has acquired jurisdiction of the subject-matter and the persons during the lifetime of such party.

4. Executors and administrators \S 188—Divorced wife not former husband's "widow."

A divorced wife is not entitled to a widow's allowance on former husband's death, since she is not the "widow" of such former husband.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Widow.]

En Banc.

Error to Montrose County Court; S. S. Sherman, Judge.

In the matter of the estate of Henry R. Parsons, deceased. Petition by Minnie M.

Parsons for a widow's allowance, and for a decree providing that she is entitled to inherit as a widow one-half of the deceased's estate. Petition granted as to widow's allowance, but denied as to inheritance of one-half of estate as deceased's widow, as premature, and Ethel Roy Parsons and others bring error, and petitioner assigns cross-error. Reversed and remanded, with directions to dismiss petition.

John L. Stivers, of Montrose, for plaintiffs in error.

Catlin & Blake, of Montrose, for defendant in error.

ALLEN, J. On December 23, 1920, the defendant in error, Minnie M. Parsons, filed in the county court of Montrose county, in the matter of the estate of Henry R. Parsons, deceased, her petition for a widow's allowance, and for a decree providing "that she inherit as the widow of said H. R. Parsons, and be entitled to one-half of the estate of said H. R. Parsons, deceased."

The application for widow's allowance was granted by the court, and certain heirs of Henry R. Parsons, deceased, who are adversely affected by the court's ruling, bring the cause here for review. The petition, in so far as it asks for an order that petitioner is entitled to inherit as a widow, was denied, as premature, and the defendant in error assigns cross-error to the court's ruling in that respect.

The principal question presented for our determination is whether the defendant in error was, at the time of the filing of her petition, a widow of Henry R. Parsons, deceased, so as to be entitled to a widow's allowance, and to inherit as a widow. The facts giving rise to the controversy are as follows:

On March 9, 1918, the defendant in error brought an action in the district court of Montrose county against her husband, for divorce. On April 17, 1918, Henry R. Parsons, the defendant in the divorce action, filed his answer, and, by agreement, the cause was tried that day. On April 18, 1918, the court made and caused to be filed its findings of fact and conclusions of law, in favor of the plaintiff, reciting, among other things:

"That the plaintiff shall, at the expiration of six months from the date of the filing hereof by the clerk, be entitled to a decree of divorce, provided these findings of fact and conclusions of law have not been set aside, and no motion to set them aside remains unheard and undecided."

On October 13, 1918, which was four days before the expiration of the six months following the filing of the findings of fact and conclusions of law, Henry R. Parsons, the defendant, died. No application has ever been made to set aside the findings of fact

and conclusions of law, nor any order entered to that effect, and no final decree of divorce has ever been entered.

The plaintiffs in error contend that the defendant in error has the status of a divorced wife, just as she would have if a final decree of divorce had been granted, and entered in her favor in the divorce action. It is claimed that this situation arises by reason of the provisions of section 10, chapter 65, Sess. Laws 1917, which so far as material here, reads as follows:

"Section 10. * * * The court shall make and sign written findings of fact and conclusions of law in the case, and shall cause the same to be filed with the clerk of the court. No decree of divorce shall be granted until the expiration of six months from the day on which such findings of fact and conclusions of law were filed by the clerk of the court, and any divorce granted before the expiration of the said six months shall be null and void: Provided, however, that the death of either party before the expiration of the said six months after the finding of facts shall operate automatically so as to grant immediate and absolute divorce to the party to whom the divorce might have been granted had the full period of six months expired. * * *"

The foregoing statutory provision is, by counsel for defendant in error, assailed as unconstitutional.

Section 25, article 5, of the state Constitution provides that—

"The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: First. For granting divorces. * * *"

[1] The statute is not one "granting divorces," within the meaning of the constitutional provision above quoted. Furthermore, the statute operates uniformly on every person who is brought within the relations and circumstances provided for, and is therefore a general, and not a special, or a local, law. 25 R. C. L. 816, § 66. In *State v. Duket*, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928, a statute providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced without any judgment of divorce or other legal process, was held not to be in conflict with a constitutional provision against legislative divorces.

[2] The main objection to the statute appears to be based on the proposition that it is an attempt by the Legislature to exercise authority properly within the scope of the judicial power, and therefore in violation of article 3 of the state Constitution, which reads as follows:

"The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial—and no persons, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any

power properly belonging to either of the others except as in this Constitution expressly directed or permitted."

The divorce statute gives to the findings of fact and conclusions of law the effect of a final decree of divorce in case of the death of one of the parties. This does not result in depriving any person of his day in court, nor does it affect property rights without due process of law, since the findings of fact and conclusions of law in divorce actions are made and filed only after trial of the cause upon its merits. The statute leaves judicial functions in divorce matters with the courts; the determination of all issues of law and fact, and of rights and obligations, with reference to past transactions, is still left to the court. The statute, in cases arising after its enactment, gives to a party who has been adjudged by a court to be entitled to a divorce the status of one having obtained a divorce. In this respect, the statute is analogous to certain curative acts which have been upheld as a proper exercise of the legislative power, because "they do not declare or determine, but only confirm rights." See 12 C. J. 821, § 273. In 12 C. J. 807, § 239, it is said:

"The distinction between the functions of the legislative and judicial departments is that it is the province of the Legislature to establish rules that shall regulate and govern in matters or transactions occurring subsequent to the legislative action, while the judiciary determines rights and obligations with reference to transactions that are past or conditions that exist at the time of the exercise of judicial power."

[3] Applying to the statute the test laid down in the foregoing quotation, we cannot see that it is an encroachment upon the judiciary, and therefore hold it to be constitutional.

There is no valid objection to the statute if it is regarded also as the equivalent of a judgment against a deceased party. Such judgments are not void, or open to collateral attack, where the court had acquired jurisdiction of the subject-matter and the persons during the lifetime of such party. 23 Cyc. 678.

[4] For the reasons above stated, the defendant in error had the status of a wife absolutely divorced from her former husband, Henry R. Parsons, at the time she filed her petition. A divorced wife is not, and cannot be, the widow of him from whom she was divorced. 40 Cyc. 934; O'Malley v. O'Malley, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 664. The court erred in granting the widow's allowance.

The judgment is reversed and the cause remanded, with directions to dismiss the petition.

SCOTT, C. J., not participating.

(33 Idaho, 726)

BERGH et ux. v. PENNINGTON et al.
(No. 3346.)

(Supreme Court of Idaho. April 30, 1921.)

1. Appeal and error \S 671(1)—Where reporter's transcript stricken only judgment roll remains.

Upon appeal from a judgment, where the reporter's transcript has been stricken from the files, the only record remaining before this court is the judgment roll.

2. Appeal and error \S 1135 — Where record consists of judgment roll only, and findings responsive to issues, judgment will be affirmed.

Upon appeal from a judgment, where the record consists of the judgment roll only, and where, as in this case, the findings are responsive to the material issues presented by the pleadings and sustain the conclusions of law and the decree entered thereon, the judgment will be affirmed.

3. Appeal and error \S 1036(6)—Intervention, if error, harmless where no substantial rights affected.

The action of a trial court in permitting a party who has an interest in the controversy, but is represented by a trustee, to intervene, if error, was harmless, inasmuch as no substantial right of appellants could have been affected thereby.

On Petition for Rehearing.

4. Corporations \S 659 — Officers of foreign corporation executing trust deed estopped to deny corporate existence or right to do business.

Officers and directors of a foreign corporation, the right of which to do business in this state has been forfeited for failure to make its annual report and pay its license fee, who, after such forfeiture, acting in their official capacity, direct and execute a trust deed conveying property of the corporation, are estopped from denying the corporate existence of such corporation and from showing that its right to do business had been forfeited at the time of the execution of the trust deed.

Appeal from District Court, Owyhee County; Ed. L. Bryan, Judge.

Actions by G. A. Bergh and another against C. E. Pennington and others to quiet title to certain mining claims in Owyhee County, and by the Murphy Lumber Company to foreclose a trust deed covering the same property, consolidated by stipulation. Judgment for defendants, and plaintiffs appeal. Affirmed.

S. T. Schreiber and P. M. Cavaney, both of Boise, for appellants.

Ira E. Barber, W. H. Davison, Hawley & Hawley, and O. W. Worthwine, all of Boise, for respondents.

BUDGE, J. Respondents heretofore made a motion in this court to strike the reporter's

transcript from the record and to dismiss the appeal in this cause, and the opinion of this court thereon, which will be found in 33 Idaho, —, 191 Pac. 204, contains a statement of the material facts of the case, and discloses the action of this court in striking the reporter's transcript and denying the motion to dismiss the appeal.

[1] The reporter's transcript having been stricken, the only record now before us is the judgment roll. As was said by this court in the case of Storey & Fawcett v. Nampa & Meridian Irrigation District, 32 Idaho, 713, at page 720, 187 Pac. 946, at page 947:

"It must be regarded as settled law in this state under existing statutes that, where upon appeal from a judgment the record brought to this court contains neither a transcript of the proceedings had upon the trial nor a bill of exceptions, nothing belongs to the record except the judgment roll, and no question outside of the record can be considered by the court."

[2] We have carefully examined the pleadings, from which it appears that a cause of action is stated. The findings are responsive to the material issues presented by the pleadings, and sustain the conclusions of law and the decree entered thereon.

[3] Appellants contend that the court erred in refusing to set aside and vacate an order permitting H. J. Benson to intervene. There is no merit in this contention. Benson had an interest in the controversy, and was represented by the trustee. Without deciding whether he had a right to intervene, the action of the court in permitting him to do so, if error, was harmless, inasmuch as no substantial right of appellants could have been affected thereby. 4 C. J. p. 925.

The judgment is affirmed. Costs are awarded to respondents.

RICE, C. J., and DUNN and LEE, JJ., concur.

On Petition for Rehearing.

RICE, C. J. Appellants have filed a petition for rehearing in this case. They insist that the court erred in holding that the permission of Benson to intervene in the original action was harmless error. We are by no means convinced that the permission granted to Benson to intervene was erroneous. But in any event we adhere to our former opinion that no prejudice resulted from the intervention.

It is further insisted that the trust deed executed by the Bergh Mining & Milling Company, a Washington corporation, to respondent Barber, which was foreclosed by the judgment in the action, was void for the reason that at the time of the execution thereof the right of the corporation to do

business in this state had been forfeited to the state for failure to make its annual report and pay its license fee as provided in C. S. § 4786.

[4] Appellants, after having directed and executed the trust deed, acting in the capacity of officers of the defunct corporation, are estopped from denying the corporate existence of the Bergh Mining & Milling Company and from showing that its right to do business had been forfeited at the time the trust deed was executed. 14 C. J. pp. 237 and 247; Fletcher, Enc. Corporations, vol. 1, p. 679; Chadwick v. Dicke Tool Co., 186 Ill. App. 376; Brady v. Delaware Mut. Life Ins. Co., 2 Pennewill (Del.) 237, 45 Atl. 345. See, also, Henry Gold Min. Co. v. Henry, 25 Idaho, 333, 137 Pac. 523; Toledo Computing Scale Co. v. Young, 16 Idaho, 187, 101 Pac. 257.

It is also urged that the trust deed is invalid because it was never executed by appellant Jennie Bergh, wife of appellant G. A. Bergh. Under the findings however, she had no interest in the property, and it was not necessary that she execute the trust deed.

The other grounds for rehearing urged in the petition are without merit.

The petition should be denied; and it is so ordered.

DUNN and LEE, JJ., concur.

(33 Idaho, 704)

NEW FIRST NAT. BANK OF COLUMBUS,
OHIO, v. LINDERMAN, City Treasurer.
(No. 3256.)

(Supreme Court of Idaho. April 25, 1921.
Rehearing Denied May 28, 1921.)

1. Municipal corporations \S 521—Funds raised by assessment in municipal sewerage district held applicable first to interest coupons and next to redemption of unpaid bonds in order.

Under Rev. Codes, § 2353, as amended by Sess. Laws 1911, c. 80, subd. 11, now C. S. § 4149, the funds raised by assessment in a municipal sewerage district should be applied first to the payment of the interest coupons on all unpaid bonds, second to the redemption of the unpaid bonds in their order beginning with the lowest number.

2. Constitutional law \S 290(1)—Method of application of sewerage district funds raised by assessment held not a taking of property without due process.

Such method of applying the funds does not violate Idaho Constitution, art. 1, § 13, which prohibits the taking of property without due process of law.

Appeal from District Court, Washington County; Isaac F. Smith, Judge.

Application by the New First National Bank of Columbus, Ohio, for writ of mandamus against Mary B. Linderman, Treasurer of the City of Weiser. An alternative writ was issued, motion to quash denied, and a peremptory writ issued, and defendant appeals. Affirmed.

J. W. Galloway and Frank D. Ryan, both of Weiser, for appellant.

Charles F. Reddoch and J. P. Pope, both of Boise, for respondent.

MCCARTHY, J. The city of Weiser created certain sewer districts and caused sewers to be installed. The property affected was duly assessed and bonds were issued under the provisions of R. C. § 2353 as amended by S. L. 1911, c. 80, subd. 11, now C. S. § 4149. Respondent bought certain of these bonds. Appellant, the city treasurer, had on hand sufficient funds paid on assessments to pay all the interest due on outstanding bonds. Respondent presented overdue interest coupons to the amount of \$584.68. Appellant refused to pay said coupons except in accordance with a partial payment plan whereby she makes payments upon all interest coupons and the principal of the bonds in proportion that the amount of money she has on hand bears to the entire issue of said bonds outstanding. Such method would not pay the interest on overdue interest coupons the payment of which was demanded by respondent. The above are the facts set forth in respondent's petition for a writ of mandate and admitted by appellant's motion to quash the alternative writ. Respondent prayed for a peremptory writ ordering appellant to apply the moneys on hand first to the payment of interest due on all unpaid bonds, second to the redemption of the unpaid bonds in their order beginning with the lowest number. Upon the district court's denying appellant's motion to quash the alternative writ, appellant's default was entered for a refusal to plead further and a peremptory writ of mandate issued in accordance with the prayer of respondent's petition. From the order denying the motion to quash the alternative writ and the judgment, appellant appeals.

The question is the interpretation of R. C. § 2353, as amended by S. L. 1911, c. 80, subd. 11, now C. S. § 4149. Appellant contends: First, that moneys paid on sewer assessments should be kept in two funds, a fund for interest and a fund for principal, and applied accordingly; second, that the judgment conflicts with the decision of this court in *New First National Bank v. City of Weiser*, 30 Idaho, 15, 166 Pac. 213; third, that applying the money in the method contended for by respondent would result in depriving property owners in the district of

their property without due process of law; and, fourth, that mandamus is not the proper remedy.

[1] We cannot agree with the contention of counsel for appellant that the statute contemplates a separate interest fund and a separate principal fund. The provision that:

"The city treasurer or other authorized officer of such city, town or village shall pay the interest on the bonds authorized to be issued by this chapter out of the respective local improvement funds from which they are payable"

—refers to the "funds" of the various improvement districts, each district having its own special fund. It is clearly intended that the interest and principal collected for the payment of the bonds of a given district shall be placed in the same fund. Otherwise the provision that:

"Whenever there shall be sufficient money in the local improvement fund against which bonds have been issued under the provisions of this chapter, over and above sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more bonds, the treasurer shall call in and pay such bonds"

—becomes unnecessary and meaningless. This interpretation is also supported by the following language of the statute:

"Each bond shall provide that the principal sum thereon named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement and not otherwise."

New First National Bank v. City of Weiser, 30 Idaho, 15, 166 Pac. 213, is not controlling because it involves the construction of a different statute to wit, R. C. § 2238, as amended by S. L. 1911, c. 81. That statute, unlike the one involved in the present case, has no provision to the effect that the fund shall be first applied to the payment of interest on all unpaid bonds, and second to the redemption of the unpaid bonds. In that case the court held that the defendant was paying out the funds in exact accordance with the provisions of the statute under which the bonds were issued.

[2] Appellant's contention that the method of payment directed by the judgment deprives property owners in the district of their property without due process of law is not borne out by the facts.

The statute provides:

"Where any piece of property has been redeemed from liability of the costs for any improvements as herein provided, such property shall not thereafter be liable for further assessment for the costs of such improvement except as hereinafter provided"

—thus limiting each taxpayer's liability to the payment of his own assessment. R. C. § 2353, as amended by S. L. 1911, c. 80, subd.

(193 P.)

11, now C. S. § 4148. There is no question of the diversion of funds collected from one taxpayer, for principal and interest on the bonds issued, to the payment of interest due from a delinquent. The bonds are issued against the work of the improvement district as a whole. No particular bonds are issued against any particular parcels of property. The uniformity in the denomination of the bonds and the variation in the amounts assessed against the property owners preclude any such arrangement. Each taxpayer simply pays his proportionate share or assessment, whether on principal or interest, into the district improvement fund, and when he has done so his liability is ended. The bondholders look first to the local improvement district fund for the payment, first, of all the interest due, then of the matured bonds themselves in numerical order as far as the money collected will go. If there should be payments due for interest or principal and no money in the fund to pay them, the bondholders might then foreclose the liens which the statute gives them upon the property of the delinquent taxpayers. This would work no hardship upon the provident taxpayers, for as we have seen, their liability is limited to the assessment made against their property. The bondholders would be able to proceed only against those taxpayers who had failed to pay their assessments and would also be limited to the extent of the assessments.

Appellant has on hand more than sufficient money to pay all interest on unpaid bonds. As the statute requires her to first pay the outstanding interest and then call in as many bonds as she has funds to take up, and as she has refused to do this, after proper demand, mandamus is the appropriate remedy to compel her to perform the duty enjoyed by the statute. There is no other remedy to enforce the right asserted, viz. the right to have the money in the hands of the treasurer paid out in accordance with law.

The judgment of the district court is affirmed. Costs are awarded to respondent.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

(33 Idaho, 565)

RICE v. OREGON SHORT LINE R. CO.

(Supreme Court of Idaho, March 22, 1921.
Rehearing Denied May 28, 1921.)

1. Carriers §177(3)—Who is "initial carrier" under subsequent contract of shipment stated.

Under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), liability of a carrier for damages as initial carrier depends upon

the reception of goods in one state for transportation to a point in another state or territory, rather than the intention which the shipper may have had at the time of loading the cars, but which does not find expression in some form of contract; and, where all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to the making of the subsequent contract for shipment into another state, the carrier receiving the property under the subsequent contract of shipment is the initial carrier.

[Ed. Note.—For other definitions, see Words and Phrases, Initial Carrier.]

2. Negligence §63—"Act of God" defined.

The distinguishing characteristic of an "act of God" is that it proceeds from the forces of nature alone, to the entire exclusion of human agency.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of God.]

3. Negligence §140—Instruction on act of God insufficient.

When an act of God is relied upon as a defense in an action for damages, it is not sufficiently accurate to instruct the jury that a natural event is an act of God if it be not reasonably anticipated, since the reasonableness of the anticipation in such cases is not to be tested by ordinary standards.

4. Carriers §123—Carrier liable for damages proximately caused by act of God if failure to prevent or mitigate contributes to loss.

A carrier is liable for damages proximately caused by an act of God, in case its failure to use reasonable diligence to prevent or mitigate the damage contributes to the loss.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by L. A. Rice against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. B. Thompson and John O. Moran, both of Pocatello, for appellant.

Hays, Martin, Cameron & Hays, of Boise, for respondent.

RICE, C. J. This action was commenced against appellant as the initial carrier under the Carmack Amendment (U. S. Comp. Stat. 1916, §§ 8604a, 8604aa) for damages alleged to have been suffered on account of negligent handling of four cars of sheep. At the trial, respondent introduced no evidence of negligence on the part of appellant for damages resulting from any act or omission on its part. The negligence for which respondent claimed damages was that of the Union Pacific Railway Company, a connecting carrier. Appellant, therefore, cannot be held liable in this

case unless it is the initial carrier under the Carmack Amendment.

It appears that the sheep were loaded on the cars at Linder, a station on the Boise & Interurban Railway, on February 17, 1914. There being no station agent at Linder, a bill of lading was issued by the conductor of the train which carried the sheep. The bill of lading showed the destination of the shipment to be Caldwell, a station also on the line of the Boise & Interurban Railway Company, the sheep being consigned to the shipper, respondent herein. The line of the interurban company is wholly within the state of Idaho. On arrival at Caldwell, a transfer of the cars containing the sheep was made from the line of the interurban railroad to that of appellant. Respondent paid the freight charges to the agent of the interurban company at Caldwell, signed a receipt, and surrendered the bill of lading, and thereafter entered into the contract of shipment with appellant which is made the basis of this action.

It was shown by the evidence that the Boise & Interurban Railway Company had not filed with the Interstate Commerce Commission any tariffs or schedule of rates previous to the time of this shipment; also that its policy was at the time of this shipment, and had previously been, not to make contracts to ship property from points on its line to points outside the state.

According to the bill of lading issued by appellant, the sheep were consigned to Rosenbaum Bros., a corporation, at Chicago, Ill., and were routed over the line of appellant, Union Pacific Ry., and Chicago, Milwaukee & St. Paul Railway. They were thereafter diverted to South Omaha, Neb.

When the sheep were loaded at Linder, respondent expected to send them to an eastern market in case he did not sell them en route. The general freight agent of the Boise & Interurban Railway Company testified that he knew when he provided the cars that the prospect was the sheep would move outside of the state of Idaho.

In the case of Barrett v. Northern Pacific Ry. Co., 29 Idaho, 139, 157 Pac. 1016, this court said:

"The agreement between appellant and respondents, prior to the arrival of the goods in Spokane, whereby they were to be transmitted from that city to Rupert, constituted a new contract entirely separate and independent of that entered into with the Chicago, Burlington & Quincy Railroad Company, and one to which that company was not a party. An initial carrier is not liable for damage to goods occurring on lines not its own, and over which they were routed without notice to it. The obligation of such a carrier ceases when the goods reach the destination, in good condition, to which they were originally consigned. Parker-Bell Lumber Co. v. Great Northern R. Co., 69 Wash. 123, 124 Pac. 389, 41 L. R. A. (N. S.) 1064."

In the case of Houston E. & W. T. Ry. Co. v. Houston Packing Co. (Tex. Civ. App.) 221 S. W. 316, the court said:

"* * * The only question presented in this court being, which one of two railroads, the I. & G. N. R. R. Co. or the appellant, under the facts in evidence, was the initial carrier of the shipment within the meaning of the Carmack Amendment to the Interstate Commerce Act (U. S. Comp. St. secs. 8804a, 8804aa)? * * *

"The bill of lading bore date March 18, 1916, and was therefore issued by the appellant on the same day the car was loaded by the International & Great Northern Railway Company and the day before it was delivered by the I. & G. N. Railway Company at its own yards to the appellant company. It will be further noted that the I. & G. N. did not receive this shipment under any contract of interstate carriage, the limit of its agreement and undertaking, pursuant to the rules and regulations of the Texas Railway Commission, being to switch all cars loaded on its line to the yards of the Houston East & West Texas, and there deliver them to it. The only contract here appearing was the one made by the packing company with the appellant, and evidenced by the bill of lading, by which the latter agreed to transport the car through from Houston to its destination in Massachusetts.

"We think these facts constituted the appellant company the 'initial carrier,' as that term is used in the Carmack Amendment, and that the courts have settled the question in favor of this view."

In the case of Baltimore & Ohio Ry. Co. v. Montgomery & Co., 19 Ga. App. 29, 90 S. E. 740, the court held that, under the evidence adduced, the only contract made was by the defendant company as represented by its bill of lading under which the shipment moved from Moorefield, W. Va., to Atlanta, Ga. But in order to make its position clear, the court said:

"If the defendant, or its connection, had delivered the shipment at Richmond, demanded a surrender of its bill of lading, there collected the freight charges due it, and thereafter a new bill of lading had been issued for the shipment from Richmond, Va., to Atlanta, then there would have been a new shipment, and the railroad issuing this second bill of lading at Richmond would have been the initial carrier of the shipment from Richmond to Atlanta."

The question presented in this case arises under and involves a construction of a law of the United States. The latest expressions of the Supreme Court are found in the cases of Bracht v. San Antonio & Ark. Pass. Ry. Co., 254 U. S. 489, 41 Sup. Ct. 150, 65 L. Ed. —, and Pere Marquette Ry. Co. v. French & Co., 254 U. S. 538, 41 Sup. Ct. 195, 65 L. Ed. —.

In the first of these cases it appears that the shipper delivered to respondent railroad company at Ingleside, Tex., a carload of vegetables consigned to himself at Dallas, Tex.,

a point off its lines, where he intended to sell them. The car moved over respondent's road to Waco, and then over the Missouri, Kansas & Texas Railway to Dallas. Upon the petitioner's request, made after such arrival, the Missouri, Kansas & Texas Railway forwarded the car to Kansas City over its own lines, took up the original bill of lading, and issued an interstate one, acknowledging receipt of the vegetables at Dallas. The court said:

"The general principles announced in *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 411, 27 Sup. Ct. 360, 51 L. Ed. 540, are applicable. Railroad Commission v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004, *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442, and similar cases are not controlling. They involved controversies concerning carriage between points in the same state which was really but part of an interstate or foreign movement reasonably to be anticipated by the contracting parties—a recognized step towards a destination outside the state. The distinctions are elucidated in *Texas & N. O. R. Co. v. Sabine Tram Co.* Here neither shipper nor respondent had in contemplation any movement beyond the point specified, and the contract between them must be determined from the original bill of lading and the local laws and regulations."

In the case of *Pere Marquette R. Co. v. French & Co.*, it appears that French & Co. shipped a carload of potatoes from Bailey, Mich., to Louisville, Ky., by the Pere Marquette Railroad as initial carrier and the Big Four Railroad as connecting and terminal carrier. The shipment was made on a "consignor's order" bill of lading in the standard form, by which the car was consigned to the shipper's order at Louisville, and upon the bill of lading there was a notation "Notify Marshall & Kelsey, c/o Capt. Bernard, Commissary, Camp Taylor." It appears that Camp Zachary Taylor was located about six miles from Louisville, on the Southern Railroad, near Dumesnil station. Marshall & Kelsey had contracted with the government to supply a large quantity of potatoes at this camp, and had made a contract of purchase with French & Co. The car in question was shipped to Louisville, to be applied on these contracts.

By stating the facts thus, we understand the Supreme Court to accept as a fact the statement of the Michigan Supreme Court (*French v. Pere Marquette Ry. Co.*, 204 Mich. 578, at page 580, 171 N. W. 491), to the effect that the potatoes were intended for ultimate delivery at Camp Zachary Taylor, located near Louisville on the Southern Railroad. Upon arrival of the shipment at Louisville, the Big Four Railroad, without requiring a surrender of the bill of lading, released the car, changed the waybill so as to provide for delivery of the car at Dumesnil, and turned it over to the Southern. The court said:

"Whatever name be used in referring to the act of forwarding the car, the Big Four, when it surrendered possession of the car to the Southern at Bindner's request, terminated its relation as carrier; just as it would have done if, at his request, it had shunted the car onto a private industrial track, or had given the control of it to a truckman on the team tracks. Having brought the goods to the destination named in the bill of lading, the carrier's only duty under its contract was to make a delivery at that place; and it could make that delivery by turning the goods over to another carrier for further carriage. Compare *Bracht v. San Antonio & A. Pass. R. Co.*, 254 U. S. 489, 41 Sup. Ct. 150, 65 L. Ed. —, decided by this court January 3, 1921; *Seaboard Air-Line Railway Co. v. Dixon*, 140 Ga. 804, 79 S. E. 1118; *Melbourne v. Louisville & N. R. Co.*, 88 Ala. 443, 6 So. 762. The fact that in forwarding the car the Big Four used the original waybill, striking out the word 'Louisville' under the 'destination' and substituting 'Dumesnil, Ky., So. R. R.', is of no significance. The shipment from Louisville to Dumesnil was a wholly new transaction. In turning over the car for this new shipment the railway made a disposal of it in assumed termination and discharge of its obligations, which was, in legal contemplation, a delivery."

The decision in the case last above cited, following so closely in point of time that announced in the *Bracht* Case, it is evident that the opinions in the two cases were intended to be in entire harmony. In the *French* Case it is held that, although it appeared that when the car was shipped at Bailey, Mich., it was intended for ultimate delivery at Camp Zachary Taylor, the turning over of the car at Louisville by the Big Four for the new shipment in "assumed termination and discharge of its obligations" constituted a delivery, and that the shipment from Louisville to Dumesnil was "a wholly new transaction."

[1] We conclude that liability for damages as an initial carrier depends upon the reception of the goods in one state for transportation to a point in another state or territory, rather than the intention which the shipper may have had at the time of loading the cars, but which does not find expression in some form of a contract, and that where all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to the making of a subsequent contract for shipment into another state, the carrier of the property under the subsequent contract of shipment is the initial carrier under the Carmack Amendment. In this case appellant was the initial carrier. *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; *South Pac. Co. v. Ariz.*, 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713. See, also, *Chesapeake & O. Ry. Co. v. Nat'l. Bank of Commerce*, 122 Va. 471, 95 S. E. 454.

The court submitted the question as to who was the initial carrier to the jury, and re-

spondent cites in support of the court's action the cases of *S. P. Co. v. Ariz.*, supra, and *Produce Trading Co. v. Norfolk So. Ry. Co.* (N. C.) 100 S. E. 318. Those cases contain nothing inconsistent with treating the question as one at law, where bills of lading are clear and unambiguous, and where the facts are undisputed as they are in this case. The jury, however, found as a fact that appellant was the initial carrier.

Error was predicated upon the action of the trial court in permitting the witness Cox to testify that the Boise & Interurban Railway Company had not filed tariffs with the Interstate Commerce Commission. This evidence only related to the question as to whether or not appellant was properly sued as initial carrier in this case, and we think it was properly received.

Appellant claims the court erred in permitting respondent to testify that the yardmaster at Laramie had agreed to put him in Valley in 23 hours. The complaint does not allege a breach of any such agreement as a basis for damages, and it does not appear that evidence was introduced or received for the purpose of establishing such agreement. It only had bearing on the question of the negligent handling of the shipment in connection with respondent's demand that the sheep be not unloaded at Laramie, but carried to Cheyenne for feeding. We do not think the reception of the evidence was prejudicial to appellant.

Appellant assigns as error the refusal of the trial court to give its requested instruction No. 8, as follows:

"You are instructed that when weather conditions arising during transit are so unusual as not to be reasonably anticipated they come within the meaning of the expression known as 'act of God.' You are further instructed that a carrier is not liable or responsible for damages or results which could not have been reasonably anticipated, nor for injury or damages occurring as a result of an 'act of God,' nor is a carrier liable for damages or injury to animals resulting from their natural propensities or inherent nature. You are therefore instructed that no damages can be awarded against the defendant for any injuries or damages falling within the above definitions, and unless you can say from the evidence that the plaintiff has suffered damages from other causes, and due to the negligence of the carriers, it is your duty to render a verdict in favor of the defendant."

[2, 3] The difficulty of framing an abstract definition of the expression "act of God" is

recognized. It is doubtful whether a reasonable anticipation of a natural event is a necessary element in such a definition. The distinguishing characteristic of an "act of God" is that it proceeds from the forces of nature alone, to the entire exclusion of human agency. As applied to the law of negligence, when an act of God is relied upon as a defense, it is not sufficiently accurate to state that a natural event is an act of God if it be not reasonably anticipated. Reasonable anticipation requires further definition. In the case of *Willson v. Boise City*, 20 Idaho, 123, 117 Pac. 115, 36 L. R. A. (N. S.) 1158, on which appellant relies, it is suggested:

"If it appeared in this case that this was such a heavy and unprecedented rainfall as had not occurred within the memory of man, as that term is defined by law, then certainly the city would not be liable. Such an act would properly be classed as the act of God for which there is no liability."

[4] The proposed instruction might also be misleading in that a carrier is liable for damages proximately caused by an act of God, in case its failure to use reasonable diligence to prevent or mitigate the damage contributes to the loss. *Ill. Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202.

The court instructed the jury as follows:

"By the term, 'act of God,' is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted; such as unexampled freshets, violent storms, lightning and frosts. For losses occurring by any of these means, a common carrier is not liable; provided it has not been guilty of want of ordinary and reasonable care to guard against such loss."

We do not think the court erred in refusing to give the instruction proposed, and instead thereof giving the instruction last above quoted. Whether or not the court's definition of the term "act of God" is entirely accurate, it is sufficiently so, and is not misleading.

We do not consider the other specifications of error to be meritorious.

The judgment is affirmed. Costs awarded to respondent.

BUDGE, DUNN, and LEE, JJ., concur.

McCARTHY, J., deeming himself disqualified, did not sit at the argument, nor take part in the opinion.

(58 Utah, 228)

HUTTON v. DODGE. (No. 3541.)

(Supreme Court of Utah. April 2, 1921. Rehearing Denied May 20, 1921.)

1. Divorce ⇨201—Against absent defendant served by publication, judgment in personam for alimony improper.

Where service of summons in divorce was made by publication only, the defendant being absent from the state, the court did not acquire jurisdiction of the person of the defendant and was powerless to enter a judgment in personam or any judgment except as to the application for divorce and the disposal of the property within the state and could not decree alimony.

2. Judgment ⇨634—A judgment is res judicata only where there is jurisdiction of subject-matter and parties.

A judgment becomes res judicata only when the court had acquired jurisdiction over the subject-matter and the parties.¹

3. Divorce ⇨234—Judgment in action where personal service was not had no bar to plaintiff's obtaining alimony in later independent action.

Although generally remedy for subsequent relief incident to divorce is by appropriate proceedings in the case in which the divorce was granted, under Rev. St. 1908, § 1212, yet where jurisdiction for a judgment in personam for alimony could not be obtained, defendant being in another state and served by publication, the plaintiff may, in an independent action in which defendant is personally served, sue for a judgment in personam for alimony.

4. Divorce ⇨238—In separate action for alimony after divorce upon substituted service, defendant may contest the merits of the divorce.

Where divorce was obtained from defendant husband served by publication while he was in another state, in the wife's later action for alimony he would have the right to contest the merits of the divorce itself, not for the purpose of setting it aside, but to defeat the alimony.

5. Appeal and error ⇨719(1)—Although a matter be not raised by any assignment of error, where the record suggests it the court may decide it.

Although a question may not be raised by an assignment of error, nevertheless, where the record suggests the question to the mind of the court, it may make a ruling thereon.

Appeal from District Court, Weber County; A. E. Pratt, Judge.

Action by Gertrude S. Hutton against Frank A. Dodge for alimony and other equitable relief after divorce decreed in another action. Judgment for plaintiff, and defendant appeals. Affirmed.

¹ Karren v. Karren, 25 Utah, 87, 69 Pac. 465, 60 L. R. A. 294, 95 Am. St. Rep. 815; Cody v. Cody, 47 Utah, 456, 154 Pac. 952.

George Halverson, of Ogden, for appellant.
Stuart P. Dobbs, of Ogden, for respondent.

THURMAN, J. Plaintiff procured a divorce from defendant by a decree of the district court of Weber county August 12, 1919. In addition to the divorce, the decree also awarded certain personal property consisting of household furniture, liberty bonds, and war savings stamps which were at that time in plaintiff's possession. Service of summons was made by publication, the defendant being absent from the state. For that reason the court found as a conclusion of law that no alimony could be awarded to plaintiff, but that the decree should be subject to modification, as to alimony, at any time upon notice of motion by plaintiff served upon defendant within the state. It appears that motion was subsequently made by plaintiff in the same case for an allowance of alimony, and notice thereof served upon defendant within the state, as suggested in the decree. Defendant appeared specially and objected to the jurisdiction of the court. The objection was sustained.

This is an independent action on the part of plaintiff for alimony and other equitable relief.

In addition to the facts above stated, plaintiff alleges in her complaint that defendant is an able-bodied man employed in the railway service at an average salary of \$175 per month; that plaintiff has no property or other means of support except household furniture, clothing, and about \$400 in war savings stamps and liberty bonds; that she is not able to earn sufficient money to provide herself with the common necessities of life; that \$75 per month would be a reasonable sum for alimony; that during the married life of plaintiff and defendant debts were incurred which were not paid by defendant amounting to \$440; that plaintiff has been able to pay about \$400 of said indebtedness, leaving unpaid the sum of \$40. Plaintiff prays for alimony and other relief.

The answer of defendant admits the allegations of the complaint, except those relating to the plaintiff's financial condition, the necessity for alimony, the reasonableness of the amount claimed, and the alleged indebtedness and plaintiff's payment thereof. As to these allegations defendant denies the same for want of information sufficient to form a belief. Further answering, the defendant alleges that the court has no power over, or jurisdiction to try or determine, any of the matters or things alleged in the complaint. The same answer, in substance, is made to each separate paragraph of the complaint.

At the trial of the case the defendant objected to the admission of any evidence on the part of plaintiff on the alleged ground that the court was without jurisdiction and

that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled.

The court found the issues in favor of the plaintiff, and awarded her the sum of \$50 per month as alimony until the further order of the court. Defendant appeals from the judgment and relies upon his assignment of error that the court was without jurisdiction to hear and determine the case.

There is but one question submitted for our determination: Did the trial court have jurisdiction to try the case and render judgment?

[1] As heretofore stated, service of summons in the divorce proceedings was made by publication only. The defendant was absent from the state when service was made. In such case the court did not acquire jurisdiction of the person of the defendant and therefore was powerless to enter judgment in personam, or any judgment whatever, except as to the application for divorce and the disposal of such property as was within the state. This is elementary doctrine and is not controverted by respondent. The trial court, in recognition of the doctrine, did not attempt to exercise jurisdiction except as to the matter of divorce and property within the state. This it awarded to plaintiff and signified its opinion that she was entitled to alimony, but that the court was powerless to award it because the defendant had not been personally served with summons. The decree, however, expressly provided for modification in respect to alimony on motion of plaintiff whenever personal service of such motion within the state could be made upon defendant. Such motion and service thereof was afterwards made as suggested in the decree. To this motion the defendant appeared specially and objected to the jurisdiction of the court. The objection was sustained.

[2, 3] It is manifest upon the most casual consideration of the question that if the court never acquired jurisdiction of the person of the defendant because personal service of summons was not made within the state, it could not afterwards acquire jurisdiction of the person of defendant by mere service of motion. In our judgment, the court could not have ruled otherwise than it did, on the question of jurisdiction. The ruling, however, had the effect of turning the plaintiff out of court and left her without a remedy, unless she is entitled to bring an independent action. Whether or not she is so entitled is the crux of the controversy presented for our determination.

Appellant contends that the power of the court was exhausted when it awarded plaintiff a divorce and some property, and that the judgment of the court on the motion for alimony was likewise res adjudicata. Counsel for appellant cites the case of *Karren v. Karren*, 25 Utah, 87, 69 Pac. 465, 60 L. R. A. 294, 95 Am. St. Rep. 815. In that case the

husband had procured a decree of divorce from his wife and had been awarded the custody of the minor children. Subsequently the wife brought an independent action to set aside the decree and to award her alimony, attorney's fee, and custody of the children. The trial court refused to set aside the decree as far as the divorce was concerned, but granted her the custody of the children and also set aside the decree as regards alimony and a division of the property. Appellant's counsel quote the following from the opinion of the court at page 95 of 25 Utah, and at page 467 of 69 Pac. (60 L. R. A. 294, 95 Am. St. Rep. 815):

"Section 1212, Revised Statutes, provides that subsequent changes may be made in a decree of divorce, by the court, in respect to the disposal of the children or the distribution of property. *Such changes must be applied for, and can only be granted, in the action in which the decree of divorce was granted.* We think it is clear, both from the allegations of the complaint and the findings of fact, that the plaintiff is not entitled to any relief in this action." (Italics ours.)

It appears from the italicized portion of the excerpt quoted that the relief, under the statute referred to, can only be obtained by a proceeding in the action in which the divorce was granted. Appellant relies upon this holding of the court as conclusive of the question presented here. Appellant's contention, first and last, develops a situation somewhat anomalous. It is insisted that respondent should be denied relief in the present action because, as held in the *Karren Case*, she can only obtain relief in the action in which the divorce was granted. She has already been denied relief in that action because the court had no power to grant it.

We can readily conceive that in some cases at least such contention as that made by appellant here, if sustained, might lead to palpable injustice. Let us assume, for instance, that in the present case plaintiff was not only entitled to a divorce and such property of defendant as was within the jurisdiction of the court, but to alimony as well. She could not follow her husband into another state and obtain relief for she would first have to establish a residence there before she could sue. She could not obtain a decree for alimony here because she could not make personal service of summons on defendant within this state. In such circumstances, what remedy would the plaintiff have? If there ever was a case in which litigation by piecemeal was justified because of the inherent difficulty of obtaining relief in one action, it seems to the writer that the case presented is almost a perfect example.

Karren v. Karren, supra, sheds no light whatever upon the question presented here. In that case personal service of summons in the divorce proceedings was made upon the defendant within the state. Complete juris-

diction was obtained for all purposes, and the court might well hold, as it did in that case, that relief as to alimony could only be obtained in the case in which the divorce was granted.

To the same effect as the Karren Case appellant cites *Greene v. Greene*, 2 Gray (Mass.) 361, 61 Am. Dec. 454, in which the syllabus, in a single paragraph states the doctrine:

"A decree of divorce from the bond of matrimony, although obtained by fraud and false testimony, cannot be set aside on an original *libel*, filed at a subsequent term. (Italics ours.)"

The opinion is by Chief Justice Shaw. At page 364 of the report (2 Gray [61 Am. Dec. 454]), that distinguished jurist says:

"But we think the point here is settled by authority, not specifically in regard to divorce, but generally as to the conclusive effect of a judgment, in a case arising afterwards, on the same matter, between the same parties. We take the rule to be, that a judgment of a court of competent jurisdiction, having jurisdiction of the subject and of the parties, by legal process duly served, where no appeal, writ of error, certiorari, review, or other legal process lies, for revising, affirming or reversing such judgment, or where no such process is commenced, by the party who would avoid the judgment, in the mode or within the time prescribed by law, is conclusive upon the same parties in any other proceeding in law, in equity, or before any other judicial tribunal."

Thus we see the application of the doctrine contended for by appellant is conditioned upon the fact that complete jurisdiction has been obtained both of the subject-matter and of the person of defendant. In such case relief subsequent to divorce can only be obtained in the same action and the doctrine of *res adjudicata* applies as in other cases. To the same effect is *Parish v. Parish*, 9 Ohio St. 534, 75 Am. Dec. 482, in which the syllabus, in almost the same language as in the *Greene Case*, supra, reflects the opinion of the court.

Appellant also calls our attention to the following cases: *Sprague v. Sprague*, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. Rep. 636; *Alderson v. Alderson*, 84 Iowa, 198, 50 N. W. 671; 19 C. J. 246; *In re Popejoy*, note, 77 Am. St. Rep. 240; *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70; *Cameron v. Cameron*, 31 S. D. 335, 140 N. W. 700, Ann. Cas. 1915D, 1062; *Moross v. Moross*, 129 Mich. 27, 87 N. W. 1035; *Spain v. Spain*, 177 Iowa, 249, 158 N. W. 529, L. R. A. 1917D, 319, Ann. Cas. 1918E, 1225; *Kamp v. Kamp*, 59 N. Y. 212; *Cody v. Cody*, 47 Utah, 456, 154 Pac. 952.

It is unnecessary to review these cases in detail. They are clearly distinguishable from the case at bar. They do not in any manner attempt to controvert the fundamental idea that where jurisdiction has not been obtained

there is no basis for the plea of *res adjudicata*. As suggested by Chief Justice Shaw, in the excerpt hereinbefore quoted, a judgment becomes *res adjudicata* only when the court has acquired jurisdiction over the subject-matter and the parties.

It would be a travesty upon justice and a sad commentary on the power of judicial tribunals generally if the courts were powerless to grant relief in a case of this kind where jurisdiction of the defendant is afterwards seasonably obtained and the rights of third parties have not intervened. We have no fault whatever to find with cases which hold that where full and complete jurisdiction has been obtained over the subject-matter and the parties, judgments rendered in divorce cases as well as others are *res adjudicata* as to every question that might have been litigated under the issues made. In such cases the only remedy for subsequent relief incident to the divorce seems to be by appropriate proceedings in the case in which the divorce was granted. Not so, however, where jurisdiction of the person was not obtained. The distinction is clearly defined in two Ohio cases reported in the Ohio State Reports. In *Woods v. Waddle*, 44 Ohio St. 449, 8 N. E. 297, the syllabus reads:

"A. and P. were married in West Virginia at their domicile, where A. retained his domicile, but P. went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce a vinculo from A., but, as there was no personal service on A., her application for alimony was dismissed without prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A.; in which case she obtained service upon A., who also appeared and filed pleadings in the case, and on trial the court found sufficient cause and allowed her alimony. Held, P. had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A."

From *Weidman v. Weidman*, 57 Ohio St. 101, 48 N. E. 506, we quote the syllabus which succinctly states the question to be determined:

"Where a wife obtains a divorce from her husband in this state without a decree for alimony, he being personally served with process, she cannot thereafter maintain a separate action against him for alimony."

It is true that the statute of Ohio provides that the wife may file her petition for alimony alone, but a careful reading of the opinion in the *Weidman Case*, which is very brief, clearly indicates that the case was determined upon broad general principles of equity and justice rather than upon the statute referred to in the case.

In *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931, the syllabus reads:

"2 Ballinger's Ann. Codes & St. § 5723, requiring the court, on dissolving a marriage, to make such decree with respect to the property of the parties as will appear just, does not make such decree a necessary part of the decree of divorce; and, where a decree of divorce obtained by a wife in a foreign state, on constructive service, and without personal jurisdiction of defendant, makes no provision for alimony or with respect to the property of the parties, and the husband thereafter becomes a resident of Washington, the parties having community property there, the wife may maintain an action in such state for alimony and for the adjudication of her property rights."

These cases with others are referred to in note to *In re Popejoy*, 77 Am. St. Rep. at page 241. We quote from the note the following language pertinent to the question under review:

"If the divorce was obtained on personal service against the husband, no reason exists why the wife should not have asked for alimony in the divorce proceedings, and a separate suit will not be allowed. (*Weidman v. Weidman*, 57 Ohio St. 101.) But if the divorce was obtained by the wife in another state, no jurisdiction being had over the person of the husband, or over his property, this is deemed a sufficient reason why the wife should be permitted to bring a subsequent action against her husband for alimony alone. (*Adams v. Abbott*, 21 Wash. 29.)"

In *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017, a Minnesota case, in which the husband commenced an action by constructive service and obtained a judgment for divorce, it was held, in an action for alimony and other relief afterwards instituted by the wife, that the judgment rendered in favor of the husband determined nothing but that the parties were divorced, and being in rem, was neither *res adjudicata* nor an estoppel as to the question of alimony; and the fact that the marriage relation was dissolved would not defeat her action.

The doctrine enunciated in these cases appears to be so eminently logical and just, it is difficult to conceive how it can be seriously questioned.

Appellant cites and relies on *Cody v. Cody*, 47 Utah, 456, 154 Pac. 952. One of the questions involved in that case arose upon a motion by the plaintiff wife, subsequent to a decree of divorce in her favor, for an allowance of alimony; such an allowance having been denied when the divorce was granted. This court affirmed the order of the trial court dismissing the application for alimony on the grounds that the question had been adjudicated upon granting the divorce. In that case the court had jurisdiction of both

the subject-matter and the parties, and, as hereinbefore asserted, we have no fault to find with applying the doctrine of *res adjudicata* in cases of that kind.

In addition to the cases and authorities above cited, respondent's counsel refers us to many cases more or less favorable to respondent's contention. As our judgment is convinced by the reason and logic of the cases already referred to, we have not deemed it necessary to cite all the cases that have been called to our attention.

In the opinion of the court, inasmuch as it was impossible for the plaintiff to have her right to alimony adjudicated and determined either at the time the divorce was granted, or subsequently to that action, for the reason that the court was without jurisdiction, she had the right to have the question determined in an independent action, especially as the action in this case appears to have been seasonably commenced and no rights or interests of third parties are in any manner involved.

[4, 5] It would seem to follow as a corollary of the doctrine herein enunciated that in such an action for alimony on the part of a plaintiff, the defendant would have the right in his defense to contest the merits of the divorce itself, not for the purpose of setting it aside, but for the purpose of defeating the alimony for which the action was brought. If the plaintiff has the right to bring an independent action for alimony after a divorce has been granted simply because she never had and could not have her day in court in respect to alimony in the divorce proceedings, the defendant for the same reason should be entitled to his day in court respecting the same matter. It will no doubt be conceded that the right to alimony to a wife is conditioned upon her right to a divorce. Hence the right to defend against the allowance of alimony in an independent action, such as this, necessarily implies the right to question the merits of the divorce, notwithstanding it cannot be vacated and set aside. Although the question was not raised by an assignment of error, there is, nevertheless, matter in the record which suggests the question to the mind of the court. For that reason we feel justified in making the above observations.

For the reasons heretofore stated, the judgment of the trial court is affirmed, at appellant's costs.

CORFMAN, C. J., and WEBER and FRICK, JJ., concur.

GIDEON, J., being disqualified, did not participate in the disposition of this case.

(58 Utah, 193)

HANCOCK et al. v. INDUSTRIAL COMMISSION: (No. 3636.)

(Supreme Court of Utah. May 5, 1921.)

1. Master and servant §417(6)—Dependency within Compensation Act question of law on undisputed facts.

The question of dependency under the Workman's Compensation Act is one of fact, but, where there is no dispute as to the facts, the legal rights deducible or inferable from such proven facts are questions of law.

2. Master and servant §388—"Dependency" within Compensation Act defined.

Neither the amounts contributed nor the times when made are necessarily controlling elements in the test of dependency under the Workmen's Compensation Act, the test being whether the contributions made by the deceased to the dependents were necessary and needed to maintain the claimants in the station of life to which they had been accustomed.

3. Master and servant §403—Dependency within Compensation Act must be proved.

Alleged dependents are required to show facts upon which such dependency exists under the Workmen's Compensation Act, except where the statute makes the wife and certain minor children presumptively dependent.

4. Master and servant §388—Occasional gifts not "dependency" within Compensation Act.

An occasional gift or contribution, made at the convenience or pleasure of the donor, does not authorize an inference of "dependency" within Workmen's Compensation Act.¹

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependency.]

5. Master and servant §388—Parents held not "dependents" of son within Compensation Act.

In a proceeding under the Workmen's Compensation Act to obtain compensation for death of an adult son, where it appeared that he boarded away from his parents' home, which they owned, and he made frequent gifts of provisions amounting to about \$25 per month, and in the year preceding his death advanced \$300 as a loan to satisfy a mortgage executed by the father, who owned real estate worth \$10,000 producing a net income of \$75 to \$100 per month, *held*, that Industrial Commission was justified in finding that applicants were not dependents.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependency.]

Proceeding by R. J. Hancock and another, under the Workmen's Compensation Act (Comp. Laws 1917, title 49), to obtain compensation for the death of a son. There was an award denying compensation, and the applicants bring an original proceeding to

have the findings of the Industrial Commission annulled. Findings of the Commission affirmed.

J. R. Haas, of Salt Lake City, for plaintiffs. Harvey Cluff, Atty. Gen., and John R. Robinson, Asst. Atty. Gen., for defendant.

GIDEON, J. This is an original proceeding in this court. The plaintiffs seek to have the findings of the Industrial Commission denying compensation for the death of a son annulled.

There is no dispute in the testimony. The deceased was a son of the applicants. He was a paid fireman in the employ of a municipal corporation of this state at the time of his death. The accident occurred in the course of his employment and while he was in the discharge of duty. He was of the age of 45 years, unmarried, and had boarded away from his parents' home for approximately ten years. The applicants, parents, reside in Salt Lake City, where the deceased was employed. The son visited his father and mother frequently; in fact, almost daily when his duties would permit. The only question presented is one of partial dependency.

By a majority opinion the Commission concluded that the applicants were not dependents and denied compensation.

The only witnesses testifying were those in support of the application. It appears that father and mother own their own home. They had other children, but they are married and reside elsewhere. The father owns real estate in Salt Lake City valued at approximately \$10,000, from which he and his wife receive a net income of \$75 to \$100 per month. Both parents testified that the deceased frequently, and almost on each occasion when he visited them, took provisions, such as sugar, flour, fruits, and other things to their home. It is in the record that at the date of the hearing they were using flour which the son had furnished. It definitely appears, however, that there were no regular or stated times when the son would make contributions to the applicants, and he seldom gave them money except on "birthdays, Thanksgiving and Christmas." The mother testified that the contributions made by the son would average \$25 per month. She gave no specific dates, however, when payments were made and no definite amounts. In the year preceding his death, the deceased drew from his banking account the sum of \$300 and gave it to his father, with which the latter satisfied a mortgage on real estate belonging to him. Just what the arrangement was as to repayment of this money to the son is not clear, but admittedly it was not advanced to pay living expenses of the applicants, and it quite definitely appears that it was the intent of the father and the son that the amount should be repaid.

¹ Globe Grain & Milling Co. v. Industrial Commission, 193 Pac. 642.

[1, 2] The question of dependency is, in the very nature of things, one of fact. In a case such as this, however, where there is no dispute as to the facts, manifestly the legal rights deducible or inferrable from such proven facts are questions of law. No absolute, unbending rule can be, or has been, laid down by the courts in determining dependency. Each case must be controlled by the particular facts of that case. Neither the amounts contributed nor the times when made are necessarily controlling elements in the test of dependency. The test seems to be whether the contributions made by the deceased to the dependents were necessary and needed to maintain the claimants in the station in life in which they had been accustomed. In *Benjamin F. Shaw Co. v. Palmatory*, 7 Boyce (Del.) at page 201, 105 Atl., at page 418, it is said:

"It is not sufficient that the contributions of the employé were used in paying the living expenses of the claimant, but it must be shown that the contributions of the employé were relied upon by the dependent for his or her means of living judging this by the class and position of life of the dependent."

Again, further on in the course of that same opinion, it is said:

"However, the test of dependency, generally speaking, is whether the claimant relied upon the employé's contributions for his support wholly or partially judging this by what would be reasonable living expenses for persons in the same class and position. Support as used within the meaning of the statute is of a broader import than food, clothing and shelter, and may include all such means of living as would enable the claimant to live in a style and condition and with a degree of comfort suitable and becoming to his station in life."

[3-5] The actual living expenses of plaintiffs are not made to appear either in detail or in gross. Alleged dependents, such as the plaintiffs, are required to show facts upon which such dependency exists. The statute makes the wife and certain minor children presumptively dependents. But dependency in other cases must be based upon proof of facts creating such dependency. It is settled in this state, and the same is supported by the authorities, that an occasional gift or contribution made at the convenience or pleasure of the donor does not authorize an inference of dependency. *Globe Grain & Milling Co. v. Industrial Commission*, 193 Pac. 642. While it is true the deceased made frequent gifts of fruits, etc., to his parents, nevertheless the Commission was of opinion that such contributions were not required or necessary to support the parents (plaintiffs) in their manner of living. The Commission was also of the opinion that the income of plaintiffs was sufficient to support and maintain them in their manner of living, and that they were not therefore dependent

upon the assistance received from the deceased for such support.

We are of the opinion that the facts as disclosed by the record support and justify the findings of the Commission, and the same are therefore affirmed.

CORFMAN, C. J., and WEBBER, THURMAN, and FRICK, JJ., concur.

(58 Utah, 219)

HOME BREWING CO. OF CHICAGO HEIGHTS v. AMERICAN CHEMICAL & OZOKERITE CO. (No. 3812.)

(Supreme Court of Utah. May 10, 1921.)

1. Corporations \S 642(7)—Suits by foreign corporations in courts of state not "doing business" within state.

The instituting of suits by foreign corporations in the courts of the state does not constitute "doing business" within the state, within Const. art. 12, \S 9, providing that no corporation shall "do business" within the state without having one or more places of business with authorized agents nor without filing a certified copy of articles of incorporation with Secretary of State, nor within Laws 1919, c. 17, providing that foreign corporations, before "doing business" within the state, shall file a copy of articles of incorporation with county clerk of county in which principal office is situated.¹

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. Judgment \S 48—Cannot be obtained on warrant, verified statement in writing being necessary.

An attorney at law, acting under a warrant of attorney purporting to have been executed by defendant, cannot obtain a judgment by confession, a statement in writing signed and verified by the defendant authorizing the entry of judgment for a specified sum and stating the facts out of which the indebtedness arose showing the sum due or to become due, or the facts constituting the liability being necessary, under Comp. Laws 1917, \S 6888.

3. Judgment \S 30—Statutory method of obtaining judgment by confession must be strictly complied with.

Comp. Laws 1917, \S 6888, prescribing the method or procedure by which judgments by confession may be obtained, must be strictly complied with.²

4. Judgment \S 949(1)—Validity of judgment of other state must be alleged and proved where rendered in a manner unknown to jurisprudence of state where action thereon is brought.

The right of a litigant to have the benefit of the full faith and credit clause of the Con-

¹ *Barse Live Stock Co. v. Range V. C. Co.*, 18 Utah, 59, 50 Pac. 630; *Booth & Co. v. Weigand*, 20 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693.

² *National Bank v. Sears*, 13 Utah, 174, 44 Pac. 832.

stitution does not relieve him from the duty of establishing his right thereto, which, in some cases, may be proved by showing a duly authenticated copy of a judgment from a court of general jurisdiction of a sister state; but, if the judgment is rendered in a manner unknown to the jurisprudence of the state where the action is brought, the existence of laws which render the judgment valid in the state where it was rendered must be both alleged and proved.

5. Judgment — 815—Confessed judgment obtained in other state by method other than that prescribed for Utah not given full faith and credit in absence of showing of validity in other state.

A judgment by confession obtained in another state in a manner other than that prescribed by Comp. Laws 1917, § 6888, prescribing the procedure by which judgments by confession may be obtained, will not be given full faith and credit in absence of showing that the judgment so obtained was valid in the state in which it was obtained.

6. Evidence — 35—Judicial notice not taken of laws of other state.

The courts of one state do not take judicial notice of the laws of another state, and are not presumed to know the laws of such state.

7. Judgment — 19—Refusal to enter judgment on counterclaim for breach of lease, in absence of proof as to amount of damages sustained, held proper.

Under Comp. Laws 1917, § 6844, refusal to enter judgment for defendant upon counterclaim for breach of a lease, where amount of damages was, of necessity, an unliquidated amount, held proper, in absence of proof of amount of damages sustained.

Appeal from District Court, Salt Lake County; Wilson McCarthy, Judge.

Action by the Home Brewing Company of Chicago Heights against the American Chemical & Ozokerite Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

James D. Pardee, of Salt Lake City, for appellant.

D. A. Skeen, of Salt Lake City, for respondent.

GIDEON, J. This is an action to recover an amount alleged to be due plaintiff from defendant on a judgment of the circuit court of Cook county, state of Illinois. It is admitted that both plaintiff and defendant are corporations. The plaintiff company was organized under the laws of the state of Illinois, and the defendant company pursuant to the laws of the state of Utah. It is alleged that the circuit court of Cook county, state of Illinois, is a court of general jurisdiction, organized and existing by virtue of the laws of such state; that, on the 15th day of July, 1918, a judgment was given in said court in favor of the plaintiff and against the defendant for a sum named, and that

the same has not been paid. To that complaint, the defendant interposed a demurrer. One of the grounds of demurrer was:

"That it does not appear from the plaintiff's complaint that it has legal capacity to sue in the state of Utah."

The demurrer was overruled, and the defendant answered. The answer admitted that defendant had not paid the judgment. It is alleged that, at the time of the purported entry of judgment, the circuit court of Cook county was without jurisdiction of either the subject-matter of the action or the defendant; that at no time had service of process been made upon defendant; that defendant was without notice or knowledge that any action against it had been commenced or was pending in said court, and had no knowledge of the judgment until the institution of this action. It is further alleged in the answer that no one was authorized to appear for the defendant in that action; that the defendant made no appearance, and that no one was authorized to confess judgment by warrant of attorney or otherwise, and that no authority had been given by the defendant to any attorney to appear in said case for any purpose. A counterclaim was interposed by the defendant, asking damages for an alleged breach of a real estate lease made between the plaintiff and defendant. No reply was made to the counterclaim. Plaintiff had judgment, and the defendant appeals.

The first error assigned relates to the order of the court overruling the demurrer. It is contended by defendant that it appears from the allegations of the complaint that the plaintiff is a foreign corporation; and, as it is not alleged that the plaintiff has complied with the provisions of the laws of this state authorizing it to do business in this state, it is not shown that plaintiff has the legal capacity to maintain this action in the courts of this state.

One of the grounds for demurrer provided for in the code is want of capacity on the part of a plaintiff to sue. Defendant therefore was within its rights in objecting by demurrer upon that ground to the sufficiency of the complaint. Article 12, § 9 of the state Constitution is:

"No corporation shall do business in this state, without having one or more places of business, with an authorized agent or agents, upon whom process may be served; nor without first filing a certified copy of its articles of incorporation with the Secretary of State."

Comp. Laws Utah 1917, § 945, as amended by chapter 17, Laws Utah 1919, provides that all foreign corporations—

"before doing any business within the state, shall file with the county clerk of the county in which their principal office in the state may be situated, a copy of their articles," etc.

[1] The question presented by the demurrer, therefore, is whether instituting suits by foreign corporation in the courts of this state is "doing business" within the meaning of that term as it is used in our Constitution and statutes.

A like question has been determined by this court in two former cases. As we understand those decisions, they are adverse to the contention of appellant. *Barse Live Stock Co. v. Range V. C. Co.*, 16 Utah, 59, 50 Pac. 630; *Booth & Co. v. Weigand*, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693. It is true that the statute has been amended in some particulars since the decision in 16 Utah, and, in some minor particulars, since the decision in 30 Utah, but the term "doing business" was found in the original statute in force at the date of the rendition of the judgment reported in 16 Utah. *Comp. Laws Utah*, 1888, § 2293. At that time, the term "doing business" was found in the code, and that opinion undertook to define the meaning of that term as used in both the Constitution and statute. The conclusions reached in the cases cited are to the effect that instituting an action in the courts of this state by a foreign corporation to enforce a contractual right is not doing business within the state. It appears from the allegations of the complaint in the case at bar that the judgment which is the basis of the plaintiff's right of action was obtained in a court of a sister state. No law of Utah, therefore, was invoked in initiating or establishing the plaintiff's right. The right to institute and maintain this action not being dependent upon plaintiff having complied with the laws of Utah authorizing it to do business in the state, it necessarily follows that it is not necessary to make such allegation in the complaint.

We regard the above-cited cases as controlling and decisive of the question raised by this assignment. It would subserve no useful purpose, therefore, to discuss the cases cited from other jurisdictions.

Several of the remaining assignments of error can be considered together. They relate to the rulings of the court in admitting in evidence the authenticated transcript of the judgment of the circuit court of Cook county, and the order awarding plaintiff judgment.

The judgment of the Illinois court was obtained by and based upon a confession of judgment by an attorney at law. The attorney was acting under a warrant of attorney claimed to have been executed by the defendant. The recital in the confession, preceding the formal order of judgment, is as follows:

"And thereupon Homer W. Woodbury, an attorney of this court, appeared in behalf of said defendant, and by virtue of a warrant of attorney for that purpose, executed by said defendant, and now produced, duly proved and

filed in open court, filed its cognovit waiving the issuing and service of process, and acknowledged that said defendant, did assume and promise, in manner and form as the said plaintiff has in its declaration alleged, and confessed that it has sustained damages in the sum of sixteen hundred twenty dollars and no cents."

The warrant of attorney referred to in the above excerpt is not found in the transcript or elsewhere in the record.

At the trial in the district court, the record of the judgment was admitted in evidence, over the objections of the defendant, and thereupon the plaintiff rested its case. The defendant thereupon moved for judgment in its favor; also, for a judgment against the plaintiff on the defendant's counterclaim. These motions were overruled. The defendant offered no testimony. The court made findings and gave judgment in favor of the plaintiff.

[2, 3] The code of procedure in this state does not authorize a judgment by confession in proceedings such as are found in the authenticated record from the Illinois court. A judgment so entered would be a mere nullity. *Comp. Laws Utah* 1917, § 6888, prescribes the method or procedure by which judgments by confession may be obtained, and such procedure must be strictly complied with. *National Bank v. Sears*, 13 Utah, 174, 44 Pac. 832. It necessarily follows that the procedure by which the judgment in this case in the Illinois court was obtained is not sanctioned or warranted by any practice known to the laws of Utah. Notwithstanding that fact it is the theory of the plaintiff that a judgment regularly authenticated from a court of general jurisdiction (such as a circuit court) of a sister state carries with it the presumption of regularity by that court, and that such presumption goes to the extent of presuming jurisdiction of the subject-matter and of the person, as well as authority on the part of the court to enter the judgment by the practice or procedure followed. It is, for that reason, contended on the part of plaintiff that, having produced an authenticated copy of the judgment of the Illinois court, the burden was thrown upon the defendant to prove that such court was without jurisdiction, or that it lacked authority to enter the particular judgment as the same is found in the transcript of that judgment. It is argued that to hold otherwise would be a refusal to give to a judgment of a sister state full faith and credit, as required by the Constitution.

[4] The right of a litigant to have the benefit of the full faith and credit clause of the Constitution does not relieve such litigant from the duty of establishing that he is entitled to such right. In many cases, he may have proven his right by showing a duly authenticated copy of a judgment from a court of general jurisdiction of a sister state. In other cases, it is incumbent upon the party

asserting such right to establish by proof the existence of the right by testimony other than the presumption that follows or goes with the judgment of a court of general jurisdiction.

Conceding that the rule of law claimed by plaintiff is applicable and binding upon the courts of this state, in favor of a judgment rendered in another state in proceedings recognized by the laws of this state, it remains to be determined whether that rule is applicable in a case in which the practice or method of procedure pursued in obtaining the judgment is unknown to the jurisprudence of this state. In 23 Cyc. 1574, that law controlling in such cases is stated as follows:

"But if the judgment is rendered in a manner unknown to the jurisprudence of the state where the action is brought, the existence of laws which render the judgment valid in the state where it was rendered must be both alleged and proved."

In *Angle v. Manchester*, 3 Neb. Unof. 252, 91 N. W. 502, the court, in discussing a question similar to the one here under consideration, says:

"Plaintiff relies on an interstate judgment procured in a manner unknown to the laws and rules of practice of the courts of the state of Nebraska. In his petition, however, he alleges the laws of the state of Pennsylvania, which authorize and validate his judgment, but in the record before us he utterly fails to introduce any proof of any kind tending to show the laws of Pennsylvania on which he must rely to support the validity of his judgment. In the case of *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306, this court, in discussing a judgment rendered under power of attorney, contained in a judgment note in the state of Pennsylvania, says: 'It must be remembered that judgments on notes of this character are not known to the jurisprudence of our state, and that, the notes having been made in Pennsylvania, and the judgment there rendered, the effect and validity of the contract must be determined by the law of Pennsylvania. What that law is was a fact to be established by the evidence in this case.'"

See, also, *Thomas v. Pendleton*, 1 S. D. 150, 36 Am. St. Rep. 726; *Hinson v. Wall*, 20 Ala. 298; *Crafts v. Clark*, 31 Iowa, 77; 2 Freeman, Judgments (4th Ed.) § 571; 16 Standard Ency. Pro. 396.

In *Crafts v. Clark*, supra, the court says:

"No evidence was given of the laws of Pennsylvania, so that the circuit court could have determined that the judgment was valid there. As the judgment is not valid under our laws, this was necessary in order to authorize the court to extend to it full faith and credit, and render judgment upon it in this action."

[5, 6] If it be conceded that the allegation of the complaint that "a judgment was duly given, made and entered by said circuit court," etc., is sufficient to authorize proof of the laws of the state of Illinois, there is, nevertheless, a total absence of any proof, or

offer to prove, the laws of Illinois giving the court power to enter judgment by confession upon a warrant of attorney such as was done in this case. As stated, no other testimony than the authenticated copy of the judgment aforesaid was tendered on the part of the plaintiff. If the judgment of the district court in this case is to stand, it must be maintained wholly upon the authenticated transcript from the Illinois court. The courts of one state do not take judicial notice of the laws of another state, and are not presumed to know the laws of such state. Courts are required to give full faith and credit to the judgments and decrees of a sister state, but the courts are not required to give such faith and credit until proof is produced, either by presumption or otherwise, that the court entering the judgment is authorized by the laws of the state to render the judgment.

Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304, and *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796, are cited by plaintiff in support of its contention that the presumption in favor of the regularity, jurisdiction, and power of courts to enter judgments is sufficient, until overcome by contrary proof, to warrant the district court in this case in entering the judgment appealed from. It does not appear from the opinion in *Van Norman v. Gordon* whether a confession of judgment by warrant of attorney is known to the laws of Massachusetts or permitted by the practice in that state. In the case from 128 New York, it affirmatively appears in the opinion that the practice of entering judgments by such procedure has obtained in New York from that state's earliest history. These authorities, therefore, do not determine the particular question presented by this record.

We are therefore of the opinion, and so hold, that, under the facts appearing in this record, the district court erred in its conclusion that the authenticated transcript of the judgment was sufficient in and of itself to warrant judgment in favor of the plaintiff.

[7] The defendant has assigned error respecting the failure of the court to make findings upon the issues presented by its counterclaim, and upon the refusal of the court to enter judgment in favor of the defendant upon the counterclaim. The counterclaim of the defendant is apparently for an alleged breach of a written lease existing between the plaintiff and defendant. The amount claimed as the penalty for such breach was, of necessity, an unliquidated amount. No proof was offered in support of the damages alleged in the counterclaim. Neither the statute nor the cases authorize a judgment for damages without proof of the amount sustained. *Comp. Laws Utah 1917, § 6844; Atchison, T. & S. F. Ry. Co. v. Lambert*, 31

Okl. 300, 121 Pac. 654, Ann. Cas. 1913E, 329. It does not appear definitely that the counterclaim is founded upon a breach of the same lease upon which the judgment of the Illinois court is founded, and, in view of the uncertainty of the record, we refrain from further discussing the question presented by this assignment.

For the reasons stated the judgment of the district court is reversed, and a new trial ordered. Appellant to recover costs.

CORFMAN, C. J., and WEBER, THURMAN, and FRICK, J.J., concur.

(109 Kan. 197)

HAAS v. KANSAS CITY LIGHT & POWER CO. (No. 23181).*

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

1. Master and servant \Rightarrow 375(1)—Injuries to oiler leaving working place held not to "arise out of and in course of employment" within Compensation Act.

A workman, employed as a night oiler of machinery in an electrical power house, whose only duties were to oil certain engines and pumps in one part of the building, left his work and went a distance of 25 or 30 feet to a narrow entrance leading into a room where he knew he had no business to be, and which was filled with electrical machinery dangerous to life, but which contained nothing that required the services of an oiler. While in the room he reached with his hand about 8 inches into a recessed place in the wall, and came in contact with electrical appliances and received serious injuries. *Held*, that his injuries did not result from an accident arising out of and in the course of his employment, and that he is not entitled to recover under the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

(Additional Syllabus by Editorial Staff.)

2. Words and phrases—"Oil switches."

"Oil switches," as used in electrical construction, are switches in which the parts carrying current separate under oil when the circuit is broken.

Appeal from District Court, Wyandotte County.

Action under the Workmen's Compensation Act by Benjamin F. Haas against the Kansas City Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded with directions.

John H. Lucas, of Kansas City, Mo., and O. L. Miller, of Kansas City, Kan., for appellant.

L. O. Carter, of Kansas City, Kan., and W. W. McCaules, of Kansas City, Mo., for appellee.

PORTER, J. In an action under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216), the plaintiff recovered judgment. The appeal presents the sole question whether his injuries were caused by an accident which arose out of and in the course of his employment.

Benjamin Haas, an oiler of engines and pumps, employed at defendant's power house in Kansas City, received serious injuries when his right hand came in contact with electrical appliances known as bus bars, the current passing through his body, and he was so badly burned that his right arm had to be amputated two inches below the elbow, and he received other serious injuries. The petition alleged that at the time of the accident he was working in the due course of his employment.

The answer alleged that the accident did not arise out of or in the course of plaintiff's employment, but that plaintiff negligently left his place of work and went into a room of the plant where he had no duty to perform, and where he had been instructed not to go, which room was necessarily filled with high-voltage machinery, dangerous to life, and that while in the room the plaintiff carelessly attempted to reach into and between parts of the dangerous machinery, not in performance of any duty in relation thereto, but for his own purposes, and thus came into contact with the electric current.

The power house of defendant is 170 feet in length north and south, and a little over 60 feet in width. The engines and pumps at which plaintiff worked as an oiler were those on the upper floor, and others which were just north of the center of the basement floor. The bus room extends clear across the south end of the basement, and is about 60 feet east and west and 25 feet north and south. The room is set apart from the rest of the basement by a brick wall which extends from the floor to the ceiling, and the only way of getting into the room is through narrow archways 2 feet wide at the east and west ends of the room.

The bus room is filled with powerful electrical equipment, conducting wires, and switches. Oil switches receive their name from the fact that the parts carrying current separate under oil when the circuit is broken. The container in which each switch is located stands on a stone slab or shelf supported by a brick structure. The bus bars are placed in a wall of the room in recessed compartments which are 18 inches deep from front to back, the bus bars extending through the center of these spaces. The reason for putting them in this recess is to prevent accidental contact with the bars, and also to

provide insulation. The bars run behind columns which cover up the face of the bus structure. There were a dozen of these oil switches in the bus room extending from the floor upward about 7 feet. No portion of the electrical apparatus in the bus room requires the attention of anyone except that of the chief electrician or his assistant. When the services of a construction gang are required in the bus room, the current is cut off. The room and the numerous passageways between the different high-power appliances and machinery are all lighted with 100-watt lamps and outside each of the narrow entrances leading into the bus room is a sign reading, "No admittance." Immediately inside of each archway there is a sign reading, "6600 Volts Danger." The testimony of the plaintiff's witnesses, as well as those of the defendant, is that an oiler never has any occasion to go into the bus room, because there is no machinery there that requires oiling or attention.

Before the accident plaintiff had been in the employ of the defendant for six weeks, first in the construction gang about the power house, and six days before the accident he was given a place as an oiler. His testimony is that he was instructed as to his duties by Arthur Ravinaw, who was an experienced oiler. The testimony of plaintiff, in substance was as follows:

He is 22 years old; had been oiling for five days before the accident; Ravinaw gave him instructions as oiler; his duties were to oil pumps downstairs and one pump upstairs; worked nights; the night he was injured went to work at 6 o'clock; after oiling machinery "got my check, and Schultz and I went to the state line and got them cashed;" after his return he went downstairs and started to oil machinery; he went from the boiler room into the engine room, and while there he heard a noise and walked back upstairs to Ravinaw; heard noise something like it was cutting or dragging, needing oil; it was south part of the building; Ravinaw had told him to report to him anything he did not understand; had never been in bus room; did not know it was dangerous to go in there; have never seen any sign of danger or any sign of volts; told Ravinaw to come downstairs—wanted to show him something or tell him something; don't know which; went downstairs; Ravinaw went down; went toward bus room still hearing noise; went into bus room, turned around to see if Ravinaw was there; that is the last he remembered; couldn't tell where he got to in the bus room; he had no bottle of whisky with him in there; didn't know where Ravinaw was when he turned around; did not remember anything after starting to turn around; he was lower oiler, and the things he had to oil down there were the oil pump on the west side of the basement about the middle of the room, two pumps on east side of basement about middle, at base of engines, and one pump near south end of the base of the north engine; there was nothing south of that in the basement that he had to oil; nothing that he knew

of that had to be oiled; neither Mr. Ravinaw or anyone else had pointed out any machinery of any kind to him to oil south of where he worked in the basement; all his work in the basement was at or north of the center of the building on that floor.

On cross-examination he said:

That on the night of the accident he went with Schultz to the saloon to cash checks; Schultz bought beer for himself and plaintiff; plaintiff bought beer for himself and Schultz; Schultz bought half a pint of whisky; plaintiff did not say to Schultz, "Think I will get a half pint and take * * * to Ravinaw;" when he went back to the plant he left Schultz in the boiler room, and went down to the basement to oil pumps on the west side; went up from there to the boiler room where Ravinaw was; they were alone; "can't say whether I said to him, I wanted to tell him something or show him something, or ask something, one of the three;" "nothing to prevent me telling him right there;" said nothing to him about noise; noise was not up there; no one told him not to go into the bus room; did not know what was in there; did not know what was in the south end of the building at all; never had been in there; he did not know how he got his hand in the hole behind the column.

He was asked:

"When you first went into the passageway, what about this supposed noise you have been talking about? A. Well, I think it was some kind of machinery that needed oiling. * * *

"Q. Now, then, you knew when you were going in around there [bus room] as you say, that there was no noise in there, and the noise, if there was any you heard was upstairs? A. Yes sir.

"Q. And you have no explanation of how you got in there? A. No, sir; only just, when I went in there, was looking for this noise."

Ravinaw, the first witness called by plaintiff, testified:

That when Haas began as an oiler he gave him his instructions, told him what he was to oil, and where, which was in part of the basement and part of the upper floor. Ravinaw knew there were oil switches in the bus room, but did not know how many, and knew that there was nothing in the bus room that called an oiler in there; nothing that needed to be oiled; just before the accident he had a conversation with plaintiff in the boiler room; plaintiff said to come downstairs, that he wanted to show the witness something or tell him something; witness could not say which it was; Haas started downstairs and "I followed him; he went straight on; saw him going into the bus room door; I had never instructed him not to go in there; I followed him in rapidly; found him standing with his hand against the wall, facing west; his right hand was next to the wall;" it was light in there; his right hand was up on top of the bus bars; tried to pull him off, and got an electrical shock; told the switchboard operator, and the current was cut off; when Haas told him to come downstairs, that he wanted to show him something, or tell

him something, the witness did not know what it was, but that there was nothing to prevent the plaintiff from telling him right there; could see no reason why he could not tell it right there if there was anything to be said.

On cross-examination, he admitted testifying in the federal court that when he found Haas the latter was standing with his "hand stuck into that hole in the wall," and he said that that was where the plaintiff's hand was. His testimony is that a person passing through where Haas was injured could not reach the bus bars except by putting his hand in through the opening. Ravinaw said that when he went to work there he was told not to go into the bus room because of the danger; that he had been in by himself, and once with the electrician, just walked through, but that nobody had any business in that room except the electrician and his helper.

Dr. Frank J. Iuen, a witness for defendant, testified:

That he was the surgeon for the company and treated plaintiff after his injuries at a hospital in Kansas City, Mo.; that he was present at an interview that took place between the claim adjuster of the company and the plaintiff at the hospital, when the plaintiff was practically sitting up in bed, and in the opinion of the witness was perfectly clear mentally; that plaintiff made the following statement to the claim adjuster, which was taken down by the latter:

"I just walked into the bus room, and must have gotten hooked up the moment I got in there. There was no one in the room when I went in, and, as for what I had to tell Ravinaw, it was a little foolishness, and it does not matter. * * * My duties were to oil the engines on the first floor and basement. I had no business in the bus room, as my duties did not take me there and the bus room was 45 or 50 feet south of the pump which I was employed to oil."

The plaintiff, on cross-examination, was asked whether he made these statements and answered:

"I think I did; yes, sir; I remember his being there, but don't remember a thing I told him."

Mr. Myers, night operator of defendant's switchboard, and who shut off the power when notified of the accident, testified that the bus room was as light as day; and he, with other employees who went to the relief of the plaintiff at the time of the accident, identified photographs showing the footprints of the plaintiff burned into the concrete by contact with the bars. The night operator testified also that there is still the burned place on the bus bar where the plaintiff's hand came in contact with it, at a point 8 inches back from the opening in the recess compartment.

Schultz testified:

That on the night of the accident he went with Haas to the saloon; they both bought

beer, and that Haas said, "I believe I will get a half pint of whisky and give Ravinaw a drink," and that he bought the whisky; when the accident happened, and the current was cut off, he ran and told Anderson, and then went to the bus room; "when we got there," Ravinaw said, "the bottle of whisky is in the little pigeon hole there, don't say anything to Anderson about it;" "after the lights went out I put my hand in there and got it, and broke it;" it was against the rules to have whisky around the plant.

The witness was the first person in there after the lights and power were turned off. He also testified that Anderson brought the plaintiff to him to be instructed as to oil, and directed the witness, in plaintiff's presence, to show him where to oil, and to show him about the bus room, and that Anderson said not to go in there; that he told Haas about the bus room, that there was nothing in there to oil.

The plaintiff, in support of the judgment, cites the case of *Brick Co. v. Fisher*, 79 Kan. 576, 100 Pac. 507. That was a case under the Factory Act, where four men were employed to work at a certain machine, and the rules permitted each one to take a turn at resting while the others operated the machine. It was held that a resting employee was engaged in the performance of duty the same as if he were occupied at the machine, and that the employer's duty to guard machinery according to the Factory Act (Laws 1903, c. 356) extends to all places which employees may reasonably be expected to use in the performance of their duties, including the taking of turns in resting.

We do not believe this case falls within the doctrine of the cases where, during rest periods or at the noon hour, workmen have sustained injuries on the premises where they are employed—as was held in *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 Pac. 372, 6 A. L. R. 1145, where a 17 year old girl remained on the premises where she was employed during a half-hour intermission at noon, and after eating her lunch was injured by falling from a truck pushed or drawn by a fellow employee. Nor does the present case fall within the doctrine of *Chance v. Coal & Mining Co.*, 108 Kan. 122, 193 Pac. 889, where it was ruled that an injury which occurs while an employee is doing what he might reasonably do at the time and place is one which arises "out of and in the course of his employment."

The words, "out of and in the course of the employment" have been uniformly held by the British courts and many American courts to be used conjunctively, and not disjunctively. In the case of *Fitzgerald v. Clark*, 2 K. B. 786, Buckley, L. J., after stating this rule, said:

"The words 'out of' and 'in the course of the employment' are used conjunctively, and not disjunctively, and upon ordinary principles of

construction are not to be read as meaning 'out of;' that is to say, 'in the course of.' The former words must mean something different from the latter words. The workman must satisfy both the one and the other. The words 'out of' point, I think, to the origin or cause of the accident. The words 'in the course of' to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character and quality of the accident; the latter words relating to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment."

In *Clark v. Wigan*, 3 K. B. 635, Cozens-Hardy, M. R., said:

"I think it would be dangerous to differ from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since those acts came into operation, namely: To hold that it is not enough for the applicant to say: 'The accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place.' He must go further, and say: 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some particular danger.' In order that the injury may be one arising out of the employment, the workman must be acting within the scope of his employment at the time of his injury."

Following this construction of the statutes, it has been held that an engine driver who goes across the rails to a signal box to inquire the time for his own purposes, when his path does not cross the rails, is not in the course of his employment. *Benson v. Lancashire & L. R. Co.*, 1 K. B. 242. And in *Keene v. St. Clement's Press*, 7 B. W. O. C. 542, it was held that a workman, who, in order to conceal from the night shift of workmen a tin of milk used by him in his tea, attempts to put it on a ledge in close proximity to a reciprocating plant, and is thereby injured, does not suffer injury by accident arising out of and in the course of his employment.

The English courts have consistently ruled that, where a workman attempts to do work around a machine with which his duties have no connection, he cannot recover under the compensation acts.

Among the American cases cited by the defendant are two which we think illustrate the rule which controls the present case. In *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368, L. R. A. 1918D, 86, the rule was stated to be that an injury to an employee does not arise out of and in the course of his employment under the Workmen's Compensation Act "unless it was received by him while he was acting within the

scope of his employment, and unless there was a causal connection between the conditions surrounding the performance of his work and the resulting injury," and that where the injury arises from a risk of the business, but is received while the employee has turned aside from his employment for his own purposes without the knowledge or consent of the employer, it does not arise out of the employment. In that case the employer knew that its employees were accustomed to heat their luncheon bottle of tea or coffee in the hot-air pipe of the dry room of its plant, and made no objection thereto.

"Held, that such tacit or implied assent by the master to the custom of heating bottles at that particular place could not reasonably be said to involve permission to an employee to go into another room and put his bottle inside of the hot-air pipe through a door therein which opened upon a revolving fan; and that in so conducting himself the employee was not acting within the scope of his employment, nor was there any causal connection between the conditions under which his work was required to be done and the injury to his hand from the revolving fan." 90 Conn. 116 (Syl.), 96 Atl. 368, L. R. A. 1918D, 86.

The opinion recognizes the right to compensation if an injury arising from a risk of the business is sustained while the employee is doing something which, although quite outside of his particular duty, is permitted by his employer for their mutual convenience, such as eating his dinner on the premises, or any similar act, to the performance of which the employer has assented. But in the opinion it was said:

"On the other hand, if the injury, although it arise out of a risk of the business is received while the employee has turned aside from his employment for his own purposes, so that he is not acting within the scope of his employment, no compensation can be given." 90 Conn. 120, 96 Atl. 369, L. R. A. 1918D, 86.

Another case cited by the defendant is *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17. There a workman was employed to operate an engine and dynamo in the basement, and no duty called him to the upper floors. He received injuries which caused his death while running an elevator from the second to the third floor, in attempting to accommodate some fellow workman. It was held that the accident did not arise out of and in the course of his employment. It was said in the opinion:

"In the instant case Spooner was rendering no service which was either accepted by or known to his superior, but was engaged in a voluntary, friendly act, entirely outside the scope of his employment upon the night in question." 187 Mich. 132, 153 N. W. 659, L. R. A. 1916A, 17.

In the case at bar the evidence shows so conclusively that the plaintiff abandoned the

work he had been employed to do and the place where he was employed to work and went on a considerable journey into a dangerous part of the plant, where his own admissions, and all the testimony, show he knew he had no business to be. From the plat of the building and the testimony, it appears that in order to get to the place where he received his injuries he had to leave the center of the basement, go to the west wall of the building, then a distance of about 25 feet to the west archway, and, after passing through that, 25 feet to the south wall, then east about 25 feet to the first opening to the north, and then about 10 feet to the place of the accident, the distance from the entrance into the bus room being about 60 feet.

It must be held, therefore, that the accident which caused the plaintiff's injuries did not arise because of anything he was doing in the course of his employment, nor because he was exposed by the nature of his employment to that particular danger. The accident did not arise out of and in the course of his employment.

It follows that the judgment is reversed, and the cause remanded with directions to enter judgment for the defendant.

All the Justices concurring.

(109 Kan. 75)

FARNEY v. HAUSER et al. (No. 22979.)*

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

1. Partnership §83—Partner may contract with firm, but can only collect by accounting and dissolution proceedings.

One of several partners in a business firm may contract with the partnership as an ordinary customer, and in the latter capacity he is entitled to his due precisely as an outsider, although the mode of collecting his due by legal process is by an accounting and dissolution of the partnership and not by an ordinary action at law.

2. Partnership §63—For practical purposes a partnership may be considered a business entity.

While a partnership is not strictly a legal entity, for practical purposes it may be considered as a business entity. It has its own capital, its own assets and liabilities, and it has a commercial life and credit of its own, virtually though not technically independent of the members comprising it.

3. Partnership §101 — Partners may have contribution for tortious acts of their servants.

Though a tortious act of the servant of a partnership is attributable in law to his employers, the partnership, yet where the partners themselves are not guilty of actual delinquency nor otherwise willfully culpable, con-

tribution between the partners for the tortious act of their servant is lawful; and the rule that no contribution will be enforced between joint tort-feasors has no application.

4. Partnership §101—Contribution between partners proper in action for manager's conversion of wheat stored.

The plaintiff and the four defendants formed a partnership to transact the business of a grain elevator. They hired a manager to conduct and operate it. Under an agreement with the manager, the plaintiff placed over 10,000 bushels of grain in the elevator to be stored, cleaned, and loaded on railway cars. The manager misappropriated a large amount of plaintiff's wheat, but the partners were free of any personal delinquency therefor. An action was brought by plaintiff to dissolve the partnership, for an accounting, and for the conversion of the wheat by the manager. *Held*, that whether plaintiff's claim against the partnership be viewed as a breach of contract, or as a claim arising from a tort attributable to the partnership because perpetrated by the servant of the partnership, contribution between the partners was properly decreed.

5. Action §46—All matters in controversy between same parties, whether legal or equitable, triable in one action.

In this jurisdiction, where all distinctions between forms of actions at law and of suits in equity are abolished, all matters of justiciable controversy arising between the same parties, whether legal or equitable, and whether already liquidated or merely capable of ascertainment, may be tried and adjudicated in one action.

6. Partnership §121 — Evidence sustaining finding as to amount of wheat misappropriated by partnership's agent.

Record examined, and *held*, that there was competent and sufficient evidence to sustain the finding of the jury touching the amount of wheat misappropriated by the servant of the partnership.

7. Appeal and error §1009(4), 1012(2)—Reviewing court will adopt findings below where supported.

Where there is substantial evidence to support a finding made by the trial court or jury, the Supreme Court adopts such finding as an ascertained fact, although the record also contains evidence to the contrary; and the Supreme Court cannot independently undertake to determine the relative weight of the evidence, except in cases where the controlling evidence is documentary or by deposition; and this rule is the same whether the cause be in the nature of an action at law or a suit in equity.

8. Warehousemen §22—Elevator firm holding wheat in trust must make claim and proof of loss thereof under fire insurance policy.

Where an elevator firm procures a policy of fire insurance covering its own grain and that held in trust for which it is legally liable, and a fire consumes the elevator and its contents, it is the duty of the elevator firm to make claim and proof of loss to the insurance company for the grain thus held in trust and

for which it is legally liable; and held that, under the facts of this case, the plaintiff's grain stored and destroyed by fire in the firm's elevator was protected by such insurance, and the failure of the firm to claim and collect the insurance thereon renders it liable to plaintiff for the amount of insurance which should have been collected.

Appeal from District Court, Barber County.

Suit by J. P. Farney against Jacob Hauser and others. Decree for plaintiff, and defendants appeal. Affirmed.

Paul Knapp, of Sedalia, Mo., Samuel Griffin, of Medicine Lodge, and Bruce Barnett and Holt & Cubblison, all of Kansas City, Mo., for appellants.

A. L. Noble, of Wichita, and Adrian Houck, of Medicine Lodge, for appellee.

DAWSON, J. This action was to dissolve a partnership, and for an accounting between the partners, and it also involved the question of a liability of the partnership in certain business transactions with one of their number.

In 1915 the plaintiff, J. P. Farney, and the four defendants, Hauser, Ricks, Rathgeber, and McBrayer, formed a partnership for the purpose of conducting a grain elevator business at Kiowa. The capital invested by the partners was \$5,300, of which the plaintiff contributed \$1,500. Hauser was chosen as president and general manager, and Ricks as secretary and treasurer, and the partnership business was placed in their charge. They purchased an elevator, and hired a manager, one Hagenmaster, to conduct it.

Under an agreement with Hagenmaster, the plaintiff placed some 10,000 bushels of wheat in the elevator to be stored, cleaned, and loaded on railway cars, at 2½ cents per bushel. This wheat was to be loaded on cars when plaintiff chose to have that done, and in May, 1916, some 1,378 bushels of plaintiff's wheat was thus loaded out of the elevator. In February, 1917, plaintiff directed Hagenmaster to load the balance of the wheat, but this was not done, for the reason, as it was afterwards developed, that Hagenmaster had in some way made away with most of plaintiff's wheat; and on March 4, 1917, the elevator burned. Plaintiff took charge of the more or less damaged wheat found in the ruins of the elevator and sold it. Plaintiff then started an investigation as to the disposition of the remainder of his wheat, but this was interrupted by another fire which burned the elevator office and books of the partnership. Hagenmaster, the manager, was arrested for the crime of burning the elevator but he died before trial. The partnership collected some insurance on the elevator and sold some other assets for cash. It also held a policy of insurance for \$2,000 on the contents of the elevator, whether

"their own" or held by them in trust or on commission but not delivered if assured is legally liable, all while contained in above described buildings." The partnership officers did not include in their claim and proofs of loss to the insurance company any item for the loss of plaintiff's wheat, and settled with the insurance company for \$969, and at the same time gave a bond indemnifying the insurance company against any liability for the loss of plaintiff's wheat.

The assets of the company were apportioned and distributed among the partners other than the plaintiff.

The plaintiff's petition narrated the pertinent facts, and defendants joined issues. The cause was tried before an advisory jury which answered many special questions which, with a minor exception, were adopted by the trial court. The trial court made an accounting which by computation showed that the partnership was indebted to plaintiff in the sum of \$11,436.59; that the net assets of the firm were \$4,524.82; that each of the parties, plaintiff and defendants, must stand his respective proportionate share of the net losses and liabilities; and that the plaintiff should have judgment against his defendant partners for their respective shares of the amount due him as an individual patron or customer of the partnership. The court also held the partnership liable to plaintiff for the sum which should have been collected from the insurance company for the burning of plaintiff's wheat. While the computations are somewhat complex, the defendants do not complain of the mathematics involved in the judgment.

[1] Defendants assign error on the ruling of the trial court that plaintiff was entitled to judgment against his partners on account of the wheat misappropriated by the partnership's manager, Hagenmaster, less the proportionate share thereof which he himself must bear as a partner in the business. They contend that Hagenmaster was the agent of all the partners and that there should be no contribution between them for his tort. Such a view fails to take note of plaintiff's additional relationship to the partnership, that of customer as well as partner. For the torts of Hagenmaster, as for all the losses of the firm, the plaintiff, like all the other partners, must bear his proportionate share; but as a customer of the partnership he is entitled to his due just as any outsider patronizing the firm would be. Hagenmaster made away with \$11,436.59 worth of plaintiff's wheat which had been placed in the elevator under a valid contract. The partnership therefore owes plaintiff that sum. But being a partner to the extent of \$1,500, and the total capital of the firm being \$5,300, plaintiff, as partner, must bear his proportionate share of the liability, 15/100, of \$11,436.59. The other partners must likewise bear their share of

this liability according to their respective interests in the partnership. Of course, the mode by which a partner may enforce his claim as creditor is not by an ordinary lawsuit, but by an accounting and dissolution.

[2] There was nothing illegal, or at variance with the theory of a partnership, for plaintiff to deal with it as an ordinary customer. It would be absurd to hold that in this commercial age when partnerships are so common that a man could not buy from, sell to, trade with, or patronize a business partnership as any other person might do, and with the same rights and liabilities, merely because he had a partner's interest in the firm business. If the partnership gets into financial difficulties with third parties, a partner who is a creditor of the firm may have his claim postponed until third parties are satisfied. But for nearly all practical purposes a partnership may be considered as a business entity. 20 R. C. L. 804. It has its own capital, its own assets and liabilities, its own business activities, and it has a commercial life and credit of its own, virtually if not technically independent of the members comprising it.

In 30 Cyc. 455, it is said:

"It is quite common for partners to buy property from the firm, or to rent or sell property to the firm, to lend it money or to borrow from it, and in many other ways to deal with it as though it were an artificial person. While such transactions are not considered as creating strictly legal obligations, between the partner on the one side and the firm on the other, courts of equity have always enforced such obligations and, under the reformed procedure both in England and in this country, they are enforceable in appropriate actions."

[3] But even if the tortious act of Hagemaster, the agent, be considered as a tort of the partnership, yet the partners would be tort-feasors in law only. None of the partners were willfully culpable; none of them was guilty of actual delinquency or moral turpitude; and in such cases proportional contribution between them for the loss or damage occasioned by the tort of their unfaithful servant is perfectly allowable. Nor is there any reason in law or logic why the rule should be otherwise. The reason why ordinary tort-feasors are refused judicial aid to enforce contribution between them is because the state does not establish and maintain courts to adjudicate between rogues or rascals who have willfully placed themselves beyond the pale of the law, nor to conduct inquiries as to their relative guilt.

In *Bailey v. Bussing*, 28 Conn. 458, several partners operated a stage line. One of their number was in charge of the stagecoach and through his negligence a passenger was injured. He sued the partnership, and one of their number paid the judgment. The latter then sued another partner for contribution.

The defendant claimed that, as partners, they were both wrongdoers, and therefore that between them there could be no contribution. It was held that the partner who paid was entitled to contribution. The chief value of the case lies in the discussion, from which we quote:

"The defendant insists that that judgment was rendered in an action of tort, and that in that class of cases there is to be no contribution among wrongdoers; the maxim of law being, as he claims, that among tort-feasors there is no contribution. To meet this objection, the plaintiffs offered evidence, and we think with entire propriety, to prove that, while the maxim might be true as a general rule, the case on trial belonged to a class of cases to which it had no application, for that here there was no personal wrong, not even negligence in a culpable sense, on the part of Turner, and that he had been found guilty only by implication, or legal inference from a supposed relation to Bussing, the actual wrongdoer, through whose neglect the other two defendants had been subjected by the jury. * * *

"What then is this case? And what is the true doctrine of the law as to contribution, or, as it may be, full indemnity, where there has been no illegal act or conduct on the part of him who seeks for a contribution? * * *

"The reason assigned in the books for denying contribution among trespassers, is, that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser it is said cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. * * * If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied. Indeed we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers and the like. * * *

In *Wooley v. Batts*, before Justice Marks, 2 Car. & P. 417, one stage proprietor had been sued alone in case for an injury to a passenger through the neglect of the coachman, and, having paid the damages, he brought assumpsit for a contribution, and recovered on the ground that in him there was no personal fault. * * * In *Story on Partnership*, § 220, the learned commentator says, speaking of the maxim that there is no contribution among wrongdoers, 'but the rule is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the innocence and propriety of the act, and the tort is one by construction or inference of law, in the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between the constructive wrongdoers, whether partners or not.' The cases are all brought together in *Chitty on Contracts*, 502." Pages 457, 458, 459, 460, 461.

In *Horbach's Administrators v. Elder*, 18 Pa. 33, five partners operated a stage line between Chambersburg and Pittsburg. A careless employé overturned the stagecoach and three passengers were injured. Damage suits were filed against the partners, but only two of them, Horbach and McCall, were served with process. Judgment being entered for plaintiff, the two partners served with process satisfied the judgments. One of these, Horbach, died, and his administrator brought suit against another of the partners, Elder, for contribution. One defense was that no contribution could be enforced as between tort-feasors. This contention was overruled, and it was held that Elder should stand his proportionate share of the liability incurred by the tort of the servant of the partnership, and judgment was accordingly entered for plaintiff.

In *Lindley on Partnership* (8th Ed.) 441, it is said:

"There is a saying that there is no contribution amongst wrongdoers; but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true that if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member; but there is no authority for saying that if one of the members of a firm sustains a loss owing to some illegal act and not attributable to him, but nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners."

See, also, 6 R. C. L. 1054, 1056.

[4, 5] From the foregoing it will be seen that whether plaintiff's claim against the partnership be viewed as a breach of contract, or as a claim arising from a tort attributable to the partnership because perpetrated by the servant of the partnership (the partners being legally though not culpably liable therefor), contribution was proper and the error assigned thereon cannot be sustained.

Again it is urged that even if plaintiff was entitled to contribution, his claim was unliquidated, and therefore it could not be adjudicated in an accounting between the partners, nor otherwise in equity. Cases from jurisdictions where distinctions in procedure in common-law actions and in suits in equity are still maintained are cited to support this contention. We doubt not that such is the law in those jurisdictions, but it is not so in Kansas. Here all distinctions between actions at law and suits in equity are abolished; and, whenever practicable, all matters legal or equitable, whether liquidated or merely capable of ascertainment, may and should be tried and adjudicated in one action. Civ. Code, §§ 10, 90 (Gen. St. 1915, §§ 6900, 6981). In *Kremer v. Kremer*, 76 Kan. 134, 137, 138, 90 Pac. 998, 999 (91 Pac. 45), it was said:

"Under the common-law procedure it must be conceded that the final adjudication of an action resulted in one judgment, which was an entirety, and on appeal it stood or fell as a whole. Under the code system provision is made for joining parties and for uniting causes of action which the common-law procedure would not have permitted; also, for the rendition of judgments for and against the plaintiff in one action, and for some of the plaintiffs joined and against others; also, for and against defendants joined. In short, one adjudication may embrace several judgments. (Code, §§ 86, 87, 89, 41-43, 83, 396, and others.)"

[6] It is next contended that the evidence did not support the finding of the jury touching the amount of plaintiff's wheat misappropriated by Hagenmaster. It was proved that plaintiff placed 10,591 bushels of wheat in the elevator; that 1,378 bushels of this amount was loaded out on a railway car; that the partnership only had 530 bushels of its own in the elevator at the time it burned; that 2,642 bushels of damaged wheat was taken from the ruins; and that, according to competent opinion evidence, not more than from 3 to 20 per cent. of wheat stored in an elevator is commonly consumed when an elevator burns. The jury were liberal; they determined that 25 per cent. of plaintiff's wheat was consumed in the elevator, and upon these bases, and upon all the relevant circumstances, they concluded that Hagenmaster must have misappropriated 5,461 bushels. This evidence and the calculations made therefrom fully justified the finding.

There was an issue of fact touching the condition of the wheat. Defendants said the wheat was infested with weevils, and that an elevator fire will consume a much greater portion of weevilly wheat than it will of sound wheat. There was evidence on both sides of the question as to the presence of weevils in the plaintiff's wheat. The jury settled that matter:

"Question 17: To what extent, if any, did you find that the plaintiff's wheat, at the time of the fire, had been damaged by weevil? Answer: No damage."

[7] But it is said that this finding was greatly against the weight of the evidence, and that as this is an equity case we should decide this question of fact for ourselves. Unless the evidence is documentary (*Mathewson v. Campbell*, 91 Kan. 625, 627, 138 Pac. 637), or by deposition (*Record v. Ellis*, 97 Kan. 754, 760, 156 Pac. 712, L. R. A. 1916E, 654, Ann. Cas. 1917C, 822), that is not done and cannot be done by this court, whether the case be one at law or in equity (*Bruington v. Wagoner*, 100 Kan. 439, 164 Pac. 1057).

[8] Defendants' final contention is that they should not be charged with their failure to collect insurance on plaintiff's wheat. They do not appear to question the general rule that where a warehouseman takes out a policy of insurance to protect his own in-

terest in property and that held in trust by him, or concerning which he may have a liability, it is his duty to claim and collect such insurance not only for a fire loss on his own property but also for the loss sustained by the owner of the property intrusted or bailed to him. Such, of course, is the general rule. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868, and *Rose's* notes thereto at page 442 et seq. And it is also settled that the failure of the warehouseman to collect such insurance renders him personally liable therefor to his customer or bailee. *Southern Cold Storage, etc., Co. v. A. F. Dechman & Co.* (Tex. Civ. App. 1903) 73 S. W. 545; *Johnston v. Charles Abresch Co.*, 123 Wis. 130, 101 N. W. 395, 68 L. R. A. 934, 107 Am. St. Rep. 995. See, also, 27 R. C. L. 955-958. But defendants resist the allowance made by the trial court for their failure to collect the insurance for plaintiff, not by taking issue with the rule just stated, but merely on the same general ground urged by them against the imposition of any liability for the loss of any part of plaintiff's grain—that the partnership was not liable to plaintiff—but that matter is already disposed of in this opinion and needs no further discussion.

The record contains no error, and the judgment is affirmed.

All the Justices concurring.

(109 Kan. 117)

STRONG v. SONKEN-GALAMBA IRON & METAL CO. (No. 23151.)

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

1. Master and servant \S 385(18)—Compensation properly reduced for refusal to permit surgical operation.

The unreasonable refusal of an injured employé to permit a surgical operation where the danger to life from the operation would be very small, and the probabilities of a permanent cure very large, justifies a court in refusing compensation under the Workmen's Compensation Law from and after the trial.

2. Master and servant \S 417(7)—Unreasonableness of compensation claimant's refusal to permit operation, question of fact.

The unreasonableness of the refusal of an injured employé, who is seeking to recover compensation under the Workmen's Compensation Act, to permit an operation to be performed, is a question of fact to be determined from the evidence.

3. Master and servant \S 405(6)—Finding as to compensable disability justified.

There was testimony to support the finding that the injured employé was not totally incapacitated.

4. Master and servant \S 417(3 $\frac{1}{4}$)—Employer not estopped to question compensation award by payment.

An employer is not estopped to question the correctness of an award made under section 16 of chapter 228 of the Laws of 1917 by paying the amount found due at the time the award is made, where the award provides for weekly payments thereafter.

5. Master and servant \S 417(3 $\frac{1}{4}$)—Compensation award reviewable.

A review of an award of an arbitrator appointed under the Workmen's Compensation Act may be had where there is only partial disability after a short period of total disability, and the award gives compensation for total disability for the full period of eight years.

West, J., dissenting.

Appeal from District Court, Wyandotte County.

Action under the Workmen's Compensation Act by William J. Strong against the Sonken-Galamba Iron & Metal Company. From a denial of compensation, plaintiff appeals. Affirmed.

Hogin & Hubbard, of Kansas City, for appellant.

McAnany, Alden & Van Cleave, of Kansas City, for appellee.

MARSHALL, J. The plaintiff is seeking to recover compensation under the Workmen's Compensation Law (Laws 1917, c. 228, amending Gen. St. 1915, § 5896 et seq.). Compensation for future incapacity was denied him in the district court. An arbitrator had been appointed, who awarded the plaintiff compensation in the sum of \$10.65 per week from November 20, 1918, to October 25, 1919, aggregating \$515.26, less \$15, making due \$500.26 at the time of the arbitration and awarded as compensation thereafter \$10.65 a week in weekly payments for the full period of eight years.

The arbitrator found that William J. Strong sustained an injury which produced a hernia that totally incapacitated him from work; that the hernia could probably be cured by a surgical operation; that at the time of the hearing before the arbitrator, the defendant tendered to the plaintiff an operation, and offered to pay all necessary expenses, including hospital bills and surgeon's fees, with the privilege of the plaintiff's selecting his own surgeon to perform the operation; that the offer was refused; that probably one operation out of a thousand for such hernias as the plaintiff was suffering from would result fatally; and that about 12 per cent. of the operations for like hernias would not result in a cure. The arbitrator found as a matter of law that the plaintiff was not required to undergo a surgical operation, and that his refusal to be

operated on at the expense of the defendant furnished no reason or justification for the termination of compensation.

On December 5, 1919, the defendant paid into the office of the clerk of the district court the sum of money awarded and found due at the time of the arbitration, and on that day filed a petition to review the award. The plaintiff afterward filed an application to enforce the award. These proceedings were consolidated and tried together, and by stipulation they were heard on the evidence that had been submitted to the arbitrator. The court made findings of fact and conclusions of law as follows:

"The plaintiff received an injury on the 13th day of November, 1918, which injury arose out of and in the course of his employment with defendant, and that said plaintiff is entitled to compensation to be paid by defendant.

"That the injury to plaintiff is proved to be a recurrence of a right inguinal hernia; that the cause of said hernia was, originally, congenital, but the disability from which plaintiff now suffers was produced by the accident which occurred while plaintiff was moving iron for defendant, as alleged by plaintiff.

"That said hernia has incapacitated plaintiff for work. The evidence is not clear, but the court finds that the temporary total disability of plaintiff resulting from said accident and injury was not to exceed five (5) weeks from November 13, 1918, and that such temporary total disability has been followed by partial disability, which partial disability will be permanent unless removed by surgical operation.

"The court finds that defendant has offered and still offers plaintiff a surgical operation, by surgeon of his own choosing, and to defray all expenses thereof; that plaintiff refuses said operation, and that his refusal is unreasonable; that the operation would not be attended with danger to plaintiff's life, but would, in all probability, result in a complete removal of present disability, as well as the congenital weakness which induced hernia.

"That the chances for recovery are so fair, and the danger so slight, that an ordinary person would readily submit to the operation.

"That plaintiff's average weekly wage prior to the accident was \$17.75; that he was and is entitled to 60 per cent. thereof for 4 weeks.

"That plaintiff during his partial disability has been able to earn the sum of \$5.25 per week (approximately 30 per cent. of prior wages), and is therefore entitled to recover 60 per cent. of \$12.50, or \$7.50 per week, during partial disability.

"That six months would be a reasonable time in which plaintiff should submit to and recover from the effects of a surgical operation.

"That plaintiff was and is entitled to compensation for 4 weeks in the year 1918, to compensation for 53 weeks in the year 1919, and to 22 weeks in 1920, to May 26, 1920, together with 6 per cent. interest."

"The court concludes, as to matters of law:

"That plaintiff is entitled to judgment against defendant for temporary total disability to date for \$42.60; for partial disability to date, 75 weeks at \$7.50 per week \$562.50; in the aggregate lump sum of \$595.10; also interest on

amounts from respective dates when due, in the sum of \$——.

"That the plaintiff should endeavor to effect a cure of his condition by submitting to the operation as tendered by defendant, and, in case of his failure so to do, his compensation shall cease at the end of 25 weeks, after May 26, 1920, and during said 25 weeks, beginning June 2, 1920, defendant shall pay plaintiff compensation in the sum of \$7.50 per week, in weekly installments.

"Should plaintiff accept the tendered operation, defendant shall pay, in addition to the operation expenses, compensation weekly in the sum of \$10.60 per week during the time the operation renders plaintiff totally incapacitated, and \$7.50 per week for the remainder of the said 25 weeks, after June 2, 1920.

"In case the operation proves successful, the compensation shall cease with said 25 weeks; but if plaintiff's disability is not thereby removed, compensation should then become due and payable at the rate of \$7.50 per week for the remainder of the period of 8 years as provided by law, either in a lump sum or in payments as the court may determine, and jurisdiction should be retained for the purpose of determining the length of time the operation results in total incapacity, whether or not the plaintiff is restored by the operation, and compensation ceases; if not, whether compensation shall thereafter be paid per week or in a lump sum and any other matters necessary for determination; such jurisdiction to be exercised upon motion of either party upon proper notice.

"That the defendant is not estopped from maintaining this proceeding."

Judgment was rendered accordingly, and from that judgment the plaintiff appeals.

The plaintiff gave the following as his reasons for refusing to have the operation performed:

"I think I am too old. I am 54 years of age. That is one reason; another is that I do not think I could stand it under my present age and condition. A man has to be perfectly healthy to undergo an operation and have it successful. I am not in condition, because I was jammed through here (indicating). By jammed through here, I mean my ribs was pulled away from my breastbone, and my spine is numb. That happened when I was thrown into the car. Another reason that I do not want to submit to an operation is that there is a chance of a man not living. I heard Dr. Steimen testify and say there was a chance of losing."

[1] 1. The principal question presented is, Did the court have power to reduce the amount of compensation that should be paid to the plaintiff if he refused to submit to an operation?

The principle, which the defendant seeks to have applied, has been recognized in actions to recover damages for personal injuries. Note, *Donovan v. New Orleans R. & L. Co.*, in 48 L. R. A. (N. S.) 110-113; note, 12 N. C. C. A. 59; 6 Thompson's Commentaries on the Laws of Negligence, § 7210. This rule was applied in this state in *Brew-*

ing Co. v. Duncan, 6 Kan. App. 178, 51 Pac. 310, where that court said:

"The next allegation of error is that the court withdrew from the jury all evidence as to the probable result of a surgical operation. This we think was error, as the probabilities of a cure of the disability would to some extent affect the amount of damages. This should have been allowed to go to the jury and be weighed by them in assessing the amount of the recovery, as should also the probable expense attending such an operation. This is not in mitigation of damages but is a proper method of showing the actual damages sustained. If the plaintiff could be certainly cured by an operation that was safe and inexpensive, the injury would surely be less serious than one for which there was no hope; and to the degree that the certainty, safety, and inexpensiveness of a cure could be assured, in such a degree would the actual damages decrease." 6 Kan. App. p. 181, 51 Pac. 311.

The present proceeding is not an equity case, but two of the oldest principles in equity jurisprudence are that, "He who seeks equity must do equity" (21 C. J. 172) and "He who comes into equity must come with clean hands" (21 C. J. 180). This is but another way of saying that he must do right who seeks to compel another to do right.

In a "Digest of Workmen's Compensation Laws in the United States and Territories, with Annotations, Sixth Edition, Revised to December 1, 1919," published by the Workmen's Compensation Publicity Bureau, is found a tabulated résumé of the statutory provisions contained in the Workmen's Compensation Acts of the several states of the American Union. This digest shows that in the following states the Workmen's Compensation Laws provide for the reduction, suspension, or rejection of compensation for the unreasonable refusal of an injured employé to accept medical treatment, or to submit to a surgical operation, or for persisting in unsanitary practices which retard recovery: Alabama, California, Idaho, Illinois, Indiana, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Porto Rico, Tennessee, Texas, Virginia, and Wyoming. Why were these provisions placed in the workmen's compensation laws of these states? There is but one answer, and that is because their Legislatures thought that the principles there enacted into law were right.

In England and Scotland it is held that if an injured employé unreasonably refuses to submit to an operation he is not entitled to compensation. *Donnelly v. Baird & Co.*, Ltd., 1 B. W. O. C. 95; *Warneken v. Richard Moreland & Son, Ltd.*, 2 B. W. O. C. 350; *Paddington Borough Council v. Stack*, 2 B. W. O. C. 402; *Wheeler, Ridley & Co. v. Dawson*, 5 B. W. O. C. 645; *O'Neill v. John Brown & Co., Ltd.*, 6 B. W. O. C. 428;

Walsh v. Locke & Co. (Newland), Ltd., 7 B. W. O. C. 117; *Dolan & Son v. Ward*, 8 B. W. O. C. 514; *Wright v. Sneyd Collieries, Ltd.*, 8 B. W. O. C. 537.

In *Donnelly v. Baird & Co., Ltd.*, 1 B. W. O. C. 95, the Lord Justice Clerk used the following language:

"I hold it to be the duty of an injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed." Page 100.

Lord McLaren said:

"I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him." Page 102.

A workman's compensation case in which an injured employé claimed compensation for hernia is *Schiller v. Baltimore & O. R. Co.*, 112 Atl. 272, decided December, 1920, where the Supreme Court of Maryland said:

"It was vigorously contended by appellant that one should not, as a condition precedent to continued compensation during disability, be required to submit to an operation the result of which might be fatal even if such result is so unlikely as to make the danger practically negligible. To support this contention he has cited but three authorities, all being New Jersey cases: *Newbaker v. New York, Susq. & W. R. R. Co.*, 38 N. J. Law, 175; *McNally v. Railroad Co.*, 87 N. J. Law, 455, 95 Atl. 122; *Feldman v. Braunstein*, 87 N. J. Law, 20, 98 Atl. 679.

"The overwhelming weight of authority is opposed to this view, holding that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily reasonable man would submit to in like circumstances." 112 Atl. 276.

In another hernia case arising under the Workman's Compensation Law of Michigan, *O'Brien v. Albert A. Albrecht Co.*, 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1257, the Supreme Court of that state used the following language:

"The physician of the company and the one of plaintiff's selection both advised an operation for the hernia. Such operation is not attended with danger to life or health, and it appears to be undisputed that it affords the only reasonable prospect of restoration of plaintiff's capacity to labor at his trade, that of a carpenter. Without it he may be able to labor at such light occupation as the condition of his feet and ankles will permit, but he cannot do heavy lifting, as his trade of carpenter requires. During all the time he has refused,

and still persists in his refusal, to submit to the operation advised by his own physician, as well as the one in the employ of defendant. Plaintiff is an intelligent man, and whether such refusal is due to a defect of moral courage or not we are unable to say. The board did not find that his refusal was due to any ignorance or misunderstanding on his part, and no such finding would be justified on this record.

"We appreciate the timidity with which the average person contemplates an operation, minor as well as major. But we also appreciate that in thousands of cases, operations, many of them of but minor degree, have restored incapacitated men to the army of wage-earners, and put them in position to discharge their duty to their dependents, themselves, and to society. We are impressed that under the undisputed evidence in the case it was the plaintiff's duty to accept the tendered operation. His unequivocal refusal to follow the advice and judgment of both physicians with reference to the operation relieved defendants from further activities in that direction, and, for the time being at least, absolved them from liability." 206 Mich. 104, 172 N. W. 601, 6 A. L. R. 1257.

The same principle was followed by the Supreme Court of Wisconsin in *Lesh v. Illinois Steel Co.*, 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105, where that court said:

"Where, as in this case, the applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation, which is fairly certain to result in a removal of the disability, and is not attended with serious risk or pain, and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal.

"No question of compelling the applicant to submit to an operation is involved. The question is: Shall society recompense a workman for a disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances, and which would result in the removal of the disability within the rule as stated above? It is true that the compensation awarded under the terms of the act is not damages in the technical sense, and that the rules relating thereto are not to be applied in cases arising under this act, and cases have been cited simply for the purpose of showing that damages accruing as a direct result of the claimant's unreasonable refusal to submit to reasonable medical and surgical treatment, where the results are fairly certain, were not even in tort cases held to be proximately caused by the accident.

"The proposition that an applicant, under the provisions of this humane law, may create, continue, or even increase his disability by his willful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society in general, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice

common to all mankind." 163 Wis. 131, 132, 157 N. W. 542, L. R. A. 1916E, 105.

Neither Maryland, nor Michigan, nor Wisconsin, has any statute authorizing the refusal, reduction, or suspension of compensation to an injured workman who refuses to submit to an operation. A number of annotators have cited cases on this question. 6 N. C. C. A. 390, "A note on *Hernia* and *Varicocele* under *Workmen's Compensation Acts*"; 6 N. C. C. A. 675; 10 N. C. C. A. 185; *Joliet Motor Co. v. Industrial Board*, 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 79; *Toner v. Pennsylvania R. Co.*, 263 Pa. 438, 106 Atl. 797, 18 N. C. C. A. 779; *Jendrus v. Detroit Steel Prod. Co.*, 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 387, Ann. Cas. 1915D, 482; *O'Brien v. Albert A. Albrecht Co.*, 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1260.

The last note, however, is on "duty of injured employes to submit to operation or to take other measures to restore earning capacity." Cases might be cited from states having statutory restrictions on the right of an injured employe to recover compensation where he refuses to submit to an operation; but it is thought that the reasoning in those cases, while broad enough to include the present discussion, may have been based upon the statutory provisions, and would therefore not be very persuasive in this state, where there is no such statute.

Why should the plaintiff permit an operation to be performed? It might not result in his improvement; it would be painful; it is remotely possible that it might result in his death. Many, if not most, of the ordinary activities of men are painful in a sense; the man who works hard all day until his muscles cry for rest, and the man who goes into the field when the temperature is from 80 to 105, and works under the direct rays of the sun, endure sensations that are as unpleasant and many times are as unbearable as pain. They are pain, but of a kind different from that caused by wounded flesh.

Danger to life is everywhere, at all times; it cannot be escaped by any one. The most trifling accident to the person or the smallest scratch on the skin may result in death. The locomotive engineer and his fireman when they climb into the cab of their engine and start on their trip constantly face dangers that may, and often do, result in their death; the miner who goes into the earth to take therefrom ore or mineral faces death every day. These men are not deterred by danger, although they know that injury or death is liable to come at any time. They go because that is their field of labor, and it is their duty to go.

One of the greatest blessings that God has given to men is the ability to work, to work with hand and head and heart. Work pro-

duces happiness; refusal to work produces misery. Whatever of happiness there is in the world is the result of hard work. Whatever has been attained by man has been done by hard work, and the greatest achievements have been produced by the greatest efforts. In art, literature, science, and in all industrial enterprises, the greatest achievements have been accomplished by the hardest labor. The last ounce of energy of which the person laboring was capable of putting forth has been what has produced the desired result. It is a man's duty to himself, to his family, to society, and to God, to work, to work hard, to work with all his might, to accomplish in his lifetime all that it is possible for him to accomplish, to keep his mind and body in such a condition as will enable him to do his best, and to avoid everything that will detract from any of his powers or prevent him from accomplishing his utmost. If misfortune overtakes him in any way, and that misfortune detracts from his ability and renders him less able to work, mentally or physically, and the effect of the misfortune can be removed, it is his duty to do the thing that will restore him, even if there is pain and danger. There is no law to compel a man to perform any of these duties, but nevertheless they exist.

The state goes to great expense to fit its people for work, to protect them in their work, and to secure to them the result of their labor. Then if a man who receives these favors from the state will not work he at least is not a good citizen.

The plaintiff has been injured. The injury can be remedied, and he can be restored to his former condition. It is his duty to do whatever is necessary to restore him. If he refuses to perform that duty, he should not ask the state nor any person to assist him in that refusal. He cannot be compelled to undergo an operation, but he can be told that if he refuses he shall not receive compensation for that which he voluntarily continues.

[2] 2. The reasonableness of the refusal of an injured employé to submit to an operation has been considered in most, if not all, the cases where he has been denied compensation on account of such refusal. That reasonableness has been disposed of in those cases as a question of fact. It is a question of fact that must be determined by the trier of facts, and when he has determined it, and his conclusion is supported by evidence, that conclusion is binding on this court the same as the determination of any other question of fact. In the present case the district court tried the fact of the reasonableness of the refusal of the plaintiff to permit an operation. The court in substance found that the plaintiff's refusal was unreasonable.

[3] 3. The plaintiff argues that—

"There was no testimony to support the court's finding and judgment that the appellant was not totally incapacitated."

The finding was not made as thus indicated, but in substance it amounted to that. The plaintiff testified:

"I have not been able to do any work of any kind since I had the accident, except I did a little work on a neighbor's automobile. I did no lifting, and it took me two weeks to get it done, and I was paid \$10. I helped to make a fence. I stapled the wire; I did none of the heavy work; I was paid \$5 for that. That is all of the work I have been able to do, and all I have earned since the accident. I cannot do manual labor because I am injured through my shoulders and arms, and the rupture I cannot get a truss to hold it up and keep it up properly. Have not been able to. When I try to work I do not have the strength I had before, and I suffer pain."

One physician testified:

"I think he could do light work without any trouble and without any danger of increasing these hernias."

Another physician testified:

"I think this man could do light work very nicely, with the aid of a truss, and without danger."

That evidence was sufficient to support the finding of partial disability after the period of total disability expired, and to support the finding that the plaintiff was able to earn \$5.25 a week, "approximately 30 per cent. of prior wages."

[4] 4. The plaintiff contends that the defendant is estopped to question the correctness of the award by reason of its having paid the \$500.26, the amount found due by the arbitrator at the time the award was made. The statute, section 16 of chapter 226 of the Laws of 1917, under which this proceeding was instituted, in part reads:

"At any time before final payment has been made under or pursuant to any award or modification thereof agreed upon by the parties, it may be reviewed by the judge of the district court having jurisdiction."

This statute provides for a review of the award after payments have been made under it. The defendant is not estopped to question the correctness of the award.

[5] 5. The plaintiff challenges the power of the court to review the award of the arbitrator on the ground that the statute provides for such review for the following reasons only:

"That the award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct, or that the award is grossly excessive or grossly inadequate, or that the incapacity or disability of the workman has increased or diminished." Laws 1917, c. 226, § 16.

The plaintiff cites *Roper v. Hammer*, 106 Kan. 374, 187 Pac. 858. That case does not control here for the reason that the statute authorizes a review of the award where the amount given is grossly excessive. In its petition to review the award, the defendant alleged:

"That since the tender of said operation and its refusal by claimant, the defendant says all payments directed to be made thereafter for total disability are grossly excessive, and the award of sums after the refusal of the tender is without authority on the part of the arbitrator."

Compensation for total disability, \$10.65 a week, was awarded. The court found that there was no total disability, but that there was partial disability, and that the plaintiff was entitled to recover \$7.50 a week during partial disability. This amounted to a finding that the award of the arbitrator was grossly excessive, and brought the proceeding within the statute authorizing a review of the award by the district court.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and DAWSON, JJ., concurring.

WEST, J. (dissenting). After about 25 years of European experiment, this country began to enact workmen's compensation laws. In 1884, Germany by an accident insurance act, began the change which has thus developed. Maryland enacted a statute of this kind in 1902, followed by Montana in 1909, and New York in 1910. Ours was passed in 1911. In Germany 700,000 accidents, with 10,000 fatalities, occurred annually. The situation was less startling than in the United States, where there were from 2,000,000 to 3,000,000 accidents, with from 25,000 to 30,000 fatalities. *Americana*, vol. 29, p. 520.

"The great object of the Workmen's Compensation Acts is to shift the burden of such economic waste from the employé to the industry, in order that it may ultimately be borne by the consumer as a part of the necessary cost of production." *Kiser's Workmen's Compensation Acts*, 8.

These cases are regarded as coming within the police power of the state, it being held that their tendency is to raise the general standard of the people and to diminish the liability of injured workmen becoming public charges. Page 15.

Sixteen states and Porto Rico are named in the majority opinion as having provided by legislative enactment for the reduction, suspension, or rejection of compensation for unreasonable refusal to accept medical treatment or to submit to surgical operation. But our statute, with all its detail and all its amendments, although providing expressly

for medical examination and refusal thereof, is utterly silent as to the duty of the employé to submit to a surgical operation as a condition precedent to receiving compensation. Hence, all the decisions in states which have covered this matter by legislation could be of no avail on the question here.

In 1916, 25 states had already enacted Compensation Acts. 21 *New International Encyc.* 228. Very few of the courts of these states have had this question before them. The matter of compensation covered by our statute has nothing whatever to do with damages for injury in the ordinary acceptance of that term, and hence such decisions as *Brewing Co. v. Duncan*, 6 Kan. App. 178, 51 Pac. 310, have no application. Cases are cited from Michigan, but the reason is not apparent, for in *Andrejwski v. Wolverine Coal Co.*, 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724, it was held that the Compensation Act of that state was in derogation of the common law requiring strict construction, which is diametrically opposed to our decisions, and to our statute, which expressly provides that such statutes shall be liberally construed to promote their objects. Gen. Stat. 1915, § 11829, and *Wall Paper Co. v. Perkins*, 90 Kan. 725, 136 Pac. 324.

In the cited *Schiller Case* where the writer of that opinion said that the overwhelming weight of authority is opposed to this view, one of the cases going to make up this overwhelming weight is *United Rys. & Elect. Co. v. Dean*, 117 Md. 686, 84 Atl. 75, which upon examination turns out to be an action for injury brought by a passenger against a railway company.

Numerous decisions, including some of those cited in the foregoing opinion, treat hernia as a very trivial matter. Inguinal hernia is an escape of a portion of the intestine into the inguinal canal. The known dangers are congestion, inflammation, and strangulation. Strangulation is well understood to be a most serious and dangerous condition; the per cent. of fatalities being very large. The modern operation for inguinal hernia is to make an incision, close the walls of the inguinal canal as nearly as possible, and unite by suture.

In an article by Dr. Joseph A. Blake, in volume 5 of the *Reference Handbook of the Medical Sciences*, published in 1915, going most learnedly and extensively into the subject of hernia, after describing the various modern operations for inguinal hernia, this language is used:

"As a rule children under 4 years of age and adults over 50 should not be operated upon, inasmuch as many children are cured by the wearing of a truss, and in the aged the hernia can be controlled by truss with less inconvenience than in the younger and more active, while the dangers of operation are greater." Page 219.

The plaintiff testified he was 54 years old; that in pushing a wheelbarrow loaded with 200 or 300 pounds of iron the runaway broke and threw the wheelbarrow full of iron to the bottom of the car, and plunged him headlong, so that he struck with all his weight on the upturned edge thereof, striking him in the lower abdominal region; that he had a rupture when he was a boy about 8 years old, which healed up when he was about 12, and he wore a truss until he was about 21, and had never had any trouble about doing any heavy work since. He said he had no particular surgeon he had confidence in, and was not willing to choose a hospital or surgeon and be operated on.

"My particular reason for refusing to do so is that I think I am too old, I am 54 years of age. That is one reason; another is that I do not think I could stand it under my present age and condition. * * * I am not in condition, because I was jammed through here (indicating). By jammed through here, I mean my ribs was pulled away from my breastbone, and my spine is numb."

Dr. Stemen testified that the plaintiff had a large inguinal hernia; that the percentage of successful operations by the best doctors runs from 80 to 90 per cent.

"An operation for inguinal hernia, such an operation as the person here possess, is a major operation, and attended with some danger. I mean there is always some danger with the anæsthetic, and always some danger of streptococic infection, but the dangers are very, very minute. I would say they have 999 chances out of one thousand of getting well, but I qualify that by saying there is always some danger. * * * The danger of an operation depends upon the individual. Shock and fear have a great deal to do with an operation. * * * The chance of a complete recovery in such an operation as would be necessary in Mr. Strong's case are affected somewhat by the person's age. The cases of complete recovery are greater in young people than in older people, and in the case of a man 54 years of age the percentage of chances of complete recovery is much less than it would be in the case of a younger person."

Dr. Gray testified that the plaintiff's heart had some defect in the aortic valves. Dr. Lowman, who had performed 300 or 400 hernia operations, on cross-examination said:

"About 10 per cent. of the hernia operations are not complete successes. This is partly due to the individual conditions. Part of it is due to infection, and part of it is due to poor quality of gut and the breaking. All kinds of things may occur in a surgical operation, even with the most extreme care."

The Legislature, which since 1911 has been making provisions for the recovery of workmen's compensation, has gone into detail in minutiae, and said that one injured in the course of his employment shall receive compensation. It has with apparent studious-

ness avoided any such condition precedent as a refusal to submit to a surgical operation.

That a man like the plaintiff with no family, or one with a wife and children dependent upon him, must be barred from the benefits of the act, and thereby become in a greater or less degree a public charge, and thus bring on the very condition this legislation was confessedly made to avoid, is a startling declaration.

Even the British courts, followed by the very few tribunals which in the absence of statute have taken the view of the matter so ably stated by the majority opinion, have spoken almost apologetically, as an examination of the cases of *Warncken v. Richard Moreland & Son, Limited*, 100 L. T. R. 12, *Tutton v. Owners of Steamship Majestic*, 100 L. T. R. 644, *Binns v. Kearley and Tonge, Ltd.*, 6 B. W. C. C. 608, 611, and *Walsh v. Lock & Co. (Newland) Limited*, 110 L. T. R. 452, will show.

With the eloquent eulogy on industry I agree, if industry be considered merely in contradistinction to idleness. But we are told in the sacred account of the creation that after the fall it was said to Adam:

"Because thou hast hearkened unto the voice of thy wife, and hast eaten of the tree, of which I commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life;

"Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field:

"In the sweat of thy face shalt thou eat bread, till thou return unto the ground. * * *"
Genesis, iii, 17, 18, 19.

I am not ready to believe that the fallen state of our first parents was better than their primal innocence, that thorns and briars are better than flowers and fruits, that "the man with the hoe" has a more desirable life than one with means of leisure, or that incessant toil is the Ultima Thule of human existence. Nothing has more thoroughly marked the progress of social economics and modern legislation than the belief that there should be time for recreation and cultivation of the intellectual, emotional, and spiritual elements of our nature, and such leisure is more to be desired than a treadmill, galley-slave life or a self-imposed immolation upon the altar of hard work.

Our Workmen's Compensation Act was passed in order that employes receiving injuries arising out of and in the course of their employment should not have to resort to lawsuits or be compelled to suffer without remedy; that the consumers in paying for the products should have added to their cost a sum sufficient to justify the employer in paying a reasonable compensation. This was in order that the injured workman might have the means of livelihood, and not become

a pauper to be supported by the public. The scheme involves no loss to the employer, because it assumes that he will fix the price of his products so as to save himself from any sacrifice whatever. And why should he be rewarded by the public by being permitted to withhold compensation because a workman suffering with an inguinal hernia does not at the age of 54 feel safe in submitting to a surgical operation?

This class of legislation is in its infancy. The progress of events in relation thereto is all in one direction. Where the Legislature has been silent, the courts should also be silent. If a prophecy might be ventured, it would be that before this generation shall have passed the decisions followed and announced by the few courts constituting the present small numerical majority will not only be repudiated, but will be pointed to with anything but pride.

But we are told that—

"The state has gone to great expense to fit its people for work, to protect them in their work, and to secure to them the result of their labor. Then if a man who receives these favors from the state will not work he at least is not a good citizen."

I do not like the paternalistic ring of these words. The state does nothing for "its people." The people do things for themselves through the instrumentality of "their state." They are under no load of gratitude to the state for laws which their own chosen representatives have enacted. The state has gone to no expense at all in providing compensation for the plaintiff. It does not pay or promise to pay him one cent. His employer has simply been authorized to charge enough more for its output to compensate him when disabled in the line of duty. His good citizenship does not depend on his submitting to what Dr. Stemen pronounces a major operation in order to receive what the Legislature has provided for him without such submission. As a good citizen he is to be commended for asking what his own representatives have declared he may receive in case of disablement in the course of his employment, on the exact terms laid down. No duty rests on him to add to those plain terms a dangerous condition precedent, and thereby run the risk of adding himself to the number of those whose earning capacity is destroyed by death or diminished by helpless infirmity.

It is hard to believe that courts have hanged witches, sentenced men to death for shooting hares, and in effect told injured employes, when asking for safe places to work, that they would quit or starve. Indeed the ancient and even comparatively recent disregard of the law for life and limb

and human comfort is almost unbelievable. But be it said to the credit of the law that in all these matters we are in a new dispensation. Let us not go back to the old.

(100 Kan. 163)

WESCOTT v. BAILEY. (No. 23178.)

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

Mines and minerals §=78(2)—Cancellation of lease held proper as to part of land leased.

An oil and gas lease given for a maximum term of 20 years construed, and it is held that under its terms the leased land was subdivided into 40-acre units, rental to be paid on each unit unless the lessee had a producing well on such unit, and in case no rent was paid and there was no producing well on the unit, the lease on so much of the land was to become void. There being no producing well on the land owned by the plaintiff, and no rent having been paid, the court rightly canceled the lease as to that unit, although the maximum period of the lease on the whole tract had not yet expired.

Appeal from District Court, Wilson County.

Suit by C. M. Wescott against A. W. Bailey to cancel oil and gas lease. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamb & Hogueland, of Yates Center, for appellant.

A. H. Ward, of Neodesha, for appellee.

JOHNSTON, C. J. In this action the cancellation of an oil and gas lease was adjudged, and the defendant appeals.

The lease covered 500 acres and was executed by P. M. and Ida Wescott to B. E. La Dow, on February 27, 1904, and subsequently assigned to the defendant A. W. Bailey, in which it was stipulated that the lessee should "have the exclusive right for 20 years from this date to enter upon and operate for oil and gas on that said tract of land," etc., describing it. It provided for the payment of consideration in the sum of \$117.25, payable semiannually, being a rental of 50 cents per acre, during the continuance of the lease. It was stipulated that the lessee should deliver to the lessor one-eighth of the oil produced on the premises, or at the option of the lessor should pay \$100 per year for each gas well of sufficient capacity to use, except one well which was then on the premises, for which the lessee was to pay \$50 per year. It contained the provision that, if oil or gas is found in paying quantities in any well drilled, the privilege of operating should continue so long as oil or gas is so produced, and when abandoned the grant should cease. It

contained the further stipulation that the rental should be paid—

"during the continuance of this lease, providing, however, that a producing well on any 40 acres of land should stop the payment of rental on that 40 acres. Said rental should be deposited to the credit of said P. M. Wescott in the Neodesha National Bank at Neodesha, Kan., or, if said bank shall discontinue business, then in any other bank in Neodesha, or be paid to P. M. Wescott or his heirs or assignees, and, if not paid when due, each 40 acres on which there shall be no producing wells shall be released, and this lease shall become null and void as to such land. A failure to carry out any of the conditions herein contained shall also render this lease null and void."

The plaintiff purchased 40 acres of this tract of land on May 15, 1918. Several years before the purchase a well had been drilled on the 40-acre tract, and eight other wells had been drilled on the entire farm. When plaintiff purchased the land, defendant was pumping the well on this tract, but oil in paying quantities was not produced, and in November, 1918, the defendant recognized that the well was not a producer, and he stated that he only got enough oil to color the water pumped from the well. In the 17 months prior to the trial plaintiff never received any royalty for oil or gas nor was any rent paid to him. The plaintiff claimed that as there was no producing well on the tract the rent became due on the 9th day of December, 1918, for a period of 6 months, and no rent having been paid defendant had forfeited his rights in that part of the leased land. After this action was commenced, and on June 7, 1919, the defendant tendered to plaintiff \$10 as rent for the 6 months' period, but the plaintiff refused to accept the same.

The court found that the defendant had failed to comply with the conditions of the lease and ordered a cancellation as to the 40 owned by the plaintiff.

Defendant contends that the lease was for a period of 20 years, that the drilling of one well on the whole tract was sufficient to preserve the lessee's right to every part of it, and that there could be no forfeiture because of the nonpayment of rent on the 40 acres in question. While the general limit of the lease was 20 years, it was provided that under certain circumstances the life of the lease might be shortened as to all or a part of the land. To determine the intention of the parties and the effect of the lease, consideration must be given to all of its terms. The parties specifically provided for the segregation of the land leased into units of 40 acres, each unit to be treated separately and independently as to the rental to be paid by the lessee, and also as to the forfeiture of such units in case of noncompliance with specified conditions. After providing for the

payment of rentals, it was agreed that the bringing in of a producing well on a 40-acre tract would stop the payment of rentals upon that 40 acres, and, if no producing well was sunk and the rent on it was not paid when due, the rights of the defendant in that part of the leased land would be forfeited. The evidence satisfactorily shows that there was no producing well on the land, and that the rent was not paid when due; in fact, no rent was paid to plaintiff during his ownership of the tract. The only way the defendant could be relieved from the payment of rent was the sinking of a producing well upon each of the 40-acre tracts. It was competent for the parties to make the subdivision of the leased land that was made and to provide for the cancellation of the lease as to each unit upon which there was no production and no payment of rent. It appears that defendant had given a practical construction to this provision of the lease, as he treated each 40 acres of the tract as a unit, and had released and canceled all of the 509 acres except three 40's upon which there were wells.

We are of the opinion that the proper construction was given to the lease by the trial court, and its judgment is affirmed.

All the Justices concurring.

(109 Kan. 48)

HELM v. HINES, Director General of Railroads. (No. 22969.)

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

1. Evidence \S 34, 46 — Railroads \S 5½, New, vol. 6A Key-No. Series—Judicial notice of acts of Congress and proclamations of President; substitution of federal agent for Director General permissible.

On February 27, 1920, a judgment was rendered against Walker D. Hines, Director General of Railroads, for damages. On February 28 an act of Congress was approved terminating federal control of railroads, to take effect on March 1, 1920, with a provision that pending causes of action against the Director General should not abate by reason of such termination, but might be prosecuted to final judgment, substituting an agent to be designated by the President within 30 days after the passage of the act. On the 11th day of March, 1920, the President, by proclamation, designated Walker D. Hines, Director General of Railroads, as such agent. The appeal from the judgment was not perfected until April 27, 1920, and was taken in the name of Walker D. Hines, as Director General, and not as agent. On May 14, 1920, the resignation of Walker D. Hines as Director General and as agent was accepted, to take effect on May 18, and the President, by proclamation, appointed John Barton Payne Director General of Railroads, and as such agent. After a judgment in this court overruling the

judgment in the lower court, and ordering judgment in favor of the defendant, the plaintiff filed a motion to dismiss the appeal, on the ground that this court had no jurisdiction of the appeal. *Held*:

(a) The courts take judicial notice of the acts of Congress and of the proclamations of the President, and if attention had been called to the change in the designation of the defendant the court would have made formal orders of substitution.

2. Appeal and error \S 435—After contesting appeal on merits, jurisdiction of court cannot be raised.

(b) The court having inherent jurisdiction of the subject-matter of the controversy, jurisdiction of the parties may always be waived, and it is too late for the plaintiff, after entering her appearance and contesting the appeal on its merits, to question the court's jurisdiction.

3. Appeal and error \S 435—Motion for rehearing precludes question as to jurisdiction.

(c) Coupled with the motion to dismiss is a motion for rehearing, which fact of itself precludes plaintiff from raising the question of jurisdiction, and in the furtherance of justice the court directs that an order of substitution be made.

On motion to dismiss and for rehearing. Motions denied, and order of substitution directed.

For former opinion, see 196 Pac. 426.

PORTER, J. Since the decision in this case was handed down, reversing a judgment in plaintiff's favor and ordering judgment for the defendant, the plaintiff has filed a motion to dismiss the appeal, on the ground that this court never acquired jurisdiction of the case, and that all proceedings here are void.

The accident out of which this lawsuit grew occurred on September 1, 1919, when Walker D. Hines was the Director General of Railroads. The motion for a new trial was overruled, and judgment was rendered in plaintiff's favor on the 27th day of February, 1920, one day prior to the Act of February 28, 1920 (41 Stat. 456), providing that federal control of railroads should terminate on the 1st day of March, 1920. The notice of appeal was not served and filed until April 27, 1920, and it was served in the name of Walker D. Hines, as Director General of Railroads.

Section 206 (a) of the Act of February 28 contained a provision that actions of this character arising out of the possession, use, or operation by the President of the railroads might be brought against an agent designated by the President for such purpose, which agent the President should designate within 30 days after the passage of the act.

Section 206 (d) of the same act reads:

"Actions, suits, proceedings, and reparation claims, of the character above described pend-

ing at the termination of federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a)."

On the 11th day of March, 1920, the President issued his proclamation designating Walker D. Hines, Director General of Railroads, and his successor in office, as such agent. Walker D. Hines tendered his resignation as Director General of Railroads, and as Agent, to become effective May 18, 1920, which was duly accepted by the President. On May 14, 1920, the President issued two proclamations, one appointing John Barton Payne Director General of Railroads, and another appointing John Barton Payne, Director General of Railroads, as the agent provided for in section 206 (a) of the Act of February 28.

It is the plaintiff's contention that on April 27, when the appeal was perfected, Walker D. Hines was no longer acting as Director General of Railroads, and that the appeal should have been taken in his name as Agent, instead of as Director General; and further, it is contended that when his resignation as Director General took effect on May 18, 1920, the name of John Barton Payne, Director General of Railroads, as Agent, should have been substituted in this court for that of Walker D. Hines.

[1] There are several reasons why the motion cannot be sustained. It is doubtless true that before serving the notice of appeal an order of substitution should have been procured in the lower court, describing the defendant as Walker D. Hines, Director General of Railroads, and Agent. But the courts of this state take judicial notice of the acts of Congress (*Dana v. Hurst*, 86 Kan. 948, 949, 122 Pac. 1041), and of the proclamations of the President (*Jenkins v. Collard*, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812). And if the attention of this court had been called to the change in the designation of the defendant by the proclamations of the President, the court would have made a formal order of substitution; and later, if attention had been called to the proclamation of May 14, another formal order would have been made substituting John Barton Payne, Director General of Railroads, as Agent.

[2] The plaintiff, however, is estopped to urge the question of jurisdiction. Under the Constitution, this court has inherent jurisdiction of the subject-matter of appeals from the district court, and where a court has inherent jurisdiction of the subject-matter of a controversy, jurisdiction of parties may always be waived. It is too late for the plaintiff, after entering her appearance and contesting the appeal on its merits, to question the jurisdiction of this court to render a decision against her.

It has been settled that a person who proceeds in a suit and takes an order or decree therein without revivor is estopped to object for want of revivor. *McNeill v. McNeill*, 170 Fed. 289, 291, 95 O. C. A. 485. The plaintiff is in the position of asking the court for a decree affirming the judgment without calling the court's attention to the want of substitution of parties, and, after being defeated on the merits, is precluded from raising the objection. A different rule, of course, would obtain in the case of a defective jurisdiction over the subject-matter. As said in *Rago v. Veneziano*, 155 Ill. App. 557, 559:

"The infirmity pointed out rests in irregularity of procedure. No objection being made to such irregularity, it is waived."

It is not claimed, nor could it be claimed, that on the trial of the merits the plaintiff suffered the slightest prejudice by reason of the failure to technically describe the office of the defendant. The Civil Code, § 141 (Gen. Stat. 1915, § 7033), declares that—

"Any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party must be disregarded."

And section 140 (Gen. Stat. 1915, § 7032), provides:

"The court or judge may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, * * * when such amendment does not change substantially the claim or defense. * * *"

[3] Coupled with the motion to dismiss is a motion for a rehearing. The plaintiff has again placed herself in a position which alone would preclude her from questioning the jurisdiction of the court to make an order of substitution, or any other order in the furtherance of justice. It has been held that where judgment is entered against defendants over whom the court has no jurisdiction, and they afterwards voluntarily request the court to open the judgment, with permission to plead, and the request is granted and pleadings are filed, the parties are before the court for all purposes. *Aherne v. Investment Co.*, 82 Kan. 435, 108 Pac. 842. In *Woodhouse v. Land & Cattle Co.*, 91 Kan. 823, 139 Pac. 356, it was held that procuring a stay of execution precludes a defendant from afterwards challenging the judgment as void for defective service of process. In a case where judgment was taken against minors on default, and eight years after the youngest had reached majority the heirs moved to vacate the judgment, because they had not been legally served, and also because the petition did not state a cause of action, it was held that the last ground of the motion con-

stituted a general appearance, and cured any defective service of summons. *Barnett v. Insurance Co.*, 78 Kan. 630, 97 Pac. 962.

In *Gundlach v. Chicago & N. W. Ry. Co. et al.*, 179 N. W. 985 (decided by the Supreme Court of Wisconsin December 2, 1920), there was a judgment against the Director General for injuries sustained while the railroad was under federal control. On motion, the mandate was amended, with directions to substitute John Barton Payne, Agent designated by the President under the Transportation Act of 1920, as sole defendant, and to render judgment against the substituted defendant.

The motion for rehearing presents the same questions urged in the original briefs and at the oral argument, and which were fully considered at the former hearing. The motion to dismiss and the motion for rehearing are denied, and, in the furtherance of justice, an order of substitution is directed. The mandate will therefore read as follows:

Judgment reversed, and the cause remanded, with directions to substitute John Barton Payne, Agent designated by the President under the Transportation Act of 1920, as sole defendant, and to enter judgment in favor of the defendant for costs,

All the Justices concurring.

(109 Kan. 87)

IN RE BARTRAM'S ESTATE.

BARTRAM v. HOLCOMB. (No. 23006.)

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

Adoption — Child adopted by maternal grandfather after mother's death inherits as adopted child and as mother's child.

A child, who after the death of his mother is adopted by his maternal grandfather, inherits from the grandfather on his death, as his adopted child, and inherits as a child of the mother.

Appeal from District Court, Shawnee County.

In the matter of the estate of William Bartram, deceased. From an order directing P. M. Holcomb, administrator, to pay the widow and children the funds of the estate in a certain proportion, George Bartram appeals. Affirmed.

J. J. Schenck, of Topeka, for appellant.
Z. T. Hazen, of Topeka, for appellee.

MARSHALL, J. George Bartram appeals from an order directing P. M. Holcomb, administrator of the estate of William Bartram, to pay to the widow and children the funds of the estate in a certain proportion.

William Bartram was married and had two children, George Bartram, the appellant,

and Mabel Thedrick. She died prior to the death of William Bartram, and left one child, Theron Quinn Bartram, as her sole and only heir. After her death William Bartram adopted Theron Quinn Bartram, and then died intestate.

The probate court, and on appeal from that court, the district court, directed the administrator to pay over to the widow of William Bartram one-half of the estate, to George Bartram one-sixth thereof, and to Theron Quinn Bartram one-third thereof. The effect of the judgment is to give to Theron Quinn Bartram an amount of the estate that would be equal to that inherited by two children of William Bartram. The appeal is taken from the order directing payment of one-third of the estate to Theron Quinn Bartram.

The only question discussed is, Can Theron Quinn Bartram inherit from his grandfather as an adopted child and at the same time as the sole surviving heir of his mother? This court has held that an adopted child inherits in a dual capacity. In *Dreyer v. Schrick*, 105 Kan. 495, 185 Pac. 30, the court said, "A child by adoption, who is adopted the second time, inherits from his first foster parent." Syl. § 2. In *Yates v. Yates*, 196 Pac. 1077, this court said:

"In the case of *Dreyer v. Schrick*, supra, the rule was recognized that, unless some statute destroy the capacity, an adopted child will inherit from both its natural and its adopted parents."

The logical conclusion to be drawn from the rule declared in these cases is that Theron Quinn Bartram inherits from his grandfather both as the child of Mabel Thedrick and as an adopted child.

The appellant cites *Billings v. Head*, 184 Ind. 361, 111 N. E. 177; *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698, and *Morgan v. Reel*, 213 Pa. 81, 62 Atl. 253. In these cases the rule is declared that a child adopted by its grandparent cannot inherit from the grandparent in the capacity of both a child and a grandchild. In the *Indiana Case* the court used the following language:

"Our statutes of descent provide that an intestate's land shall descend, one-third to the widow and the remainder to his children in equal proportions, provided that if a child be dead, leaving a child surviving, the latter shall take the share which its parents would have inherited, if living. Section 2991, Burns 1914; § 2468, R. S. 1881. Our statute dealing with the right of inheritance of an adopted child reads as follows: 'Such court, when satisfied that it will be for the interest of such child, shall make an order that such child be adopted, and from and after the adoption of such child it shall take the name in which it is adopted and be entitled to and receive all the rights and interest in the estate of such adopting father and mother, by descent or otherwise, that such child

would if the natural heir of such adopting father or mother: Provided, however, that should such adopted child die intestate, without leaving wife or husband, issue or their descendants, surviving him or her, seized of any real estate or owning any personal property which may have come to such child by gift, devise or descent from such adopting father or mother, such property so coming to such adopted child shall, on its death, descend to the heirs of said adopting father or mother the same as if such child had never been adopted.' § 870, Burns 1914, supra."

The statute there quoted was given a place in the reasoning by which that court reached its conclusion. This state has no such statute. In the *Massachusetts case* the court said:

"The statute provides, in section 6, that, after the decree of adoption, all the rights, duties, responsibilities, and other legal consequences of the natural relation of child and parent, except as regards succession to property, shall exist between the child and the adopting parent, and shall, except as regards marriage, incest, or cohabitation, terminate between the adopted person and his natural parents and kindred. By section 7 it is provided that, 'As to the succession to property, a person adopted in accordance with the provisions of this chapter shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him.' Pub. St. c. 148, §§ 6, 7.

"The intent of the statute was to put an adopted child, for all legal purposes with certain carefully defined exceptions, in the place of a natural child, and to give him the same rights. If the statute had stopped here, it would seem clear that Henry Curtis would, in regard to the succession to the property of his adopting parent, stand as a son, and that his rights of succession as a grandson would be merged in his greater rights as a son.

"But the statute contains a further provision, at the close of section 7, that 'no person shall, by being adopted, lose his right to inherit from his natural parents or kindred.' Probably the Legislature contemplated, what is in fact true, that most of the children adopted would be infants, incapable of protecting their rights and of appreciating the effect of the transaction, and it was just to provide that they should not, without their intelligent consent, be deprived of the right to inherit the property of their natural parents or kindred. As applied to most cases, the provision is plain, and in harmony with the other parts of the statute, and there is no difficulty in carrying into effect every part of it. But when applied to the case before us, if it is to receive the construction claimed by the guardian of Henry Curtis, it becomes inconsistent with the main provisions of the statute.

"The same person cannot, as to the legal descendants of his adopting parent, stand in the position of his son and at the same time claim to inherit a portion of his property as his

grandson. It is to be continually borne in mind, that we are not dealing with the question whether Henry Curtis can inherit as a son from his adopting parent and at the same time inherit directly from his father. If his father left property, he would have the right to inherit it. But the sole question is as to the right to inherit the property of his grandfather and adopting father in a double capacity, as his son and as his grandson. He claims the right to inherit, under the first part of the section, as his son, and under the last clause because he is included among his 'kindred.' When the Legislature provided that no person should, by being adopted, lose his right to inherit from his natural parents or kindred, we do not think it understood or intended that 'kindred' should include the adopting parent. It intended to save the right of inheritance from other parties, having already provided as to the right of inheritance from the adopting parent. To bring this provision, when applied to a case like this, into harmony with the other parts of the statute and with its general spirit and scope, we are of opinion that it should be held to apply to the inheritance of the property of some third person, and not to that of the property of the adopting parent."

The limitation placed by the Massachusetts statute on the right of an adopted child should be noticed because in that limitation is found a restriction on the right of the child to inherit. In the Pennsylvania case the court said:

"The act of May 19, 1887 (P. L. 125), after prescribing the conditions and mode of adoption, and, *inter alia*, that the adopted child 'shall have all the rights of a child and heir of the adopting parent,' continues, 'Provided, that if such adopting parent shall have other children, the adopted shall share the inheritance only as one of them; in case of intestacy, he, she, or they, shall respectively inherit from and through each other as if all had been the lawful children of the same parent.'" 213 Pa. 89, 62 Atl. 256.

Pennsylvania has placed qualifications on the right of an adopted child to inherit from the adopting parent, and out of those qualifications the Pennsylvania court deduced its rule.

Outside the statutory restrictions in Indiana, Massachusetts, and Pennsylvania, limiting the right of an adopted grandchild to inherit from its adopting grandparent, the rule declared by the courts of those states appears to have been followed for the purpose of avoiding the incongruity that is presented by an adopted child inheriting more

than a natural child of the grandparent, but the reasons given for the conclusions that were there reached are not convincing. The logic found in *Wagner v. Varner*, 50 Iowa, 532, is better. The Iowa court said:

"In the absence of a will the estate descends in equal shares to the children of the deceased. Code, § 2453. If one of the children of the deceased 'be dead, the heirs of such child shall inherit his share * * * in the same manner as though such child had outlived his parents.' Code, § 2454.

"Under section 2310 the wards of the plaintiff inherit as the children by adoption of John Bumer, and if Mahala Boyer had outlived him she would have inherited as the natural child of said Bumer, under section 2453; and section 2454 expressly provides that her children shall inherit in the same manner as though she had outlived her father. There is no escape from this conclusion, unless it can be said that the child by the adoption is disinherited by its natural parent.

"Because of the adoption the child acquires certain additional rights, but there is nothing in the act of adoption which, in and of itself, takes away other existing rights, or such as may subsequently accrue, except as is by statute provided.

"The argument that these children cannot inherit through their mother leads to this result. Suppose their father after her death consented to their adoption, they could not inherit through their mother or from their father, or through him from a remote ancestor.

"By the act of adoption these children became in a legal sense the children of John Bumer. Nevertheless they are the children of their natural parents, and the act of adoption does not deprive them of the statutory right of inheriting from their natural parents, unless there is a statute which in terms so provides. Not only is there no such statute, but we think the contrary is expressly provided.

"If, therefore, a child is adopted by a stranger, it will inherit from its natural parents, in the absence of a will, because section 2453 of the Code in express terms so provides."

In each of these cases a grandchild had been adopted by its grandparent, and the right of the grandchild to inherit from its grandparent in a double capacity was involved. Extensive excerpts from these cases have been set out for the purpose of showing the reasoning by which the different conclusions were reached. The inequality in the present case is created by statute.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 33)

(198 P.)

STATE v. ROSELLI. (No. 22900.)*

(Supreme Court of Kansas. May 7, 1921.)

(Syllabus by the Court.)

1. Homicide \S 138 — Information sufficient without stating murder was committed in perpetration of robbery.

The defendant and a companion entered a merchant's store and proceeded to rob him. While the robbery was in progress, the defendant's companion shot and killed the merchant. *Held*, it was permissible to charge the defendant with murder in the first degree, by an information in the common form, without stating the murder was committed in perpetration of robbery.

2. Homicide \S 142(1) — Evidence sustaining allegations of information charging murder.

Evidence showing the murder was committed in perpetration of robbery sustained the allegations of the information.

3. Homicide \S 138—Charge of conspiracy between defendant and companion to rob and murder held unnecessary.

It was not necessary the information should charge conspiracy between the defendant and his companion to rob or to murder.

4. Criminal law \S 304(2)—Homicide \S 30(1) — Robbery \S 6 — Matter of common knowledge that display of personal violence to accomplish robbery tends to taking of life; if one of two robbers murders his victim, the other is guilty of murder; "robbery" a crime of violence used or threatened.

Robbery is a crime of violence used or threatened. It is a matter of common knowledge, derived from human experience, that a display of personal violence to accomplish robbery normally tends to the taking of life; and if, in execution of a common purpose of two persons to rob, one of them murder the victim, the other is guilty of murder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

5. Witnesses \S 277(4), 337(2, 5)—Subjects as to which accused may be cross-examined enumerated.

On cross-examination of the defendant, who was a witness in his own behalf, he was properly interrogated with respect to (a) subjects embraced in his direct examination; (b) the subject of his own criminal record; (c) the subject of his relation to robbers and other criminals who made his place of employment their rendezvous; and (d) subjects involving him in degradation and disgrace, although not pertaining to the robbery and homicide for which he was on trial, and although pertaining to the commission of other crimes.

6. Homicide \S 163(1)—Evidence against defendant's character inadmissible where character not in issue.

In rebuttal, evidence was offered and received relating to the reputation of the defendant's place of employment. The purpose, was to smirch the character of the defendant with

the character of the place where he worked, although he had not placed his character in issue. *Held* error.

7. Homicide \S 338(1)—Evidence erroneously admitted to attack defendant's character held harmless.

The evidence referred to was too weak to accomplish its purpose. *Held*, the error was not prejudicial.

8. Homicide \S 308(5)—Instruction as to murder in second degree held properly denied.

The defense was that, when the merchant was robbed and killed, the defendant was at work at the place of his employment in Kansas City, Mo. The evidence was conclusive that, if he were present when the crime was committed, he and his companion were engaged in robbery. *Held*, a request for an instruction relating to murder in the second degree was properly denied.

9. Assignments of error.

Minor assignments of error considered, and *held* to be without substantial merit.

Appeal from District Court, Wyandotte County.

Mike Roselli was convicted of murder in the first degree, and he appeals. Affirmed.

See, also, 106 Kan. 689, 189 Pac. 136.

Hogin & Hubbard, of Kansas City, for appellant.

Richard J. Hopkins, Atty. Gen., and E. A. Enright, of Kansas City, for the State.

BURCH, J. The defendant was convicted of murder in the first degree, and appeals.

On the evening of March 18, 1919, as C. P. Jehu was preparing to close his grocery store in Kansas City, Kan., George Becker rushed in at the front door, flourishing a revolver, and said, "Stick them up boys; no fooling; we mean business." Several persons were in the store, and Becker's command was obeyed by all except Jehu. Jehu had just taken money from the cash register and put it in a sack which he placed in his sweater pocket. Becker went toward him, and as he retreated to the rear of the store Becker shot him twice. While Becker was moving toward Jehu, the defendant entered the store, flourishing a revolver. He covered the persons who had their hands up, searched a man standing by the stove near the center of the store, and then went to the place where Jehu was lying. Meanwhile Becker returned to the cash register. There was evidence the defendant struck Jehu, who was still alive, on the head with a revolver, and took the sack of money from Jehu's pocket. Becker asked the defendant if he had the money, and the defendant said "Yea." The two then backed out of the store, went up the street, and entered a waiting automobile. The defense was that, when the killing oc-

curred, the defendant was at work at 614 Independence avenue, Kansas City, Mo., where he was regularly employed. There was evidence no marks were found on Jehu's head, and there were some slight discrepancies in the evidence relating to some of the details of the event. There was, however, ample evidence to identify the defendant as Becker's companion, and the state's evidence left no room for any doubt about the material facts of the robbery and homicide.

[1, 2] The information charged a malicious, willful, deliberate, premeditated killing by Becker and the defendant, without stating the murder was done in perpetration of robbery, and it is said proof of killing in perpetration of robbery did not correspond to the allegations of the information.

The sections of the statute relating to the crime of murder follow:

"Every murder which shall be committed by means of poison or by lying in wait, or by any kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration [or] an attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree.

"Every murder which shall be committed purposely and maliciously, but without deliberation and premeditation, shall be deemed murder in the second degree.

"Persons convicted of murder in the first degree shall be punished by confinement and hard labor in the penitentiary of the state of Kansas for life. Those convicted of murder in the second degree shall be punished by confinement and hard labor for not less than ten years."

"Gen. Stat. 1915, §§ 3367, 3368, 3369.

On numerous occasions this court has adverted to the fact that the statute does not define murder, and that the basis of the legislation is murder at common law. For purpose of punishment murder is divided into two degrees, depending on the presence or absence of deliberation and premeditation. Every murder committed by any kind of willful, deliberate, and premeditated killing is murder in the first degree. Use of poison, lying in wait, and killing in perpetrating or attempting to perpetrate arson, rape, robbery, burglary, or other felony are statutory equivalents for the deliberation and premeditation essential to murder in the first degree. All other murders are murders in the second degree.

The Code of Criminal Procedure requires an information to be definite and certain respecting the crime charged, and requires a statement of the facts constituting the offense. There is no substantial dispute in the authorities that, under a crimes act of the character described, these requirements are satisfied by pleading murder in the first degree in the common form. Deliberation and premeditation are ultimate facts. When alleged they denote murder in the first degree, and they may be established by proof of murder committed in perpetrating a fel-

ony, without pleading the particulars. Cases are collated in 10 Enc. Pl. & Pr. 150, note 5; 2 Supp. Enc. Pl. & Pr. 636; 21 Cyc. 870, notes 82 and 84; 63 L. R. A. 393, note. Later cases discussing the principle are *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *People v. Friedman*, 205 N. Y. 161, 98 N. E. 471, 45 L. R. A. (N. S.) 55; *People v. Patini*, 206 N. Y. 176, 101 N. E. 694; *Holmes v. State*, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300; *Turner et al. v. State*, 8 Okl. Cr. 11, 128 Pac. 452; *State v. Farnam*, 82 Or. 211, 161 Pac. 417, Ann. Cas. 1918A, 818.

In the case of *State v. Keleher*, 74 Kan. 631, 87 Pac. 738, it was said:

"Proof that a homicide was committed in the perpetration of a felony is held tantamount to the premeditation and deliberation which otherwise would be necessary to constitute murder in the first degree." 74 Kan. 635, 87 Pac. 739.

[3] The defendant says that the information did not charge a conspiracy between the defendant and any one else to rob or kill Jehu, and without such a pleading the defendant could not be convicted of murder on evidence showing Becker did the killing. It was not necessary to plead conspiracy in terms. *State v. Roberts*, 95 Kan. 280, syl. par. 2, 147 Pac. 828; 16 C. J. 647, § 1284. All participants in a crime are equally guilty, without regard to the extent of their participation. It was sufficient to charge directly those concerned with the crime, and if, in execution of a common purpose to rob, one of them did the killing, the other would be guilty of murder.

The defendant was a witness in his own behalf. He came to Kansas City, Mo., from Denver, Colo., on the last day of December, 1918, and worked at 614 Independence avenue until he was arrested in April, 1919. The place was a cigar store, with tables for card playing, and the defendant had charge of cigar, sandwich, and candy cases. He said he was 20 years old at the time of the trial, and his name was Mack Roselli, but he had always gone under the name of Mack Ross. He came to Kansas City with Carl West. West was arrested in February, 1919, for beating to insensibility and then robbing a man named Peterfreund, in Kansas City, Kan., and was lodged in jail in that city. The defendant visited him while he was in jail. George Casey was implicated in the Peterfreund robbery, and the defendant was with Casey when the latter was arrested. Casey's sister and Casey's "girl" told the defendant he had better get away, and Luke Maturi advised him to leave, but he did not go. The defendant was arrested in Missouri, and was identified in the show-up room in the Kansas City, Mo., police station. The defendant testified that a police officer, who was present at the time, said to him, "This is Mike Roselli, known as Cokey Mike, all over, to the police, and he is wanted in

Kansas." The defendant had a friend, Ross Bonuri, who was implicated in the Peterfreund robbery. The two were in the Missouri police station together, and were brought to Kansas at the same time. When first brought to Kansas the defendant was held in the Kansas City police station. While there an officer inquired if he knew Becker. The defendant denied acquaintance with Becker, and the officer then said, "Don't you know him? he killed a man in St. Louis and one here in Kansas City."

[5] On cross-examination the defendant was asked if he did not, while in Denver, sell cocaine, procured by acting as a fence, and if he did not acquire the cognomen of Cokey Mike from that fact. He was asked if he had not been convicted of robbery in Colorado and confined in a reformatory there, if he had not been paroled, and, if he did not break his parole. To all these questions negative answers were returned. The defendant's alibi rested on his own and other testimony that he worked every day from 5:30 p. m. until midnight at 614 Independence avenue. He met Casey, Bonuri, and others implicated in the Peterfreund robbery and other crimes at that place. Searching inquiry was made respecting his association with these criminals, and questions were asked indicating that the place was their rendezvous. The defendant did not admit knowledge of the Peterfreund robbery on the night it occurred. He did admit that those who committed the crime set out from 614 Independence avenue, and afterwards all came in together, "one night." He denied knowledge of the fact that Becker had killed and robbed a druggist and was in the penitentiary. He said Mabel Trimble was "a girl" of his. He was asked if she were not the wife of another man, and he said he did not know. He was then asked if he did not solicit her to go on the street as a street-walker and obtain money for him. The record does not disclose an answer to the question.

Objection was made to the greater part of the cross-examination which has been outlined. The defendant introduced the subject of names by which he was known, and cross-examination in respect to that matter was proper. The other subjects were all proper subjects of cross-examination. The defendant's own criminal record, if he had one, and his relation to a gang of criminals of the beating, killing, robbing type, who frequented his place of business, were open to inquiry. If the imputations respecting the Trimble woman were true—and the questions regarding the matter were evidently propounded in good faith—the defendant was too despicable to be worthy of belief. The purpose of the cross-examination was to discredit the defendant's testimony by discrediting him. To that end he might be required to give an-

swers which would degrade and disgrace him, although not pertaining to the robbery and homicide for which he was on trial, and although pertaining to the commission of other crimes. This rule of criminal evidence was carefully considered in the case of *State v. Pfefferle*, 86 Kan. 90, 12 Pac. 406, and has been applied in a long line of subsequent cases, extending to that of *State v. Bowers*, 108 Kan. 161, 194 Pac. 650. The defendant relies on such cases as *State v. Boyland*, 24 Kan. 186, *State v. Kirby*, 62 Kan. 436, 63 Pac. 752; and *State v. Wheeler*, 89 Kan. 160, 130 Pac. 656. In the *Boyland* Case the prosecuting witness testified to shameful words and deeds of the defendants, said and done several days after the alleged offense. In the *Kirby* Case the defendant's wife was cross-examined in reference to other and distinct offenses committed by the defendant, not by the witness. In the *Wheeler* Case the state as a part of its case in chief produced evidence tending to prove offenses by persons with whom it was not shown the defendant had associated or conspired. Cases such as these have no application whatever to cross-examination of a defendant who offers himself as a witness.

[6, 7] In the course of the defendant's cross-examination some questions were propounded which were not warranted by the rule just discussed. They were not of sufficient importance to be harmful. The county attorney, however, transgressed the limits of propriety in offering, and the court committed error in receiving, evidence on the part of the state in rebuttal relating to the reputation of the place referred to as 614 Independence avenue. The purpose was to smirch the character of the defendant with the bad character of the place where he worked. The state was bound by the defendant's answers, given on cross-examination, unless and until he placed his character in issue. He did not place his character in issue, and the state had no right to make a general attack on it. The judgment would be reversed because of this error, if it were not for the fact the evidence did not aid the state's case. The place was frequented chiefly by Italians. "The boys" played cards there. Although the reputation of the place was not very good, it was not any worse than many others in the city, and the place had never been raided. Some of the perpetrators of the Peterfreund robbery were arrested there. This being the substance of the evidence, it cannot be said the error resulted in substantial prejudice to the defendant's rights.

Complaint is made that the court refused an instruction to the jury on the subject of conspiracy. The jury was properly instructed according to the theory of the information which has been approved.

[4] In the instruction given relating to the defendant's responsibility for killing done by Becker, the court said, in effect, that if, in execution of a common intent and purpose of the defendant and Becker to rob Jehu, Becker killed Jehu, the defendant would be guilty of murder in the first degree if, when tested by human experience, a natural and probable result of the robbery would be the taking of human life. Complaint is made because the court used the expression "when tested by human experience." It is said the jury were not told to use knowledge and experience they possessed in common with mankind, but were invited to resort to the abstract thing, "human experience." The complaint is hypercritical. The meaning of the instruction was the same as though the expression had been omitted. If the expression had been omitted, the instruction would have been in the common form, when probable outcome of a felonious enterprise is to be considered. Robbery is a crime of violence used or threatened. It is a matter of common knowledge, derived from human experience, that a display of personal violence to accomplish robbery normally tends to the taking of life, and under the evidence in this case the jury could make no mistake about it.

[8] Complaint is made that the court refused to instruct the jury with reference to murder in the second degree. There was no evidence on which to base such an instruction. The defendant was either present and participated in the robbery, or he was at 614 Independence avenue in Kansas City, Mo. If in Missouri, he was entitled to a verdict of acquittal. If in Jehu's store, he was engaged in perpetrating the robbery in which the murder was committed, and that deliberation and premeditation which must be utterly absent in second degree murder was incontestably present. It is true that generally a charge of murder in the first degree in the common form will include a charge of murder in the second degree, and the court must instruct the jury on all matters of law necessary for its information in returning a verdict; but the court is not required to instruct with reference to a lesser degree unless there be evidence warranting a reasonable inference of guilt in that degree. In this instance there was no opportunity for even capricious acceptance and rejection of evidence by the jury in such a way as to leave a residuum on which to predicate murder in the second degree. Every person in Jehu's store who survived the robbery gave an account of it which made the defendant guilty of murder in the first degree, and the court was not authorized to license the jury to indulge in

speculation leading to a conclusion not justified by the evidence.

An argument is made relating to proof of guilt of a principal in the first degree, before a principal in the second degree may be convicted, based on the following statutes:

"Every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall upon conviction be adjudged guilty of the offense in the same degree and be punished in the same manner as herein prescribed with respect to the principal in the first degree."

"Any person who counsels, aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were a principal."

Gen. Stat. 1915, §§ 3332, 8029.

The purpose of these statutes was to get rid of the subtle common-law distinctions between principals in the first and second degrees and accessories, and to permit trial and punishment of participants in a crime independently of each other. *State v. Bogue*, 52 Kan. 79, 34 Pac. 410. It was not necessary that Becker be tried and convicted before the defendant could be placed on trial, and in the defendant's trial, order of proof was not important.

[9] It is argued that, because the defendant was charged jointly with Becker, he was entitled to be tried jointly with Becker, unless he chose to demand a separate trial. The statute gives the court control over the subject, unless a separate trial be demanded, in which event the defendant requiring it shall be granted a separate trial. Gen. Stat. 1915, § 8139. An article of clothing worn by Jehu when he was shot was properly introduced in evidence. Instructions relating to malice and to deliberation and premeditation did not confuse the two subjects. A misstatement in argument by the county attorney of the penitentiary of which West was an inmate was not a serious matter. The county attorney's characterization of 614 Independence avenue and of its habitues had a basis in the evidence, and the jury was able to distinguish between fact and argumentative extravagance. The defendant and Becker used an automobile in departing from the scene of their crime, and the county attorney's comments on use of high-powered motorcars by assassins rushing out from 614 Independence avenue had a relation to the case, though somewhat "high-powered."

The judgment of the district court is affirmed.

All the Justices concurring.

(100 Or. 435)

MANSKER v. CITY OF ASTORIA et al.*

(Supreme Court of Oregon. May 17, 1921.)

1. Cemeteries ⇨3 — Charter amendment held not to divest city council of all authority over cemetery.

The power of the city council of Astoria over cemeteries under Sp. Laws 1855-56, p. 4, Laws 1876, p. 117, and Charter, § 52, giving the council power to provide cemeteries and to regulate the burial of the dead, found in Laws 1899, p. 761, was not entirely divested by the charter amendment of 1910, which declared that the power and authority over cemeteries should be exercised by a commission, etc., and, while the commission may exercise all powers specially delegated, the residuum of powers remains in the city council.

2. Cemeteries ⇨15—Grantee of cemetery lot does not take fee simple.

A conveyance of a cemetery lot as a place of burial for the dead does not vest the grantee with fee-simple title in the lot, but gives rights analogous to an easement or a privilege; the right of burial being a privilege or license to be enjoyed so long as the place continues to be a burying ground subject to municipal regulation and control and legally revocable whenever the public interest requires.

3. Cemeteries ⇨16 — Conveyance of burial ground passes license to make interments so long as the place remains a cemetery.

The conveyance of a plot of ground for burial purposes, though not transferring an absolute right of property, passes a privilege or license to make interments in the plot purchased exclusive of others so long as the place remains a cemetery.

4. Cemeteries ⇨15—Conveyance of burial lot includes more than mere right of depositing dead bodies.

The privilege or license created by the conveyance of a burial lot, in the absence of express restriction, includes more than the mere naked right of depositing dead bodies in the ground, for with the right is included the right to interment according to usual custom and the right of the living to express their affection and respect of the dead by decorating the place of interment.

5. Cemeteries ⇨17—Purchaser and successor are entitled to care for the lot.

The purchaser of a burial lot and those who succeeded to his rights are entitled to exercise the right to care for the lot, and to exercise that right are entitled to reasonable access.

6. Cemeteries ⇨17—Purchaser may improve by himself or agent.

A purchaser of a cemetery lot may improve it, etc. either in person or by agent.

7. Cemeteries ⇨20—Purchaser of lot may recover for or restrain desecration or disturbance of rights.

The right vested in the purchaser of cemetery lot is entitled to protection, and he may recover damages for any desecration or any unlawful disturbance of a grave and may invoke

the aid of equity to restrain threatened wrongful acts.

8. Cemeteries ⇨16—Rights of burial subject to regulation promulgated by proprietor of cemetery.

The right of burial is usually deemed to be subject to the reasonable rules and regulations promulgated by the proprietor of the cemetery.

9. Cemeteries ⇨1—Rules of proprietor must be equal, uniform, and reasonable.

All rules and regulations by the proprietor of a cemetery must be equal, uniform, and reasonable.

10. Cemeteries ⇨17 — Regulation requiring lot owner to provide fund for permanent maintenance unreasonable.

Rule by cemetery commission under Astoria Charter, § 51, requiring prior purchasers of lots to deposit a fund sufficient to care for their lots perpetually, which deprived the owners of lots of the right to care for the same and required them to be cared for under a park plan, is unreasonable and void, and the refusal of burial permits to compel compliance therewith may be enjoined; for the regulation is unreasonable and cannot be justified even under the police power.

11. Cemeteries ⇨17—Proprietor not entitled to compel lot owner to provide fund for permanent maintenance.

Though a burial lot in a cemetery was conveyed subject to rules and regulations, the municipal proprietor cannot by virtue of such reserve power compel the purchaser to provide a permanent fund for caring for the lot.

12. Cemeteries ⇨15—Purchaser cannot exercise his rights to injury of others.

The purchaser of a cemetery lot must not exercise his rights so as to injure others.

13. Cemeteries ⇨3—Proprietor is entitled to general control.

Where burial lot was sold subject to rules and regulations, the municipality which was proprietor has general control over the grounds, and, if a purchaser of a burial lot by failing to act or acting wrongfully injures the rights of others, the city may resort to its right of general control to avail itself of the remedy.

14. Cemeteries ⇨18—Offensive inscriptions can be prevented.

Offensive inscriptions on a monument can be prevented.

15. Cemeteries ⇨18 — Improper monuments cannot be erected.

A purchaser of a burial lot cannot erect improper monuments.

16. Cemeteries ⇨17—If a burial lot is unkept, the proprietor may remedy the condition.

If a burial lot becomes unsightly by reason of weeds, the proprietor of the cemetery can cause the condition to be changed.

17. Cemeteries ⇨18—Proprietor can compel restoration or removal of ruinous monuments.

If any of the markers or monuments on a cemetery lot fall into a ruinous condition so as to disfigure the rest of the cemetery, the pro-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Petition for rehearing denied 199 Pac. 381.

prior may cause them to be repaired or removed.

18. Cemeteries ¶17 — Regulation requiring payment of fund to care for cemetery lot cannot be sustained because it might subsequently become overgrown.

Where plaintiff's lot was not overgrown with weeds or brush, and in fact seemed too bare of growth, a regulation of the municipal cemetery commission requiring plaintiff to furnish a fund to perpetually care for the lot and keep it free from weeds and brush cannot be sustained on the theory that it might in the future become overgrown.

Department 1.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by Mrs. Thomas J. Mansker against the City of Astoria and others. From decree for plaintiff, defendants appeal. Affirmed.

This suit was brought by Mrs. Thomas J. Mansker against the city of Astoria and the members of the city's cemetery commission. The plaintiff prayed for a decree invalidating a charge of \$77.45 attempted to be made by the cemetery commission against a lot in the cemetery which the plaintiff had previously purchased from the city for burial purposes and for which she paid the full purchase price. A trial resulted in a decree for the plaintiff, and the defendants appealed.

At some time prior to 1886 the city of Astoria, in the exercise of the power conferred upon it by the Legislature, bought a tract of land to be used as a cemetery. The tract embraces about 80 acres and is located about 12 miles west of Astoria. The distance from the north to the south end is considerably longer than it is from the east to the west side. The cemetery was called Ocean View Cemetery, and it was placed in charge of a committee appointed by the mayor from the members of the council and known as the committee on public property. From the date of the opening of the cemetery until about 1904 all interments were made in the south end only of the cemetery. The climatic conditions prevailing near the coast where the cemetery is located are such that wherever the soil is fertile and free from shifting sands one may expect to find grasses, weeds, ferns, shrubs, and trees growing in profusion and with unusual rapidity. The soil in the south end of the cemetery seems to be very fertile, for the evidence shows that the conditions in the south end are such that, if a plot of ground is neglected for even so much as a year, ferns, salmon berry bushes, scotch broom, trees, and weeds will sprout up, and at the end of only a few years the plot will be covered up by what some of the witnesses have termed "a jungle." It appears that when the cemetery

was first opened interments were made in the south end and continued to be made in the south end exclusively until about 1904, when the committee on public property discontinued issuing permits for burials in the south end and required all interments to be made near the center of the cemetery. Some of the plots were cared for by those having relatives or friends buried in the south end, but about half of the plots in which interments had been made were neglected; and the result was that the south end in appearance was much like a checkerboard, for scattered here and there were lots kept neat and clean and between and around these lots were an equal number covered with scotch broom, trees, weeds, vines, and shrubs. Because of this condition prevailing at the south end of the cemetery the committee on public property about 1904 caused an area of approximately 10 acres to be cleared off near the center of the cemetery, and thereafter no permits were issued for burials in the south end, or "the old part," as the south end was then called; and thenceforth the interments were made in the "new part" which had been cleared off near the center of the cemetery. All those who held lots in the "old part" were permitted to exchange those lots for the same sized lots in the new part. Many and probably most of the persons having lots in the old part took advantage of this opportunity to exchange; and in cases where such exchanges were made bodies buried in the "old part" were exhumed and reburied in the new part; so that in 1919 the date of the trial, only between 50 and 100 bodies remained buried in the "old part."

Apparently the committee on public property was not able, because of other duties, to give such time and attention to the cemetery as its needs seemed to demand; and for that reason the charter was amended by the legal voters of Astoria in the exercise of the initiative on December 14, 1910. The amendment placed the management of the cemetery in the hands of the cemetery commission composed of five persons, appointed by the mayor; and since the adoption of the charter amendment the cemetery has been in charge of the cemetery commission.

Owners of lots in the "new part" did as the owners had done with their lots in the "old part." About half of the lots received attention, but the remainder were neglected. Some of the lots which were cared for received slight attention, while others were kept in good condition. Some of the lot owners employed the superintendent of the cemetery to care for their lots. A portion of the lot owners employing the superintendent to care for their lots paid for ordinary care while others paid for extra care; and accordingly some lots received

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only ordinary care while the others received extra care. The funds in the hands of the commission were derived from taxes and from the sale of lots. But the cemetery commission says that these funds can be and have been used only for general cemetery purposes, such as caring for roads, avenues, pumping plant, salary of superintendent, and the unsold portion of the cemetery. The commission takes the position that none of the funds held by it can be lawfully used in caring for lots which have been conveyed by the city to private persons for burial purposes.

As a remedy for the unsatisfactory conditions then existing, the commission conceived a plan which the parties have referred to as the endowment plan. In 1917 the commission caused the superintendent of the cemetery to go over the grounds and make an estimate of how much it would cost each year to care for each of the lots in the cemetery, including both the sold and unsold lots. The services of a landscape gardener were enlisted, and he made a survey and estimate of the expense of keeping up the lots. The city engineer went over the grounds and made a report. The commission sought and received information from persons in charge of other cemeteries. Based upon these reports and this information, the commission made its calculations. The course pursued in making the estimate for lot 1 in block 1 will illustrate the course pursued with all other lots. The estimated annual cost of keeping this lot in condition was, we shall assume, \$3; and therefore, figuring 5 per cent. as the rate of interest, this being the rate used by the commission in its calculations, the principal sum of \$60 was found to be necessary to produce an annual increment of \$3. Inasmuch as no interest would be received the first year, an additional charge of \$3 was made to cover the expense incurred the first year. In the case of this lot, as with all other lots, some expense would be incurred in leveling the surface of the lot; and this expense was estimated at \$3. This was the method followed with all lots including the sold and unsold lots. Lot No. 1 was an unsold lot; and therefore to the foregoing items was added \$20 as the price of the lot itself, making an aggregate of \$86 as the sum paid by the person who afterwards acquired the lot. Of this sum of \$86 so received by the commission, \$60 was set aside as an irreducible and perpetual fund. No part of this irreducible fund except the interest arising out of it is available for keeping up the lot.

The commission did not in the beginning apply the endowment plan to any lots except those which were sold subsequently to the adoption of the plan. However, at the end of about a year, or on June 25, 1918, the commission adopted a resolution making the

plan applicable to lots which had been sold prior to the adoption of the plan.

On January 5, 1912, the plaintiff purchased from the city a plot 16x20 feet in area. She paid the purchase price of \$18, received a conveyance, and immediately buried the body of her husband. The charge made against the Mansker lot under the resolution of June 25, 1918, was \$77.45.

The resolution of June 25, 1918, declares that—

"Whereas, the commission deems it wise at this time, on account of having placed all lots hereafter sold in said cemetery on the endowment plan for perpetual care, that all moneys paid by owners of lots in said cemetery for the care thereof be paid to the clerk of the commission in endowment so that the same may be properly accounted for in accordance with estimates recently prepared and adopted at meetings held August 14, 1917, and September 11, 1917, October 9, 1917, and that the superintendent in the future give his undivided time and attention to the cemetery work as provided in paragraph 3, page 4, of the rules and regulations for the government of city cemeteries:

"Therefore be it resolved that hereafter the superintendent of Ocean View Cemetery be and he is hereby required as provided under paragraph 3, page 4, of the rules and regulations for the government of the city cemeteries to give his undivided time and attention to the cemetery work as provided under the rules and regulations for the government of the city cemeteries and under the direction of the commission, and that in the future he shall not receive or accept any money whatsoever from any person or persons owning lots or plots in said cemetery, but shall refer all persons requesting his assistance in the decoration or improvement of any lot or parcel of land within the cemetery to the clerk of the cemetery commission, who will thereupon inform the applicant of the rules and regulations now in force in relation thereto and request that he pay the sum apportioned to such lot for the perpetual maintenance thereof as set forth in the schedule of costs as adopted by the cemetery commission at meetings held August 14, 1917, and September 11, 1917, October 9, 1917, and which is hereby made a part of this resolution."

The resolution further provided:

That the charges made against lots previously sold could be paid at once or in installments, but if paid in installments the whole sum "must be paid" on or before December 31, 1919, "and failing to make said payment the commission will refuse permits for future interments in said lots, and the clerk shall not issue a permit unless at least one-half of said sum has been paid and in accordance with the provisions of the deed under which the lots were sold; and the refusal, neglect, or failure of owners to care for their lots properly shall annul all their rights therein and said lots shall revert to the city of Astoria for its sole use and benefit."

The resolution also contained the following provisions:

"The perpetual care and maintenance of all lots endowed as above described shall consist of keeping them sown in grass, which shall be kept watered and trimmed and all avenues surrounding them properly designated and free from obstructions. All monuments and markers shall be kept in proper positions, and no one shall be permitted to make any alterations or additions to the now existing monuments or markers, or surface of soil, without first obtaining permission therefor from the cemetery commission.

"The owner or agent of owner of any lot who may desire special and extra care be given his lot shall make application therefor in writing to the clerk of the cemetery commission and the said clerk shall submit the same to the cemetery commission who may make suitable arrangements therefor."

The plaintiff's father died; and on March 3, 1919, the plaintiff applied for a permit to bury his remains in her lot. With her application she tendered a fee of \$5 required by the rules and regulations for opening and closing the grave. She had not paid any part of the charge of \$77.45 made against her lot, and on that account the commission refused to issue to her a permit. She then brought this suit to enjoin the defendants from enforcing the resolution of June 25, 1918, and to restrain them from interfering with the interment of her father's remains in her lot. A preliminary injunction was granted upon her application, and under its protection the body of the plaintiff's father was interred.

The answer questions the regularity of the conveyance received by the plaintiff, because of the fact that it was signed by the mayor and by the auditor of the city instead of by officers of the commission. However, at the hearing in this court we understood counsel for the defendants to say that the defendants waived any question about the regularity of the instrument in this respect; and hence we shall not give this feature of the paper any further notice, but shall assume that the instrument is as effective as it would have been if signed by the officers of the commission.

A proper understanding of the questions presented for decision cannot be acquired unless we first inform ourselves of such charter provisions as are material to the controversy. We must also acquaint ourselves with the form of contract which, under a resolution passed on August 14, 1918, the commission adopted as the contract to be signed by the commission and persons who had purchased lots prior to the adoption of the endowment plan.

The territorial charter and the first state charter, in brief terms, empowered the city to purchase, receive, and hold property beyond the corporate limits for burial purposes. Special Laws 1855-56, p. 4; Laws 1876, p. 117. Subsequently the charter provision

relating to cemeteries was changed so as to read as follows:

"The council has power and authority within the city of Astoria: * * *

"52. To provide cemeteries and to regulate the burial of the dead, and shall have power to establish cemeteries or burial grounds within or without the city limits, and have authority and jurisdiction over the same, necessary to the safety, preservation, regulation and ornament of the same."

Laws 1891, § 38, subd. 52, p. 291.

See, also, Laws 1899, p. 761.

So far as we are advised, no change was made in this provision of the charter until December 14, 1910, when the legal voters of Astoria amended section 38 of the charter, so far as it appertained to cemeteries, and as so amended the charter reads as follows:

"The council has power and authority within the city of Astoria: * * *

"51. To provide cemeteries and to regulate the burial of the dead, and shall have power to establish cemeteries or burial grounds within or without the city limits and have authority and jurisdiction over the same necessary to safety, preservation, regulation and ornamentation of the same. The power and authority over said cemeteries or burial grounds shall be exercised by a commission to be known and designated as the cemetery commission, consisting of five members who shall be appointed by the mayor. * * *

"Said cemetery commission shall have power and is hereby authorized and empowered to levy a tax of not exceeding one-half ($\frac{1}{2}$) of a mill on each dollar of taxable property in the city of Astoria, at the time and in the manner as other taxes of the said city are levied. The funds derived from the levy and collection of the said tax shall be placed in the hands and control of the said cemetery commission, and shall be used exclusively for cemetery purposes and in maintaining, repairing, beautifying, equipping and ornamenting such cemeteries or burial grounds and for the building and maintenance of the proper pumping plants and other devices for the purpose of irrigating said cemeteries or burial grounds, and other needful or convenient appliances or devices for use in said cemeteries and for the care and preservation thereof. * * *

"The treasurer shall be the custodian of all funds and shall pay the same out only upon warrants properly signed by the president or acting chairman and attested by the clerk.

"Said cemetery commission shall have authority through its president or acting chairman and clerk to sell all lots, blocks and plats in said cemeteries for burial purposes, and execute and deliver good and sufficient deeds of conveyance of the customary title thereof in the name of the city of Astoria; but before the president or acting chairman, and clerk shall be privileged to sell or otherwise dispose of any of such lots, blocks or plats, the commission shall carefully appraise and adopt and make known the value placed thereon; and it shall be the duty of the commission to make such appraisements as often as may be necessary

from time to time. It shall also make and publish rules and regulations governing burials, structures permitted in said cemeteries, and on all proper matters, and shall also make and adopt by-laws for its own governance and procedure.

"Said commission shall make an annual report to the common council of all funds levied by it in taxation, and of all funds secured by taxes from the sale of lots and blocks or otherwise, the number of lots and blocks sold and of all expenditures and disbursements in detail.

"The city auditor and police judge, the city treasurer, the city attorney and the city engineer shall be the clerk, the treasurer, the attorney, and the engineer respectively for the commission, and they shall render such services as they may be called upon for, from time to time, without additional compensation other than their regular salaries as such city auditor and police judge, city treasurer, city attorney and city engineer."

The form of contract adopted by the commission was such as to obligate it, in consideration of the payment of the charge made against a given lot, "perpetually to care for and keep the same [the lot] under the park and lawn plan, now in general use by the cemetery associations."

The instrument by which the city conveyed lot No. 57 in block No. 47 to the plaintiff for burial purposes declares that the city does—

"hereby grant, bargain, sell and convey to said grantee the perpetual use and occupancy, for the purpose hereinafter mentioned, of the following described parcel of land. * * *

"To have and to hold the said use and occupancy of said premises and the privilege thereof unto the said grantee, and to his heirs, administrators, executors, and assigns forever, for the sole purpose of a place of burial for the dead, which use and occupancy by the said grantee shall be at all times in strict conformity to the laws of the state of Oregon, and the ordinances, rules, and regulations of the said grantor, now or hereafter existing, with reference to said cemetery, it being expressly understood, and this conveyance is executed and delivered with the express reservation by the grantor, that if said premises shall at any time be used, or attempted to be used, by any person or persons whomsoever, for any other purpose than as herein set forth, the use, occupancy, rights, and privileges granted herein shall immediately terminate."

Edward E. Gray, of Astoria (Olof Anderson, City Atty., of Astoria, on the brief), for appellants.

A. W. Norblad, of Astoria (Norblad & Hesse, of Astoria, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1] The defendants have taken the position that all the power over cemeteries which prior to the charter amendment of December 14, 1910, was vested in the common council was by that amendment taken from the council and conferred upon the cemetery

commission, and that therefore, if the cemetery commission adopted a regulation concerning a particular subject, "the common council cannot enact a valid ordinance to the contrary." In other words, the defendants say that, if the powers conferred upon the city are broad enough to support the adoption and enforcement of the endowment plan, then it must follow as a necessary conclusion that the acts of the cemetery commission are lawful and enforceable, on the theory that all power over cemeteries was conferred upon and is exercisable by the cemetery commission.

In our view the council is not divested of all authority over cemeteries owned by the city. The first sentence of subdivision 51 of section 38 of the present charter is exactly the same as subdivision 52 of section 38 of the charter of 1891, except that the word "the" previously appearing before the word "safety" is now omitted, and the word "ornament" previously used has been changed to the word "ornamentation." Under the charters of 1891 and 1899 all authority over cemeteries was conferred upon the common council. The same words which, in the charters of 1891 and 1899 were used to vest the common council with authority over cemeteries were used in the charter when it was amended on December 14, 1910; and the new matter constituting the amendment, is merely an addition to the charter as it was before the amendment. It is impossible to say that the whole of municipal authority over the cemetery is vested in the cemetery commission, without ignoring and eliminating from the charter not only the words "the council has power and authority within the city of Astoria," but also the entire first sentence of subdivision 51 of section 38. Obviously the first sentence of subdivision 51 relates back to and must be connected with the words "the council has power and authority within the city of Astoria"; and when so connected the charter plainly says that the council has "authority and jurisdiction over" cemeteries, established by the city, "necessary to safety, preservation, regulation and ornamentation of the same." It is true that the amendment begins with the words, "The power and authority over city cemeteries or burial grounds shall be exercised by a commission;" but it is also true that the charter proceeds to detail and to particularize "the power and authority of the cemetery commission." The commission is empowered to levy a tax of not to exceed one-half of a mill, to convey lots, to make rules and regulations, and to do other specified things. The charter must, if possible, be so construed as to give effect to all the language found in it. If we adopt the construction suggested by the defendants, we can do so only by deleting a part of the charter. But we are not permitted to ex-

punge an entire sentence of subdivision 51 of section 38 of the charter; nor is it necessary to do so. The cemetery commission can exercise authority over the cemetery to the extent that the charter has particularized such authority. The commission is empowered to levy a tax; and the common council cannot deprive the commission of the power to levy such tax. The commission can adopt rules and regulations for the purposes specified in the charter; but the commission cannot, in the absence of authority conferred by the council or by the voters in the exercise of the initiative, exceed the authority which is particularized and specified by the charter. To the extent that the charter has particularized the powers of the commission, it can act independently of the common council; but the residuum of authority is vested in the common council. We need not at this time discuss any of the questions which might arise out of a conflict, whether seeming or actual, between an ordinance enacted by the council and a rule or regulation adopted by the cemetery commission. At present we content ourselves by saying that the charter has not shorn the council of all jurisdiction and then conferred the whole of it upon the cemetery commission. We shall assume, and we may add that we think, that the cemetery commission is acting within its prescribed authority when it sells lots under the endowment plan. But quite a different question is presented when we come to consider the authority of the commission to apply the endowment plan to lots which were sold before the endowment plan was adopted.

The concrete question for decision is: Can the commission by compulsion bring within the embrace of the endowment plan all lots which were sold prior to the adoption of the plan? In the discussion of this question we shall assume, without deciding, that if the municipality possesses power at all, it may be exercised by the commission, and we shall also assume, without deciding, that every resolution adopted by the commission concerning the endowment plan is a rule or regulation. At the very outset we naturally ask: What did the conveyance pass to the plaintiff? What rights did she acquire? What rights remained in the city after the conveyance?

[2] The conveyance received by the plaintiff did not vest her with the fee-simple estate in the lot, for by the terms of the instrument the lot was transferred to her as "a place of burial for the dead." The right or title acquired under a conveyance of a plot of ground for burial purposes is oftentimes likened to an easement, sometimes to the grant of a pew in a church, and occasionally to both an easement and a license, but probably most frequently to a license or privilege. Although the right created by the conveyance

of a lot for burial purposes is not one which, on the one hand, possesses all the inherent and essential qualities of an easement, and, on the other hand, is subject to the limitations and qualifications which control and govern a pure easement, it does possess many of the characteristics of an easement; and it likewise possesses some of the qualities of a license, although it is unaccompanied by some of the characteristics of a license and is unaffected by some of the qualifications and limitations which govern and control a pure license. And furthermore, when it is said that the right acquired by the purchaser of a burial lot bears an analogy to a pew tenancy, it must be remembered that the word "analogy" is used in its strict sense of denoting only a partial similarity, for the likeness between the two rights is not perfect. Occasionally the suggestion is made that a conveyance for burial purposes creates an estate in the nature of a qualified or base fee. The right with which we are now dealing is in reality sui generis, for the reason that the places where the dead sleep are by all human-kind treated as holy ground and by us are withdrawn from many of the rules which govern ordinary property; and consequently it is difficult to define or to describe such right when we use words which are usually employed in designating other rights possessing qualities in part similar and in part dissimilar to those inhering in the right of burial. One of the descriptions or definitions of the right of burial is as follows: The right of burial is a privilege or license, to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control, and legally revocable whenever the public interest requires. Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481; Kerlin v. Ramage, 200 Ala. 428, 76 South. 360, L. R. A. 1918A, 142; Green v. Danahy, 223 Mass. 1, 111 N. E. 675; Anderson v. Acheson, 132 Iowa, 744, 110 N. W. 335, 9 L. R. A. (N. S.) 217; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377; Clark v. Kenting, 183 App. Div. 212, 170 N. Y. Supp. 187; Grinnan v. Fredericksburg Lodge, 118 Va. 588, 88 S. E. 79, Ann. Cas. 1918D, 729. See, also, Roundtree v. Hutchinson, 57 Wash. 414, 107 Pac. 345, 27 L. R. A. (N. S.) 875. In Brown v. Hill, 284 Ill. 286, 119 N. E. 977, it is likened to an easement and is designated as a privilege or license. In some precedents it is referred to as an easement or a license. Nicolson v. Daffin, 142 Ga. 729, 83 S. E. 658, L. R. A. 1915E, 168; Stewart v. Garrett, 119 Ga. 386, 46 S. E. 427, 64 L. R. A. 99, 100 Am. St. Rep. 179; Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26. In the following adjudications the right of burial is either characterized as an easement or is said to be in the nature of an easement. Waldron's Petition, 26 R. I. 84, 58 Atl. 453, 67 L. R. A. 118, 106

Am. St. Rep. 688; *Angusta v. Bredenburg*, 146 Ga. 459, 91 S. E. 486; *Trefry v. Younger*, 226 Mass. 5, 114 N. E. 1033; *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769. The following are some of the cases which either affirm or deny that the right of burial is analogous to a pew tenancy, or affirm or deny that it is a qualified or base fee. *Silverwood v. Latrobe*, 68 Md. 620, 629, 13 Atl. 161; *Chew v. First Presbyterian Church (D. C.)*, 237 Fed. 219, 237; *Pitcairn v. Homewood Cemetery*, 229 Pa. 18, 20, 77 Atl. 1105; *Craig v. First Presbyterian Church*, 88 Pa. 42, 54, 32 Am. Rep. 417. See, also, note in 67 L. R. A. 119.

[3] Although the conveyance of a plot of ground for burial purposes does not transfer an absolute right of property, it does pass a privilege or license to make interments in the plot purchased, exclusively of others, so long as the place remains a cemetery. 11 C. J. 60.

[4] The privilege or license created by the conveyance, in the absence of express restrictions made at the time, includes more than the mere naked right of depositing a dead body in the ground; for with the right of interment are included the right to do so according to the usual custom in the neighborhood, the right to make mounds, and the right to erect stones and monuments at the graves. *Brown v. Hill*, 284 Ill. 286, 119 N. E. 977; 5 R. C. L. 247; 11 C. J. 62. A cemetery is not only a place where the living may bury their dead, but it is also a place where they may express their affection and respect for those dead by marking and decorating the place of interment. *Ex parte Adlof*, 86 Tex. Cr. R. 13, 215 S. W. 222.

[5] The purchaser of a lot and those who succeed to his rights are entitled to continue to exercise the right to care for the lot, and in order to exercise that right are entitled to reasonable access to the lot.

[6] The purchaser of the lot can improve it by placing material upon it or removing material from it, if reasonably necessary; and, although the precedents are not entirely in harmony, the better rule in our view is that the purchaser of a lot may exercise the right to improve it either in person or by an agent.

[7] The right vested in a purchaser is one which like every other right is entitled to the protection of the law; and the purchaser or those succeeding to his interest may recover damages for any desecration or unlawful disturbance of a grave and may likewise when necessary invoke the restraining hand of equity, whether the wrongful act is done or threatened to be done by either a stranger or the proprietor of the cemetery. *Bessemer Land & Improvement Co. v. Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377; *Anderson v. Acheson*, 132 Iowa,

744, 110 N. W. 335, 9 L. R. A. (N. S.) 217; *Trefry v. Younger*, 226 Mass. 5, 114 N. E. 1033; *Graves v. City of Bloomington*, 67 Ill. App. 493; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

[8] The right of burial is usually deemed to be subject to reasonable rules and regulations promulgated by the proprietor of the cemetery. 5 R. C. L. 245; *Nicolson v. Daffin*, 142 Ga. 729, 83 S. E. 658, L. R. A. 1915E, 168; *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769; *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685; *Johnstown Cemetery Association v. Parker*, 28 Misc. Rep. 280, 59 N. Y. Supp. 821, affirmed in 45 App. Div. 55, 60 N. Y. Supp. 1015. Indeed, in the instant case the plaintiff agreed and consented that the privilege of burial together with all accompanying rights should be subject to the rules and regulations "now or hereafter existing with reference" to the cemetery. *State v. Scoville*, 78 Conn. 90, 61 Atl. 63; *Green v. Danahy*, 223 Mass. 1, 111 N. E. 675; *Hancock v. McAvoy*, 151 Pa. 460, 25 Atl. 47, 18 L. R. A. 781, 31 Am. St. Rep. 774.

[9] In other words, the plaintiff agreed when she accepted the conveyance that the right of burial acquired by her should be subject to reasonable rules and regulations, and that all accompanying rights, such as the right to make monuments, the right to improve the lot, and the right to maintain it, should likewise be subject to reasonable rules and regulations. The authorities agree that all rules and regulations adopted by the proprietor of the cemetery must be equal, uniform, and reasonable. *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 29 N. E. 685. The authorities do not always agree, however, that a given rule is reasonable. For example, the majority of the courts dealing with the question have ruled that a cemetery proprietor cannot by a rule, adopted after the sale of a lot for burial purposes, say to the purchaser that all improvements must be made by or under the supervision of the superintendent of the cemetery, and that the purchaser cannot make the improvements in person or by his own agent. *Silverwood v. Latrobe*, 68 Md. 620, 13 Atl. 161; *Ex parte Adlof*, 86 Tex. Cr. R. 13, 215 S. W. 222; *Johnstown Cemetery Association v. Parker*, 28 Misc. Rep. 280, 59 N. Y. Supp. 821, affirmed in 45 App. Div. 55, 60 N. Y. Supp. 1015. See, also, *Ritchey v. Canton*, 46 Ill. App. 185; *Benson v. Laurel Hill Cemetery Co.*, 68 Pa. Super. Ct. 242; *Nicolson v. Daffin*, 142 Ga. 729, 83 S. E. 658, L. R. A. 1915E, 168. A different view is expressed in *Cedar Hill Cemetery Co. v. Lees*, 22 Pa. Super. Ct. 405. See, also, *Angusta v. Bredenburg*, 146 Ga. 459, 91 S. E. 486.

[10] When the plaintiff purchased her lot the city recognized her right to care for and

maintain the lot, for at that very time among the rules and regulations for the government of the cemetery were 11 rules "concerning the improvement and the keeping of the grounds"; and these 11 rules assumed that purchasers were entitled to do the work of improving and caring for their lots. The plaintiff, as the owner of the right of burial, is entitled to care for the lot where her dead are buried, and she may do so either in person or by her own agent. Nor can the city deprive her of this right without her consent. By the resolution of June 25, 1918, and the form of contract adopted by the cemetery commission, the city, as the cemetery proprietor, has in effect said to the plaintiff and to all others who purchased prior to the adoption of the endowment plan:

"You must agree that your lot shall be kept up under the park and lawn plan; you must agree that the work shall be done by the city, and not by yourself, nor by any other agent selected by you; you must agree that this work is to be done through all time; and you must agree perpetually to pay, for this work is never to be completed, but is to go on forever; and if you do not so agree and if you do not furnish the fund which the city thinks is necessary to earn through all time enough money to pay the expense of caring for your lot, the commission will refuse to grant you a permit for future interments in your lot."

These limitations attempted to be placed upon the rights of the plaintiff amount almost to a deprivation of such rights, and consequently are unreasonable and unenforceable. 5 R. C. L. 246. See, also, *Monett Lodge v. Hartman*, 185 Mo. App. 148, 170 S. W. 670.

[11] The circumstances are not such as to make the attempted action of the cemetery commission a lawful exercise of the police power, broad though the scope of the police power is. Nor can the city say that the right to compel the application of the endowment plan was reserved to the city at the time of the conveyance of the lot to the plaintiff. The city is without power to bring the plaintiff's lot within the embrace of the endowment plan, unless the plaintiff consents.

[12-15] Undoubtedly the purchaser of a lot for burial purposes must exercise his rights so as not to injure others or interfere with the rights of others. Indeed, every right, whether it be in the perfect form of an absolute ownership of the soil, or in the uncertain form of an evanescent license, must be exercised subject to the restriction that it shall be so exercised as not to injure others. The language of the conveyance received by the plaintiff contemplates that the city as the proprietor of the cemetery shall have general control of the cemetery grounds (*Hancock v. McAvoy*, 151 Pa. 460, 25 Atl. 47,

18 L. R. A. 781, 31 Am. St. Rep. 774; *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 769); and hence, if a purchaser either by failing to act or by acting wrongfully injures the rights of others, the city can by resorting to its right of general control avail itself of a remedy. The available remedy, it is true, may not always be as effective as might be wished. Offensive inscriptions on monuments can be prevented. *McGann v. McGann*, 28 R. I. 130, 66 Atl. 52. A purchaser cannot erect improper monuments. *Pitcairn v. Homewood Cemetery*, 229 Pa. 18, 77 Atl. 1105. See, also, *McGough v. Lancaster Burial Board*, L. R. 21 Q. B. Div. 323, 57 L. J. Q. B. N. S. 568, 38 Week. Rep. 822, 52 J. P. 740.

[16, 17] If a burial lot becomes so overgrown with weeds or otherwise unsightly as seriously to disfigure the burial ground, the cemetery proprietor can cause that condition to be changed; and if any of the monuments or markers become in such a ruinous condition as to disfigure the rest of the cemetery the city has the power to cause them to be repaired, and, if not repaired, to be removed. *Brown v. Hill*, 284 Ill. 286, 119 N. E. 977.

[18] The complaint made against the condition of the plaintiff's lot is, not that it is overgrown with weeds and brush, but that it is likely to become overgrown at some time in the future unless it is cared for under the endowment plan. The record contains photographs of the plaintiff's lot, and from these photographs it appears that if any criticism is properly to be passed upon the condition of the lot it is that the ground is too bare of growth rather than otherwise. It is true that the plaintiff has not planted and maintained flowers on the lot as many others would have done; but it is also true that thus far the plaintiff has neither done nor failed to do anything causing injury to the rights of others.

The carefully prepared briefs submitted by counsel for the respective litigants have covered the whole field of the controversy and have thrown all possible light upon every disputed point; and, after viewing the different phases of the controversy, with the aid of the light shed by the briefs, we find ourselves unable to agree with the contention of the city, although we can well understand that from the viewpoint of many persons there are not a few strong practical reasons for desiring the application of the endowment plan to all lots in the cemetery. However, there are legal reasons preventing the compulsory application of the endowment plan to the plaintiff's lot; and therefore the decree is affirmed.

BURNETT, C. J., and McBRIDE and BROWN, JJ., concur.

(103 Or. 17)

HANSEN v. HANSEN.

(Supreme Court of Oregon. May 24, 1921.)

1. Appeal and error §612(1) — Supreme Court's appellate jurisdiction based only on duly authenticated record.

The Supreme Court's appellate jurisdiction must be based on a duly authenticated record of the doings in the circuit court, and not on an affidavit originally filed in the Supreme Court and purporting merely to narrate the occurrences in the circuit court.

2. Divorce §285 — Supreme Court without jurisdiction to require payment of temporary alimony in absence of record referring to order.

On defendant's appeal from a divorce decree for wife, the Supreme Court had no jurisdiction to require husband to pay temporary alimony decreed by lower court, on motion made in the Supreme Court on affidavit filed therein reciting that court allowed wife such temporary alimony, in absence of duly authenticated record containing such order or referring thereto, since in such case the court could not discuss or consider or review the order.

In Banc.

Appeal from Circuit Court, Multnomah County; F. M. Calkins, Judge.

Action by Alma Hansen against Ingalberg Hansen. Judgment for plaintiff, and defendant appeals. Plaintiff's motion to compel payment of temporary alimony denied.

B. G. Skulason, of Portland, for appellant.
P. J. Bannon, of Portland, for respondent.

HARRIS, J. The plaintiff, has filed with our clerk a motion "to compel the defendant to pay the temporary alimony heretofore awarded to the minor children in the above-entitled cause in the sum of \$30 per month, and which same is now delinquent in the sum of \$180, and that he be compelled to pay said amount thereafter each month in said sum of \$30 as prayed for and shown by the affidavit hereto attached."

The affidavit attached to the motion avers that "about one year ago" the plaintiff commenced a suit for a divorce against the defendant; that "shortly thereafter" the plaintiff made application for maintenance for the two minor children, and that the circuit court made an allowance of \$30 per month; that "thereafter" the cause was tried, and the court awarded the custody of the two minor children to the plaintiff, and decreed that the defendant pay \$50 per month for the maintenance of the children; that thereafter the defendant appealed to the Supreme Court, where the cause is now pending; that "shortly after the appeal" the defendant "refused to pay any alimony for the support of the said minor children," and the plaintiff caused the defendant to appear in the circuit court

"and show cause why he should not be compelled to pay said alimony"; and that upon the showing made by the defendant the circuit court "decided that, as the cause was appealed to the Supreme Court, he had lost jurisdiction not only over the decree, but also over the order allowing the temporary alimony, and therefore dismissed said proceeding"; that the defendant "is now delinquent in his payment in the sum of \$180 or for the period of six months at the rate of \$30 per month."

The affidavit does not make it entirely clear whether the sum of \$180 alleged to be delinquent includes any installments accruing before the rendition of the decree in the circuit court. However, we infer from the affidavit that the defendant paid the monthly installments regularly until the rendition of the decree in the circuit court, and that the defendant did not refuse to pay monthly installments until "shortly after the appeal." If this inference is correct, the motion of the plaintiff presents a situation where the wife is asserting that the order made on the authority of section 512, Or. L., providing for maintenance during the pendency of the suit continues to be effective until the suit is finally disposed of on appeal, and that the order continues to be effective notwithstanding the undertaking on appeal recites that the principal and his surety agree that the defendant "will pay all damages, costs and disbursements which may be awarded against him in said suit on the appeal, and that if the said decree or any part thereof be affirmed, the defendant will satisfy the same so far as affirmed." See section 551, subd. 1, Or. L. The claim involved in the motion of the plaintiff is one which might present many interesting questions if the record permitted discussion of the merits of the claim. See 19 C. J. 190.

[1] This tribunal exercises appellate jurisdiction, and, with comparatively few exceptions, is without original jurisdiction. If this court possesses any jurisdiction over the matter involved in the plaintiff's motion, it is appellate in its nature. See *Taylor v. Taylor*, 70 Or. 510, 134 Pac. 1183, 140 Pac. 999. Our jurisdiction, if any we have, being appellate, must be based upon a duly authenticated record of the doings in the circuit court, and not upon an affidavit originally filed in this court and purporting merely to narrate the occurrences in the circuit court.

[2] There is on file with our clerk a copy of the decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal as required by section 554, Or. L. Upon examination of the copy of the decree we learn that the plaintiff obtained a divorce; that she was awarded the custody of the minor children; that the defendant was ordered to pay to the plaintiff \$50

per month for the support of the minor children; and that the defendant was required to pay the sum of \$50 as suit money in addition to an allowance that had been previously made. The decree makes no reference to the order which required the payment of \$30 per month pending the suit. We have examined the transcript of testimony, and, although we find a reference to "an allowance of \$75 heretofore made" as suit money, we have not discovered in the transcript any reference to the order for the payment of maintenance pending the suit. The printed abstract is likewise silent upon the subject of the order for the payment of money for the support of the children during the pendency of the suit. In brief, the only information which we have concerning any order for the payment of money for the support of the children during the pendency of the suit comes from the motion and original affidavit filed by the plaintiff in this court; and therefore, even though the record is sufficient to give this court appellate jurisdiction over the final decree, the record is not sufficient to enable us to discuss or consider or review the order which it is said the circuit court made directing the payment of \$30 per month for the support of the children pending the suit.

The motion filed by the plaintiff is denied.

(100 Or. 576)

ALLEN et al. v. BILYEU et al.

(Supreme Court of Oregon. May 31, 1921.)

Taxation — 535 — Return of taxes refunded, though for insufficient reason, not required, where assessment was void.

The assessment of the stock of a national bank to it, instead of to the stockholders, being contrary to Rev. St. U. S. § 5219 (U. S. Comp. St. § 9784), and so void, so that no application to the board of equalization to correct or set it aside was necessary, the bank will not be required to return the part of the tax refunded to it by order of the county court, though the refund was for the insufficient reason that the property had been overvalued; the right of the bank to relief on that account having been lost by failure to apply to the board of equalization to correct the discriminatory assessment.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Suit by C. H. Allen and others against Charles G. Bilyeu and others. Decree for defendants, and plaintiffs appeal. Affirmed.

The plaintiffs, as taxpayers of Wallowa county, brought this suit to compel the defendant bank to refund the sum of \$584.25 alleged to have been unlawfully rebated upon the amount collected from the bank for taxes of 1914. The pleadings are too long to be inserted here, but allege, in substance, that

defendants Marvin, county judge, and Litch, county commissioner, conspired with defendant bank to present a fraudulent and groundless claim of \$584.25 for alleged overpayment of taxes with the understanding that Marvin, Litch, and Newby, sitting as the county court, would allow such unlawful claim, and that in pursuance of such unlawful and fraudulent conspiracy the defendant bank presented such claim, and the defendants Marvin and Litch, and Newby, sitting as the county court, allowed and paid it.

Defendants deny the charges of fraud and conspiracy and allege for a defense: (1) That defendant bank is a national bank, and that for the year 1914 the capital and shares of said bank were assessed to it, and not to the stockholders, such assessment being contrary to section 5219, U. S. Revised Statutes (U. S. Comp. St. § 9784); that such assessment was void, and the defendant bank was entitled to recover it; and (2) that while property in Wallowa county was usually assessed at a valuation of 75 cents on the dollar, the property of defendant bank was assessed at 100 cents on the dollar, whereby there was an unfair and unjust discrimination against the bank; that in 1915, when the bank was about to bring suit against the sheriff to enjoin the collection of such inequitable tax, it was agreed between the county court and the bank that, if the latter would not bring suit, but would pay the taxes as assessed, the county would rebate and return to said bank the sum of \$584.25, being 25 per cent. of the total amount assessed, and that thereupon the bank paid the taxes assessed and presented its claim as agreed upon, which was allowed.

J. A. Burieligh, of Enterprise, for appellants.

A. S. Cooley and D. W. Sheahan, both of Enterprise, for respondents.

McBRIDE, J. (after stating the facts as above). So far as the overvaluation of its property is concerned, it would seem that the bank had lost any claim to recover on that score by reason of the fact that it had not applied to the board of equalization to correct such discriminatory assessment, if such was in fact made. But it clearly appears that the assessment upon shares of the capital stock was made against the bank instead of against the stockholders, and to this extent the assessment was void, and the bank was not required to apply to the board of equalization to correct or set aside an absolutely void assessment. So, whatever may have been in the contemplation of the county court at the time it made the order, the law will not interfere to compel the defendant bank to return the money refunded simply because the court gave a wrong reason for a proper decision. *Graves County v. First National Bank et al.*, 108 Ky. 194, 56 S. W. 16. The decree is affirmed.

(185 Cal. 643)

In re GARTENLAUB'S ESTATE.

GARTENLAUB v. UNION TRUST CO. OF
SAN FRANCISCO et al.

(S. F. 9326.)

(Supreme Court of California. May 12, 1921.

Rehearing and Petition for Modification of
Judgment Denied June 9, 1921.)1. Trusts \S 274(4)—Premiums paid on bonds
to be charged against income by trustee.

A premium paid for securities purchased by a trustee under a will should be charged against the income of the estate, and the principal must be maintained intact from loss, in the absence of a clear direction in the will to the contrary.

2. Trusts \S 217(4), 218(1)—Trustee not per-
mitted to buy and sell bonds on speculation;
fluctuations in prices of bonds purchased by
trustee disregarded.

A trustee is not permitted to buy and sell bonds on speculation and the fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remaindermen for funds from the trust estate invested in income-bearing property.

3. Trusts \S 274(4)—Deduction from interest
of premiums paid by trustee not violation of
statute.

Where testamentary trustee purchased bonds at a premium, deduction from interest of the amount paid as premium is not a violation of Civ. Code, §§ 723, 724, prohibiting accumulations of income except during minority.

4. Wills \S 684(5)—Principal of trust not to
bear loss occasioned by wearing away of
premium paid for bonds.

A bequest of three-fourths of the "entire net income" held not to contemplate that the principal of the trust estate should bear the loss occasioned by the wearing away of premium paid by the trustee in purchase of bonds.

5. Trusts \S 227—Trustee held entitled to re-
imbursement for attorney's fees.

Where litigation arose upon the settling of a trustee's accounts and concerned the interpretation of the instrument creating the trust and a determination of the proper mode of executing the trust, the trustee was therefore directly interested in its representative capacity, and had authority to employ a legal representative in the interests of the trust estate, and was entitled to reimbursement for attorney's fees at the hearing and upon appeal, although the appeal arose out of conflicting claims of beneficiaries, and it was immaterial that the attorney first supported one beneficiary's claims and later altered his position.

6. Trusts \S 274(3)—Extraordinary expenses
of trust taken from principal and ordinary
from income.

Where litigation becomes necessary to remove a doubt or ambiguity so as to insure the correct administration of the trust, the expense is an extraordinary charge, which, unless oth-

erwise provided by the testator, should be borne by all parties, and if the expense of litigation incident to the trust is paid from principal, the life tenant as well as the remaindermen shares the burden, for in that event the life tenant is deprived of the interest on the sum taken from principal; but expenses in regard to matters concerning the ordinary management of the trust, such as the preparation of annual accounts, are usually payable from income.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

In the matter of the Estate of Abraham Gartenlaub, otherwise known as A. Gartenlaub, deceased. From an order setting forth annual account of the Union Trust Company of San Francisco, as testamentary trustee, Alice G. B. Gartenlaub appeals. Modified and affirmed.

See, also, 197 Pac. 90.

Garret W. McEnerney, of San Francisco, for appellant.

Norman A. Eisner, Heller, Powers & Ehrman, and Samuel S. Stevens, all of San Francisco, for respondents.

LENNON, J. Objections interposed to the settling of an annual account of a testamentary trustee form the basis of the present appeal. The decedent, Abraham Gartenlaub, who died June 1, 1914, devised and bequeathed the greater part of his estate in trust to the Union Trust Company of San Francisco, and empowered the trustee to convert into money the estate thus received and invest the same in certain described bonds. By the terms of the will the trustee was directed to pay to Alice G. B. Gartenlaub, the wife of the testator, monthly, during her lifetime, three-fourths of the "entire net income, revenue, and profit of every kind arising from said estate in said month in any way whatever." The said Alice Gartenlaub appeals from an order of the superior court of San Francisco settling the fourth annual account of the trustee. Sarah Fox, who is the sister of the testator and the life tenant in respect to the remaining one-fourth of the "net income, revenue, and profit," her two children, Harry and Gussie Fox, who are the remaindermen under the trust, and the trustee are the respondents. Appellant contends that, in the account attacked, the trustee has erroneously deducted certain sums from "income" and credited them to "principal."

Pursuant to the provisions of the will, the trustee has invested funds of the trust estate in certain bonds which it purchased at a premium. Obviously the amount of the premium cannot be collected from the obligor when the bonds mature, for the latter is liable only for the face value thereof. Conse-

quently, if the bonds are retained by the trustee until maturity, the principal of the trust estate will be depleted by an amount equal to the premium paid. For the purpose of preventing a shrinkage of the principal in this manner, the trustee has, on each coupon date, deducted a portion of the interest collected on the bonds and credited the same to principal. It is calculated that at maturity the sum of the amounts thus taken from interest and credited to principal will equal the premium originally paid for the bonds. This deduction from interest is assigned by appellant as an unwarranted diminution of the income of the life tenant.

Whether a premium paid for securities purchased by a trustee for a trust estate should be charged against the principal or the income of the estate has never been decided in California, and upon this question we find the decisions in the other states in sharp conflict. Whatever view may be accepted, it is clear that some definite rule of action must be prescribed by this court and departures therefrom permitted only where the creator of the trust has given a clear and unmistakable direction to the contrary of that rule. The determination of the course to be pursued by trustees in such cases cannot be made wholly dependent upon the peculiar circumstances of each case as it arises, as has been attempted in some states. *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; *Hemenway v. Hemenway*, 134 Mass. 446, 452; *Shaw v. Cordis*, 143 Mass. 443, 9 N. E. 794. Such attempt has proven unsatisfactory in these states, for the reason that in the majority of cases the creator of the trust fails to make specific provision for the contingency in question, and therefore, if the duty of the trustee in this particular be governed entirely by the intention to be ascertained from the instrument creating the trust or the circumstances surrounding the execution of that instrument, "no trustee will know how to safely act, and a question constantly arising in the administration of estates will be involved in great confusion and be the cause of great litigation." *In re Stevens*, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511; *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493.

[1] The decisions which hold that a premium must be charged wholly to the principal of the trust estate, which is the rule contended for by appellant, are based largely upon the reason that a premium is paid to secure safety of investment, as well as high interest, and that therefore the premium is for the benefit of the remainderman as well as the life tenant. There is also the argument that there is a possibility that the bonds may be sold before maturity and, owing to fluctuations in market value, may, when thus disposed of, bring more than the

sum for which they were purchased, so that these matters are likely to balance themselves in time. *Hite's Devisees v. Hite's Ex'r*, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; *In re Penn-Gaskell's Estate*, 208 Pa. 346, 57 Atl. 715. The weight of authority, however, and, we believe, the better view, is the rule finally adopted in *New York* in the case of *In re Stevens*, supra, to the effect that—

"In the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run."

This rule has been consistently followed in *New York* (*Dexter v. Watson*, 54 Misc. Rep. 484, 106 N. Y. Supp. 80; *Furniss v. Cruikshank*, 191 App. Div. 450, 181 N. Y. Supp. 522, 528), and has been adopted in *New Jersey*, *Connecticut*, and *Wisconsin* (*Ballantine v. Young*, 74 N. J. Eq. 572, 70 Atl. 668; *Curtis v. Osborn*, 79 Conn. 555, 65 Atl. 968; *In re Wells*, 156 Wis. 294, 144 N. W. 174). See note, 4 A. L. R. 1249.

A testator who creates a trust such as that in the instant case has two objects in view: First, the payment of the income arising from a fund to certain persons during lifetime; second, the transfer of that fund to certain individuals upon the death of the life tenants. The existence of a corpus, principal, or fund is an essential element of the trust, and the preservation of this principal until the termination of the life estates is indispensable to the fulfillment of the testator's plans. Therefore, any depletion of the principal tends to frustrate the fundamental purpose of the trust and should be avoided, and, where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted which will prevent the impairment of the principal unless the testator has clearly directed to the contrary. Otherwise the life tenant who is entitled to receive only income, will, in effect, have received a part of the principal. In other words, where a premium is paid, the ostensible interest yielded by the bond cannot be considered entirely as interest on the face value of the bond, for a sum in excess of the face value has gone into the investment, and the amount of interest remains unchanged, resulting, necessarily, in a decreased rate of return. A portion of the nominal interest is therefore a repayment of the premium.

[2] This duty to restore to principal the total amount invested in the bonds cannot be evaded upon the theory that the bonds may, as a result of fluctuations in market value, be sold at higher prices than those for which they were purchased. A trustee is not permitted to buy and sell on speculation. The fluctuations in market value after purchase

by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remainderman for funds from the trust estate invested in income-bearing property. In re Stevens, *supra*.

[3] The deduction from interest of the amount paid as premium is not a violation of sections 723 and 724 of the Civil Code, prohibiting accumulations of income except during minority and for the benefit of the minor. The entire net income from the bonds is distributed, for, as previously stated, a portion of the interest on the bonds is in reality return of a part of the principal invested therein to the corpus of the trust estate, in the same sense that sums of money are returned to principal when a loan is repaid in installments. The trustee is not withholding any part of the income for the purpose of investing it as new capital. Estate of Steele, 124 Cal. 533, 541, 57 Pac. 564.

[4] In the present case the testator has given no direction that the principal of the trust estate should bear the loss occasioned by the wearing away of premium. The bequest to appellant of three-fourths of the "entire net income" cannot be interpreted as such a direction, in view of the fact that part of the interest on the bonds is not, strictly speaking, income, but a return of capital. It is pointed out that the testator provided that no investments of trust funds should be made in bonds of the United States, "for the reason that said bonds yield too low a rate of interest." At the time of the hearing, United States Liberty bonds were yielding a higher rate of interest than many of the bonds of the trust estate after the deduction from their interest return of a proportionate part of the premium. This, it is urged by appellant, shows that no deduction should be made from the interest on the bonds of the trust estate, since the return to the life tenant would thereby be made lower than intended by the testator. This inference cannot be drawn from the provision in question, for any inference deduced from the provision in regard to United States bonds must be based upon the facts existing at the time the testator made the provision. At the time the will was executed and that the testator died, the year 1914, the interest on United States bonds was far lower than the lowest yield of any bonds of the trust estate after deductions on account of premium. The will contains the following provision:

"If at the end of any one year it shall appear that my said wife has not received an average of at least the sum of seven hundred and fifty (\$750) dollars for each month of said year, * * * then and in that event said trustee shall resort to the personal property of the corpus of said trust estate, and thereout shall take sufficient to make up and pay over to my said wife a sum sufficient to make the aggregate receipts of my said wife the equivalent

of seven hundred and fifty (\$750) dollars for each month of said year." (*Italics ours.*)

Appellant's income from the estate has not fallen below the sum of \$750 per month, but has far exceeded that minimum, and, consequently, the only contingency upon which the testator has authorized payments to the life tenant from the corpus of the trust estate has not arisen. The testator has not only not directed the charging of premium to principal, but has clearly indicated that the corpus is not to be resorted to unless the income falls below the specified minimum.

[5] The order appealed from made an allowance to the trustee of \$500 as compensation to its attorney for legal services rendered by the latter upon a former appeal to the Supreme Court from an order settling the second annual account of the trustee (Estate of Gartenlaub, 197 Pac. 90), and \$250 for services rendered upon the hearing of the fourth annual account of the said trustee. It is contended that these matters constituted litigation between the life tenant and remaindermen which was not hostile to the trust itself and in which the participation of the trustee was gratuitous and uncalled for, and therefore that the trustee is not entitled to an allowance for attorney's fees. It is a general rule that trustees are entitled to reimbursement for expense incurred in good faith in the execution of the trust. *Denvir v. Park*, 169 Mo. App. 335, 152 S. W. 604. While the participation of a trustee in litigation between rival claimants not involving the execution of the trust would seem unwarranted, the present case does not present such a state of facts. The litigation arose upon the settling of the trustee's accounts, and concerned the interpretation of the instrument creating the trust and a determination of the proper mode of executing the trust. The trustee was therefore directly interested in its representative capacity, and was not without authority to employ a legal representative in the interests of the trust estate.

"The rule which has been applied in a great variety of cases affecting the administration and execution of trusts is that a trustee has a right, whenever necessary to the proper administration, preservation, and execution of the trust and the prosecution or defense of action, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel. The rule is applicable even though the cestui que trust employed counsel to represent the same interests, and although, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation." 39 Cyc. 339.

It is immaterial that counsel for the trustee supported appellant's claim upon the hearing of the fourth account and later altered his position, maintaining on this appeal that the items representing a portion of the premium on bonds were correctly charged

against income. The duty of the trustee and its counsel was to aid the court in deciding upon a correct administration of the trust funds, without regard to the conflicting claims of beneficiaries. If, upon the appeal, the order of the court below appeared to the trustee correct, it was the duty of the trustee to support that order.

[6] The \$500 thus allowed the trustee for attorney's services rendered in the litigation, as well as an additional allowance for so-called "ordinary" services of attorneys in connection with the preparation and presentation of the annual account of the trustee, were ordered paid from the income of the trust estate. The reasonableness of the sums allowed is not questioned, but it is claimed that they should have been charged to principal rather than income. The decision of *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37, lays down the following rule for the payment of the expenses incurred in the execution of a trust:

"The regular annual or periodically recurring expenses arising in the administration of a productive trust, commonly are paid out of the income, while extraordinary and unusual expenses are chargeable against the capital. The costs of litigation generally fall in the latter class. These rules apply in cases where the question concerns life tenants and remaindermen, both guiltless of any wrong against the trust and where the point of incidence of proper expenses must be determined as between innocent persons."

The following cases hold that costs of litigation in connection with the execution of a trust are payable from the principal of the trust: *In re Osborne*, 209 N. Y. 450, 103 N. E. 723, 731, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298; *In re Schaefer*, 222 N. Y. 533, 118 N. E. 1076, affirmed 178 App. Div. 117, 165 N. Y. Supp. 19, 23. Where litigation becomes necessary to remove a doubt or ambiguity so as to insure the correct administration of the trust, the expense is an extraordinary charge, which, unless otherwise provided by the testator, should be borne by all parties. If the expense of litigation incident to the trust is paid from principal, the life tenant, as well as the remainderman, shares the burden, for in that event the life tenant is deprived of the interest on the sum taken from principal. However, expenses in regard to matters concerning the ordinary management of the trust, such as the preparation of annual accounts, are usually payable from income. *Howe's Income and Principal*, p. 67. That these ordinary expenses are to be paid from income in this case, at least, is clear from the fact that the will

provided that the life tenants should have only the "net" income, thus indicating that all current expenses are to be deducted from income.

The order appealed from must be modified in accordance with the rule set forth in the immediately preceding paragraph; that is to say, the income must be credited and principal charged with the amount allowed to the trustee as compensation for its attorney for "extraordinary" services in connection with the execution of the trust. The trial court is directed to so modify the order, and when so modified the order will stand affirmed, without costs to either party upon this appeal.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

(185 Cal. 444)

FRASER'S MILLION DOLLAR PIER CO. v. OCEAN PARK PIER CO.
(L. A. 6023.)

(Supreme Court of California. April 30, 1921.)

In Bank.

Supplemental opinion.

For former opinion, see 197 Pac. 323.

Milton K. Young, Davis, Kemp & Post, and Kemp & Clewett, all of Los Angeles, for appellant.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

PER OURIAM. The discussion in the opinion concerning the common-law rule on the subject of the direction of the extension of boundary lines into streams, lakes, or ponds, when the lands of different persons abut thereon and the rights of the landowners in or upon the water is involved, is wholly based upon the facts shown in the record on appeal. It was not intended to be a decision construing the terms of the Santa Monica charter on the subject. The charter in connection with the sections of the Political Code (sections 3901-3959) defining county boundaries, to which the charter refers, leaves it somewhat difficult to determine whether the boundaries do or do not extend into the ocean. We withhold any expression of opinion on that subject. The judgment of the superior court on the point involving this question is sustained on the other ground mentioned.

All concur.

(52 Cal. App. 118)

PEOPLE v. COFFEE et al. (Cr. 548.)

(District Court of Appeal, Third District, California. March 28, 1921. Rehearing Denied April 23, 1921. Hearing Denied by Supreme Court May 26, 1921.)

Burglary ⇨—Chicken house held a "house" under burglary statute.

Under Pen. Code, § 459, defining burglary, a chicken house, used for housing chickens, is a "house" within the statute; and it was immaterial that it may have been attached to skids so that it could be moved.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, House.]

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

John Coffee and another were convicted of burglary, and appeal from the judgment, and from an order denying their motion for new trial. Judgment and order affirmed.

L. J. Maddux, of Modesto, for appellants.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The charging part of the information against the defendants was as follows:

"That said John Coffee and J. R. Hopkins on or about the 8th day of July, A. D. 1920, at and in said county of Stanislaus, state of California, prior to the filing of this information, did then and there willfully, unlawfully, feloniously, and burglariously enter the chicken house of one T. B. Michael, and upon the premises of the said Michael, located one half mile south of Hughson, on what is known as the Tully boulevard, in the county of Stanislaus, state of California, with the felonious intent then and there to commit the crime of larceny."

Section 459 of the Penal Code defines burglary as follows:

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

One of the contentions of appellants is that the information does not charge the offense of burglary, inasmuch as it appears therein that the house was for the use of chickens, instead of human beings, the objection growing out of the common-law conception of burglary. At common law, as is well known, only the habitation of human beings could be the subject of the burglarious breaking and entry. It may be added that certain decisions of the courts in interpreting the meaning of the statutory definition of the offense have been greatly influenced by a consideration of what the crime meant at common law.

People v. Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373.

But in this state the courts have clearly distinguished between the common-law and the statutory definition, and have pointed out that the latter is much more comprehensive than the former. **People v. Stickman**, 34 Cal. 242; **People v. Barry**, 94 Cal. 481, 29 Pac. 1026.

In the latter case it was said:

"It will thus be seen that common-law burglary and the statutory burglary of this state have but few elements in common, and consequently English cases give us but little light upon the question under examination."

The **Stickman Case**, supra, holds that burglary may be committed by the entry of a chicken house, and the decision is directly opposed to the contention of appellants herein. There it is said:

"While the language of the statute might have been made more definite and certain by employing words in common use, it could not well be made more comprehensive, and we think that the absence of more particular terms of description indicates an intention on the part of the Legislature to include every kind of buildings or structures 'housed in,' or roofed, regardless of the fact whether they are at the time, or ever have been, inhabited by members of the human family. A house, in the sense of the statute, is any structure which has walls on all sides, and is covered by a roof."

Accordingly, the Supreme Court held that it was not error for the trial court in that case to refuse to give the following instruction:

"The breaking and entering, to constitute a burglary, must be into a house, room, apartment, or tenement, or a tent, vessel, or water craft, usually used, or at any time used, as a sleeping place or residence for human beings, or wherein some person dwells, or persons dwell and lie in. If the jury find from the evidence that the chicken house which the defendant is charged with having feloniously entered was at any time used as a sleeping place or residence for human beings, or wherein some persons dwell, or persons dwell and lie in, and they also find that defendant feloniously entered with intent to commit grand or petit larceny, or any felony, they will find the defendant guilty as charged in the indictment. If they do not so find from the evidence, they will acquit the defendant."

Other cases from various jurisdictions are in harmony with the foregoing. In **Williams v. State**, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82, the defendant was charged with entering a chicken house and stealing therefrom certain pigeons. The prosecutor testified that—

"He had a large number of pigeons in a coop, from which a number were stolen. In describing the coop he testified that it was a chicken house; that the house was made of

wire, and was about eight feet tall, two stories, covered with shingles; that while he called it a coop, it was really a chicken house; that it was nailed to the fence; it could not be moved about; that the posts that held it were not in the ground, but that the structure was stationary."

The Supreme Court held that the structure was a building within the meaning of the section of the Penal Code defining burglary. It is true that said structure was nailed to the fence, but it is difficult to see how it could have been any the less a house or building if it had been on "skids," and therefore movable with less difficulty.

In *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, it was also held that a "chicken house" was a building that could be burglariously entered, the court saying:

"The purpose of the Legislature in passing the foregoing section of our statute was to radically change the common law as to the crime of burglary, and make those who burglariously enter other buildings than a mansion or dwelling house guilty of that crime."

In *Favro v. State*, 39 Tex. Cr. R. 452, 46 S. W. 932, 73 Am. St. Rep. 950, it was held that "a tent or structure made by placing two forked mesquite poles, about seven feet high, into the ground, with a ridge pole thereon, and stretching over this a wagon sheet, the ends of which are brought down to the ground and nailed on each side to planks nailed to stakes in the ground, the east end of the structure being boxed up with boards, with a door and some boxes, with the wagon sheet tied over them, close up to the west end," was a "building" within the contemplation of the Penal Code.

Other decisions are collated in Words and Phrases (1st Ed.) under the term "House," vol. 4, p. 3351, most of which are in line with the foregoing. Those apparently in favor of the contention of appellants represent somewhat different facts from what are found herein, and they require no specific notice.

At any rate, the law in this state was correctly set forth in the following instruction of the trial court:

"This jury is instructed that, if you believe from the evidence, beyond a reasonable doubt and to a moral certainty in this case, that the building described in the information was an inclosed building, about 6 feet long and 5 feet wide, with a height of 6 feet on one side and 4 feet on the other, covered with a roof, and that the building was constructed with doors to be used in entering the building, and was used by the complaining witness as a building within which to keep his chickens, then I instruct you that that chicken house would constitute a building as contemplated by our statute defining burglary, to wit: Section 459 of the Penal Code, even though said chicken house may not have had any floor, and may have been attached to skids so that the same could be moved, if you should so find."

To this instruction, in addition to the contention that such a structure does not constitute a house or building within the meaning of said section, appellants make the further objection that it is obnoxious to the constitutional provision forbidding judges from charging juries as to questions of fact. In this appellants are in error. The instruction did not assume the existence of any of the component elements of the structure, but it declared what the legal conclusion must be if certain facts were shown by the testimony. It is true that there is no conflict in the evidence as to the size and character of said building and, therefore it would have been without prejudice if the court had declared what they were. But what the court really did was to define or explain one of the important terms used in the definition of burglary, as it was necessary to have it explained in order that the jury might apply it to the evidence in the case. It was no more an invasion of the province of the jury than for the court to tell them, that if they believed a burglary was committed between sunset and sunrise it was burglary of the first degree. The only difference is that what constitutes burglary in the first degree is defined in the statute, whereas the definition of the term building, or house, must be sought in the dictionary and decisions of the courts. The instruction, it may be added, contained a proper conception of the term, according to said authorities. Undoubtedly, the court might have defined the term in the abstract, might have stated, for instance, in the language of the Supreme Court that "a house, in the sense of the statute, is any structure which has walls on all sides and is covered by a roof," but the concrete form adopted by the court was more easily understood and applied. The jury might well have complained if the court had failed to state the meaning of the term as fixed by the authorities in reference to those elements of the structure that were established by the evidence. As laymen, they would be supposed to understand the meaning of the term "house" as used in common parlance, but they needed the assistance of the court to understand the word as a part of the legal terminology of the case.

In view of the fact, as before stated, that the evidence as to the building was without conflict, it would not have been prejudicially erroneous for the court to instruct the jury that said structure was a house, as contemplated by said section of the Penal Code. *Willis v. State*, 33 Tex. Cr. R. 168, 25 S. W. 1119.

From the foregoing it follows that the trial court committed no error in refusing certain instructions proposed by defendants, which were similar to one another, of which the following is an example:

"You are further instructed that if the alleged chicken house was portable, and made

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for the express purpose of being carried from place to place for the purpose of holding chickens, and was constructed on skids, and was not used or intended to be used for any purpose connected with habitation, or other purpose for which houses are ordinarily used, then you cannot convict the defendants of burglary."

The other refused instructions proposed by defendants, as far as correct in principle, were fully covered by the charge of the court.

There is no merit in the contention that the evidence is insufficient to support the verdict. It is a fair inference from the showing made that the owner of the premises, being aroused by the barking of a dog between 12 and 1 o'clock at night, went from his residence to the chicken house, a distance of some 300 feet and he found the defendants a short distance therefrom, having in their possession certain chickens which were accustomed to roost in said structure. There was evidence also that certain human tracks were found in the chicken house which corresponded with the tracks made by the defendants where they were apprehended by said owner. Indeed, without further specification of the evidence, we may say that there can be no reasonable doubt that the charge was fully sustained.

We find no error in the record, and as the defendants seem to have been fairly tried and justly convicted, the judgment and order are affirmed.

We concur: PREWITT, Presiding Justice pro tem.; HART, J.

On Petition for Rehearing.

PER CURIAM. Appellants in their petition for rehearing contend that this court misunderstood their position in stating that—

"One of the contentions of appellants is that the information does not charge the offense of burglary, inasmuch as it appears that the house was for the use of chickens instead of human beings, the objection growing out of the common-law conception of burglary."

They state in their petition that—

"What the appellants intended to convey was that there is no such term used in the statute defining burglary as chicken house, and that in arriving at the question whether or not the structure designated as chicken house came within the terms defining burglary, that it either had to come under the term 'house' or 'other building.' The question of whether or not it was inhabited or occupied by human beings is not raised by appellants."

We willingly accord to appellants the benefit of this explanation of their position, but we are satisfied that it can make no difference in the result of the appeal. The term "house" is used in the statute, and the addition of the qualifying expression "chicken" does not detract from the force of the information in stating the offense of burglary.

Whether it was a "house" in contemplation of the statute was a matter of proof to be presented at the trial. We are still entirely satisfied that such proof met the conditions of the statutory requirement, and we think no satisfactory reason has been shown why the cause should be reheard.

The petition is therefore denied.

(52 Cal. App. 177)

IN RE PINNELL'S GUARDIANSHIP. (Civ. 3762.)

(District Court of Appeal, First District, Division 1. California. April 5, 1921.)

1. Parent and child \S 2(3)—Court may award custody to either parent under such regulations and conditions as it may require.

In awarding the custody of a minor, the court is to be guided by its consideration of the child's best interests as to temporal, mental, and moral welfare, and, as between parents, neither is entitled to custody as of right, and, other things being equal, the child, being of tender years, should be given to the mother (Civ. Code, \S 248); and, where father and mother are separated without being divorced, the court may grant the custody to either for such time and under such regulations as the case may require, under section 214.

2. Parent and child \S 2(4) — Decree, after hearing and observing witnesses, that mother is qualified to care for minor daughter upheld.

Where a father and mother were not divorced and the father sought the custody of a minor daughter, and the trial court heard all the testimony and saw and observed the witnesses, its mandate, giving the custody to the mother, should be followed.

3. Parent and child \S 2(4)—Decree as to custody that both parents give bond that minor remain in jurisdiction held proper.

Where, on the father's application, custody of a child was awarded to the mother, with provision that the father could visit it, the direction that both should give a bond, conditioned that the minor should not be removed from the jurisdiction of the court, is a reasonable regulation, authorized by Civ. Code, \S 214.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

In the matter of the guardianship of the person and estate of Mildred Bernice Pinnell, a minor, wherein John H. Pinnell, her father, applied for guardianship, which was opposed by Erma M. Pinnell, his wife, mother of said minor, and from an order granting custody to the child's mother, giving the father permission to visit his daughter at reasonable times, and placing both under bond not to take the minor out of the county, the petitioner appeals. Order affirmed.

See, also, 193 Pac. 574.

A. M. Drew, of Fresno, for appellant.
Henry Hawson, of Fresno, for respondent.

WASTE, P. J. John H. Pinnell, the petitioner and appellant in this matter, sought to be appointed guardian of the person and estate of Mildred Bernice Pinnell, the three year old daughter of himself and Erma M. Pinnell, his wife. At the time the application was made the minor was in the care of the mother, who, the petitioner alleged, was an unfit and improper person to have the custody of the child. These accusations were denied by the mother. The trial court found that the petitioner and respondent are husband and wife, living in a state of separation, but not divorced. It determined that both parents are fit and proper persons to have the care and custody of the minor, and that neither has any right superior to the other in that regard while they continue to live separate and apart. It determined that it would be for the best interests of the minor that she be placed, and remain, in the custody of the mother. It made an order to that effect, and directed Mrs. Pinnell to file an undertaking in the sum of \$2,000 conditioned that she would not take, or permit the child to be taken, from the county of Fresno. The father was granted permission to visit his daughter at all reasonable times, and to have her in his exclusive custody during suitable hours of the day not to exceed two days in each week, provided that he should file an undertaking in the sum of \$1,000, payable to Mrs. Pinnell, conditioned that he could not take, nor permit the child to be taken, from the county of Fresno. From this order the petitioner has appealed.

The appellant specifies several errors as grounds for this appeal, none of which we find of sufficient merit to warrant a reversal of the judgment of the lower court.

It appears from the record that petitioner and respondent married in Fresno in 1916. The child was born in December of that year. Two years later the parties went to reside in the state of Washington, the petitioner later going to Wyoming, where he was employed in the oil fields, and where the mother and child joined him. The father's employment took him away from home for long periods. In the latter part of 1919, while petitioner was absent at his work, the respondent with the little girl, in company with a woman friend and her three children, removed from her home in Glenrock to a cabin some 35 miles in the country. Here the petitioner found her some time later, living, he claims, in improper relations with one Safford. The child, at the time, according to the petitioner's testimony, was in an unkempt and neglected condition. Petitioner was accompanied by a deputy sheriff, who had a warrant for Safford's arrest, charging him with adultery committed with Mrs. Pinnell. There was introduced upon the hear-

ing in the court below the record of a judgment of conviction of Safford in the justice court of Converse county, Wyo., from which it appears that Safford pleaded guilty to the charge and was fined and sentenced to a term in the county jail.

Petitioner took the little girl, and at the request of Mrs. Pinnell, she was allowed to accompany him back to their home. The parties then appear to have separated, the father taking the child to the home of his parents in the state of Washington. Some time later Mrs. Pinnell went to Washington, and in the absence of her husband filed a petition in the superior court of Pacific county for a writ of habeas corpus, alleging that her husband had failed for more than a year to support either herself or their child. The little girl was placed by the court temporarily in the custody of the probation officer, but, pending final determination of the habeas corpus proceedings in the Supreme Court of Washington, the mother obtained possession of her and brought her back to Fresno county in this state. The father followed, and initiated this guardianship proceeding. In addition to the foregoing testimony, a number of witnesses testified as to the general reputation of Mrs. Pinnell for morality and chastity while she resided in Wyoming, stating it was bad. Another witness testified that Mrs. Pinnell and Safford behaved in an improper manner.

Mrs. Pinnell appears to have made no effort to refute the testimony of the witnesses who testified to her bad character while she lived in Wyoming. She did, however, deny the specific allegation of improper conduct with Safford, and introduced testimony of a number of witnesses to the effect that since she returned to this state and resided in Fresno her behavior and her reputation are good, and counsel for petitioner in open court admitted this to be the fact.

[1] In awarding the custody of a minor the court is to be guided in its consideration by what appears to be for the best interests of the child in respect to its temporal, mental, and moral welfare. As between parents adversely claiming custody, neither is entitled to its as of right. Other things being equal, the child being of tender years, it should be given to the mother. Section 246, Civ. Code. When, as in the instant case, the husband and wife live in a state of separation without being divorced, the court has power to award the custody of the minor child of such parents to either for such time and under such regulations as the case may require. Section 214, Civ. Code. The child's welfare should be the controlling consideration in such matters. In re Campbell's Estate, 130 Cal. 382, 383, 62 Pac. 613.

[2] The marital relations of the appellant and respondent appear to have been most unhappy, jealousy and discontent, perhaps, lending color to accusations made by each

against the other in the present proceeding. In view of the broad powers vested in the chancellor in providing for the custody of children, particularly those of tender years, and of deciding such matters in the manner, in his opinion, which conduces most to the welfare of the child, we think it very rarely happens that an abuse of discretion will be found. In the instant case the trial court seems to have been patient and to have allowed the parties ample opportunity to produce all the testimony they had at hand. The petitioner, contestant, and little girl were before him. After such hearing and personal observation, he has entered a decree which on its face is in keeping with the consideration which must govern in such matters. In a case of this kind, as in others, there may well be a locus penitentia. Where the present conduct of the mother satisfies the court that the child of tender years may safely be committed to her care, the mandate of the section should be followed. In re Mash, 28 Cal. App. 692, 153 Pac. 961.

[3] The provisions in the order as to the custody of the child, and the direction of the lower court that each of the parties should give a bond conditioned that the minor should not be removed from the jurisdiction of the court, is reasonable regulation authorized by section 214, Civil Code of California. *Cole v. Superior Court*, 28 Cal. App. 1, 4, 151 Pac. 169.

The order is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(52 Cal. App. 110)

ARMSTRONG v. SACRAMENTO VALLEY REALTY CO. et al. (Civ. 2227.)

(District Court of Appeal, Third District, California. March 28, 1921. Hearing Denied by Supreme Court May 26, 1921.)

1. **Compromise and settlement** §20(1)—Notice in writing of additional appraiser lists held waived.

Where a compromise agreement provided that one party should be paid by the other parties a certain sum in cash and a further specified sum in lands at a certain value to be ascertained by means of an appraisement, and that each side should select 15 names of proposed appraisers, placing the names in sealed envelopes, and that, if three names were found to be common to both lists, these three should be the appraisers, and, in carrying out this provision, three names were found to be common to both lists, but one of the three appraisers refused to act, the fact that when the stakeholder went to the representative of the parties who were to make the payment, and demanded the selection of additional lists for the purpose of choosing another appraiser, such parties declined to submit them on the ground

that the agreement made no provision for additional lists in such case, amounted to a waiver of a written notice.

2. **Specific performance** §114(2)—Complaint held sufficiently to plead consideration.

In action to specifically enforce a contract of compromise, the complaint of the party to be paid under the compromise agreement sufficiently alleged an adequate consideration for the agreement where it contained a direct statement or averment that the other parties thereto did receive an adequate consideration, and in addition contained in its allegations an affirmative showing that they all received an adequate consideration, and that as to them the agreement was just.

3. **Compromise and settlement** §6(3)—Compromise of litigation held adequate consideration.

Where one of the parties to a compromise agreement was a party to the litigation settled by such agreement, the compromise of such litigation was not only a valuable, but an adequate, consideration for her obligation; it being immaterial whether her obligation was primarily her own or was entered into in behalf of some of her co-obligors.

4. **Vendor and purchaser** §39—Agreement of vendor to procure consent of wife to execution of conveyances does not render contract void.

A contract wherein one of the parties agrees that he will procure the consent of his wife to the execution of certain conveyances therein provided to be made is not void, although, under Civ. Code, § 3390, it might be a contract that could not be specifically enforced.

5. **Vendor and purchaser** §8—Vendor may agree to convey lands owned at the time by another.

One may agree to convey lands which at the time of contracting are owned by another, it being presumed that the contracting party is advised that he can at the proper moment procure the title or procure the holder thereof to make or join in the proper conveyance.

6. **Specific performance** §10(1) — Contract may be enforced in part.

That legal title was outstanding as to part of the property sued for, was not a complete defense, but plaintiff would be entitled, in any event, to specific performance as to such portion of the property as stood in the names of defendants or any of them.

7. **Compromise and settlement** §11—Failure of contract providing for appraisal to provide for selection of another appraiser in case one already selected refused to act held immaterial.

Where a compromise agreement provided for payment in part in land to be valued by an appraisement, each side to select fifteen names of proposed appraisers, and if three names were found to be common to both lists, these three to be the appraisers, the contract was not ineffective because failing to provide a method of selecting an alternate in place of an appraiser so selected who refused to act; for,

in view of Civ. Code, §§ 1636, 1643, 1655, it would be assumed that a vacancy arising from such a refusal to act should be filled in a manner provided in the contract for filling other vacancies, namely, by resort to additional lists of fifteen names submitted by each side, such fixing of values being merely a means to an end, and not of itself a vital part of the agreement; and in such a case the refusal of one set of parties to the contract to join in the selection of a third appraiser justified the trial court, sitting as a court of equity, in itself fixing the values and affording such parties an opportunity to complete the transaction upon the values thus fixed.

8. Specific performance ⇐128(1) — Monetary relief may be granted.

Where, through no fault of plaintiff, specific performance cannot be decreed, the court, if it has jurisdiction, will grant, as an alternative, monetary relief, which, in an action strictly at law, would be by way of damages.

9. Compromise and settlement ⇐20(2)—Interest allowed from breach of agreement.

On defendants' breach of a compromise agreement by refusing further to perform and by declaring to plaintiff that further performance was impossible, plaintiff was entitled to interest from the date of such breach.

10. Specific performance ⇐128(1) — Money judgment held proper.

In action for specific performance of a compromise agreement, where the court had extended to defendants an opportunity to convey in accordance with the agreement, of which opportunity they declined to avail themselves, the court thereupon properly afforded relief by way of a money judgment for the sum provided in the agreement to be paid.

Appeal from Superior Court, Glenn County; H. D. Gregory, Judge.

Action by W. S. Armstrong against the Sacramento Valley Realty Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 185 Pac. 874.

Claude F. Purkitt and W. T. Belleu, both of Willows (Courtney L. Moore, of San Francisco, of counsel), for appellants.

Frank Freeman and George Freeman, both of Willows, for respondent.

PREWETT, Presiding Justice pro tem. This is an appeal from a judgment in favor of the plaintiff and respondent and against the appellants in an action brought against them to enforce the terms of a contract dated on April 27, 1917. Though the record in the case is somewhat voluminous, the actual matters in dispute may be brought down to a very narrow compass.

On December 6, 1910, the respondent and other persons owned 1,251 shares of the capital stock of Armstrong-Quatman Company, a corporation, and the appellant Mrs. Quat-

man owned the remaining 1,249 shares. On said day said corporation entered into a contract with the appellant Sacramento Valley Realty Company, a corporation, whereby Armstrong-Quatman Company sold to the latter corporation certain tracts of land situated in the counties of Glenn and Colusa for the agreed price of \$25,000, payable in small installments.

The appellants C. L. Donohoe, A. H. Quatman, and H. J. Barceloux were stockholders in the Sacramento Valley Realty Company, and they made themselves parties to said contract of December 6, 1910. Divers differences having arisen among the parties, the respondent commenced an action against the parties to the contract. In this action Mrs. Quatman became an intervener, asserting by way of intervention that she had an interest in the proceeds of the sale as owner of 1,249 shares of stock. Judgment went against all the defendants therein and the intervener, and they all appealed the case to the Supreme Court. The action of that tribunal is reported in 179 Cal. 648, 178 Pac. 516.

[1] While that appeal was pending the parties got together on the terms of a proposed compromise. These terms were embodied in a lengthy agreement dated April 27, 1917, which agreement constitutes the foundation of the present action. It will be seen that Mrs. Quatman, claiming, as she did, practically one-half the proceeds of sale to arise from the earlier contract, was vitally interested in the outcome of the compromise agreement. This compromise agreement provided substantially that the various suits pending between the parties, some 20 in all, should be dismissed; that the appellants herein should pay to the respondent the sum of \$5,000 in cash and a further sum of \$12,796.01 in lands at a certain value to be ascertained by means of an appraisement. It is out of the provisions for this appraisement that most of the points on this appeal arise. The agreement provides that each side should select fifteen names of proposed appraisers, placing the names in sealed envelopes, and that if three names were found to be common to both lists, these three should be the appraisers. No specific provision was inserted in the agreement for the selection of an alternate in case one of the three should refuse to act, although it was provided that, if three names were not found to be common, then additional lists of fifteen names should be prepared until the requisite number was thus obtained. Three names were found to be common to both lists, but one of the three appraisers refused to act. The agreement provides that such additional lists should be prepared on two days' notice in writing, and no such written notice was given. However, the stakeholder went to

the representative of the appellants and demanded the selection of additional lists, but the appellants declined to submit them on the ground or claim that the agreement made no provision for additional lists in such case. This amounted to a waiver of a written notice, since such claim demonstrated that a more formal notice would have been unavailing. The respondent promptly prepared his additional list. The appellants contended, and on this appeal contend, that the omission of the agreement to make specific provision for supplying the place of an appraiser who refused to act rendered the entire agreement incapable of performance and consequently null and void. No claim was made by any of the appellants prior to the commencement of this suit, so far as the record informs us, that the agreement was inequitable, unjust, or unconscionable, nor that the money agreed to be paid was not justly due. It is a case where the litigants withhold both the land and the money and refuse to submit a list of appraisers on the plea that it is not so nominated in the agreement.

[2] All the appellants make the point that the complaint does not show that they received adequate consideration for their undertaking, and that as to them it is equitable and just. While the appellants devote much space in their briefs to this point, it is sufficient to say that the complaint contains a direct statement or averment that they did receive an adequate consideration, and, moreover, contains in its many allegations an affirmative showing that the appellants and each of them received an adequate consideration, and that as to them the agreement is just. No more is required. No more could be stated.

[3] The appellant Letitia Beretta Quatman makes the further point that, while the complaint may show that the agreement is equitable and just and founded on an adequate consideration as to the other appellants, yet as to her it falls to do so. But she was a party to this litigation—the very controversy that resulted in the compromise agreement. She had intervened in the principal suit and had appealed from an adverse judgment therein. The compromise of the litigation in which she had so vital an interest was not only a valuable, but an adequate, consideration for her obligation, and it matters not whether her obligation was primarily her own or was entered into in behalf of some of her co-obligors. In this view of the matter, the complaint shows that the consideration for her obligation was adequate. It does not seem to be seriously disputed that such consideration may be sufficiently shown by the general allegations of the complaint; but any doubt on the subject is fully settled by the following extract from a late opinion:

"It is not necessary, however, that the complaint for specific enforcement should declare,

in the very words of the Code, that there was 'an adequate consideration for the contract' and that it was 'just and reasonable.' * * * The proper mode of pleading is to set forth the facts from which the court may conclude that the contract is supported by an adequate consideration and is, as to the defendant, fair and just." *Magee v. Magee*, 174 Cal. 276, 162 Pac. 1023.

[4-6] 2. The appellants insist that the agreement is void for the reason that C. L. Donohoe contracts therein that he will procure the consent of his wife to the execution of certain conveyances therein provided to be made. But, first, such a provision does not render a contract void, although it might be a contract that could not be specifically enforced (section 3390, Civ. Code); and, secondly, in this case the appellant Donohoe has entered into no such stipulation. There is a provision in the agreement that a conveyance from her would be sufficient. It is in no way unlawful for a party to agree to convey lands which at the time of contract are owned by another. In such case it is presumed that the contracting party is advised that he can at the proper moment procure the title or procure the holder thereof to make or join in the proper conveyance; but in any view that is his own affair. He is none the less answerable for his breach, even though he may have placed himself in a position where he cannot comply with the terms of his contract. This principle is a complete answer to the claim of appellants that the respondent cannot maintain this action because he knew at the time of contract that the appellants did not own the property involved. However, it is not shown that he knew this, although it is shown that at least a portion of the legal title stood in the names of others. But respondent was nevertheless entitled, in any event, to specific performance as to such portion of the property as may have stood in the names of appellants or any of them. *Farnum v. Clarke*, 148 Cal. 610, 84 Pac. 166.

3. Complaint is made that the court found without sufficient evidence that Frank Freeman had executed a certain quitclaim deed, but neither party is complaining that this deed was not executed, neither party assigns this as a breach, and neither party is injured by the finding. The delivery of such a deed was preliminary to the payment of the first or initial check of \$5,000, and neither party complains that this check was not delivered, nor does either party set out its delivery or nondelivery in their pleadings as a breach. The whole matter is unimportant.

[7] 4. Other points urged, save one, are unimportant, and they require no special attention. This one excepted point is the failure of the agreement to provide a method of selecting an alternate in place of an appraiser refusing to act. The appellants boldly insist that this condition blocks the en-

forcement of the agreement, although they make no pretense of controverting the justice of the respondent's claim to the land or money. The agreement to select three names from the lists of fifteen necessarily implied the names of persons who would be willing to act. This is not a violent nor an unreasonable interpretation of the agreement. It is fundamental that a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contract. Section 1636, Civ. Code. It must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without violating the intention of the parties, as such intention existed at the time of contract. Section 1643, Civ. Code. Stipulations which are necessary to make a contract reasonable are implied. Section 1655, Civ. Code. In the light of these obvious principles of interpretation, no embarrassment is encountered in holding that a vacancy arising from the refusal of an appraiser to act should be filled in the manner provided in the contract for filling other vacancies, to wit, by resort to additional lists of fifteen names submitted by each side. If this is a correct view, then the appellants committed a breach of the agreement when they refused upon request to submit additional lists. If this view is open to question, then we have a condition where, owing to the incompleteness of the agreement, no method of carrying it into effect is provided, and equity can adopt the method most in harmony with the covenants of the parties. In either view, the court was authorized to entertain the action and to render equitable relief.

The selection of the appraisers was merely a means to an end and is not of itself a vital part of the agreement. It was no more than a method of selecting unbiased appraisers. The court is an unbiased appraiser, and under the authorities is competent to appraise the land. As said by the Supreme Court of Washington in the case of Cogswell v. Cogswell, 70 Wash. 178, 126 Pac. 431:

"The matter in suit having been settled by the solemnly executed contract of the parties, that contract having been partly performed on both sides, the failure to arbitrate relating only to a nonessential incident, not giving ground for a rescission, it follows that the appellants have mistaken their remedy. They should have applied to the court for the enforcement of the contract by fixing the price of the land."

And quoting from another case:

"In such a case the courts hold that the matter of determining the price is matter of form, rather than of substance; and if it becomes

evident that it cannot be determined in the manner provided for in the contract, by reason of the refusal of one party to do what in equity he ought to do, the court will determine it upon the application of the other." *Town of Bristol v. Bristol Waterworks*, 19 R. I. 413, 34 Atl. 359, 82 L. R. A. 740.

To substantially the same effect are *Cooke v. Miller*, 25 R. I. 92, 54 Atl. 927, 1 Ann. Cas. 30, and *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304. In *Parsons v. Ambos*, 121 Ga. 98, 48 S. E. 696, the umpire died, and the court itself determined the values. The court said:

"So, too, in contracts of sale the parties may stipulate * * * that the value of the property shall be ascertained by appraisers before either has the right to sue. This fixing of values, however, is a mere incident and not of the substance of the contract. It rather serves the office of evidence, than of a finding which construes the contract or determines rights."

[8] We entertain no doubt that the refusal of the appellants to join in the selection of a third appraiser justifies the trial court, sitting as a court of equity, to take the matter in hand and itself fix the values and afford the appellants an opportunity to complete the transaction upon the values thus fixed. Upon their failure so to do, it is well settled that the court could grant, as an alternative, a judgment for monetary relief. Our Supreme Court says:

"And, finally, it is indisputable that where, through no fault of the plaintiff in equity, specific performance cannot be decreed, the court, having obtained jurisdiction of the subject-matter properly within its cognizance, will grant as an alternative monetary relief, which in an action strictly at law would be by way of damages." *Messer v. Hibernia S. & L. Soc.*, 149 Cal. 122, 84 Pac. 835.

[9] 5. The court allowed the respondent interest on the sum found due, or rather on the sum admitted to be due, from July 1, 1917. At or about this date the appellants committed a breach of the agreement by refusing further to perform and by declaring to the respondent that further performance was impossible. From that date the respondent was entitled to interest.

[10] 6. The court extended to the appellants an opportunity to convey, of which opportunity they declined to avail themselves. The court thereupon afforded relief by way of a money judgment for the sum provided in the agreement to be paid. This method of procedure is open to no objection, and is in harmony with the usual practice.

We find no error in the record and the judgment is accordingly affirmed.

We concur: HART, J.; BURNETT, J.

(49 Cal. App. 43)

ELLIS v. CHAMBERS, State Controller,
et al. (Civ. 2208.)

(District Court of Appeal, Third District, California. Aug. 5, 1920.)

Mandamus §14(3)—Writ denied, where respondents are willing to do acts desired.

Application for a writ of mandate, to be directed to the state controller and state treasurer, requiring them to credit proceeds of certain checks to "the proper state highway fund," will be denied, where it appears that respondents have at all times been willing, and are still willing, to credit any payments received on account of any co-operative projects to any funds lawfully designated by the state engineering department.

Application by W. R. Ellis for writ of mandate, to be directed to John S. Chambers, as Controller of the State of California, and Friend W. Richardson, as Treasurer of the State of California, requiring them to credit proceeds of certain checks to "the proper state highway fund." Writ denied.

Dunn & Brand, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Robt. T. McKisick, Deputy Atty. Gen. (C. C. Carleton and James L. Atteridge, both of Sacramento, of counsel), for respondents.

PER OURIAM. It appears to the court in this proceeding that the respondents have at all times been willing, and are now ready and willing, to credit any payments received from the general government on account of any co-operative projects to any fund or funds as may be lawfully designated by the state engineering department.

It follows that no writ of mandate should issue herein; and it is so ordered.

(52 Cal. App. 222)

NEW RICHMOND LAND CO. v. IVANOVICH. (Civ. 3738.)

(District Court of Appeal, First District, Division 1, California. April 12, 1921.)

1. Vendor and purchaser §84—Provision giving vendor right to forfeit payments in event of default does not give purchaser option to abandon contract.

Where a contract for the purchase of land on installments provided that in event of the purchaser's default the vendor might forfeit all rights under the agreement and retain amounts paid, the provision was one clearly for the benefit of the vendor giving him an option, but the purchaser has no option which will allow him to abandon the contract on pain of forfeiture of installments paid.

2. Evidence §461(1)—Parol evidence inadmissible, where written contract is definite.

Where a written contract for the purchase of lands on installments was definite and gave the purchaser no right to abandon on pain of forfeiting payments made, parol evidence offered for the purpose of showing that the parties intended the purchaser should have the right to abandon is inadmissible, in view of Civ. Code, § 1639.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the New Richmond Land Company against Martin Ivanovich. From judgment for plaintiff, defendant appeals. Affirmed.

Ralph L. Hathorn, of San Francisco, for appellant.

Faulkner & Faulkner, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff in an action brought to recover a balance alleged to be due under a contract by the terms of which the defendant agreed to purchase from the plaintiff certain lots of land in the city of Richmond, the purchase price to be paid in monthly installments. Defendant made a number of such payments, and then abandoned the contract, whereupon the present action was brought to recover the balance of such installments.

In support of his appeal the defendant contends that, according to the terms of the contract entered into between the plaintiff and himself, in the event that he should fail to make the specified payments, the only remedy of his vendor was the retention by him of the amount of money already paid on the purchase price, the respective rights and obligations of the parties being thereby terminated, which excluded any right on the part of the vendor to recover any unpaid balance. The provision of the contract upon which this claim of the appellant is predicated reads as follows:

"The due performance of all covenants and agreements on the part of the buyer is a condition precedent whereon depends the performance of the agreements on the part of the seller. In the event of a failure of the buyer to comply with the covenants and agreements, or any part thereof, on his part entered into, the seller shall be released from all obligations in law or equity to transfer and convey said property, or any part thereof, and the buyer shall forfeit all rights under this agreement, and all rights to any and all moneys which he shall theretofore have paid hereunder, as liquidated damages for such default, and not as a penalty."

[1] We are unable to concur in appellant's construction of this provision of the contract. It is clearly one intended for the benefit of

the vendor by which, at his option, in the event of the vendee's default, he is relieved of his obligation to convey the lots sold, and may regard as forfeited all payments theretofore made by the vendee, or, waiving the forfeiture, he may require the vendee to complete his contract. The vendee is given no option, but must abide by the election of the vendor. *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *North Stockton v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438; *Glock v. Howard*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Shenners v. Pritchard*, 104 Wis. 287, 80 N. W. 458.

In *Willcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310, where a similar contract was under review, it was held that under a contract for the sale of land, in which the vendee agrees to pay a balance of the purchase money on or before a certain date, and the vendor agrees to convey upon such payment, and which provides that if the vendee shall fail to make such payment he shall forfeit all right to the land, and the vendor shall be released from all obligations to convey, "and the agreement shall be void," if the vendee neglects or refuses to pay the vendor has the option to avoid or enforce the contract, and may, if he so elects, sue and recover the unpaid balance of the purchase money.

The instant case is distinguishable from the case of *Beckwith Land Co. v. Allison*, 26 Cal. App. 473, 147 Pac. 482, and other cases relied upon by the appellant. Here, as we have seen, it was optional with the plaintiff whether he should declare the amounts paid forfeited, or should insist upon performance of the contract; while in the cases relied upon by the appellant the contract unconditionally provide that upon failure of the purchaser to comply with the conditions to be performed by him a certain sum was to be forfeited as damages for his nonfulfillment of those conditions. In such a situation it is plain, as stated in those cases, that the purchaser has an option to purchase without any obligation beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction.

[2] Finally, we think the court properly excluded parol evidence offered for the purpose of showing that the parties intended that the purchaser should have the right to abandon the contract at any time upon suffering the loss of payments already made. Here the contract is free from uncertainty or ambiguity, and, accordingly, the intention of the parties, must be ascertained from the formal agreement. See Civ. Code, § 1639; *Payne v. Com. Nat. Bank*, 177 Cal. 68, 169 Pac. 1007, L. R. A. 1918C, 328.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(52 Cal. App. 55)

BOZARTH v. BIRCH. (Civ. 3671.)

(District Court of Appeal, First District, Division 1, California. March 24, 1921. Hearing Denied by Supreme Court May 23, 1921.)

1. Fraud ⇨34—Rescission essential to recovery for undue influence.

In an action for damages based solely on defendant's exercise of undue influence over plaintiff in the procurement of a contract whereby plaintiff, who had lent to the corporation in which defendant was stockholder and director, surrendered his notes and stock, the complaint, not averring rescission of the contract, did not state facts sufficient to constitute a cause of action.

2. Fraud ⇨34—Rescission held not essential to attack on surrender of notes and stock by one unduly influenced and deceived.

In an action sounding in fraud by plaintiff against defendant stockholder and director in the corporation to which plaintiff had lent, on account of defendant's having induced plaintiff to surrender his notes of the corporation and stock, complaint held not based wholly or chiefly on defendant's undue influence over plaintiff, so as to necessitate rescission before suit, but to sound in fraud, consisting in the fraudulent design and false representation of defendant whereby plaintiff was induced to part with his notes and stock without adequate consideration.

3. Fraud ⇨31—Defrauded party may rescind or sue for damages.

One defrauded has the choice of remedies, either to disaffirm the contract through its rescission, or to affirm it and sue for damages.

4. Fraud ⇨11(1)—Misrepresentations as to insolvency of corporation statements of fact.

Defendant stockholder and director's alleged misrepresentations to plaintiff lender to the company, to induce him to surrender his notes and stock, as to the insolvency of the corporation and its imminent danger of bankruptcy, held statements of fact based on defendant's superior knowledge of the affairs of the corporation.

5. Fraud ⇨52—Evidence of defrauded party's unsoundness of mind admissible.

In an action by the lender to a corporation against its stockholder and director, who induced him by fraud and undue influence to surrender his notes and stock by misrepresenting the insolvency of the company and its imminent danger of bankruptcy, evidence as to plaintiff's unsoundness of mind was admissible, as tending to show he was more easily led by defendant's misrepresentations.

6. Appeal and error ⇨1050(1)—Evidence of defendant's wealth and business experience harmless to him in view of verdict.

In an action by a lender to a corporation against its stockholder and director who, by fraud and undue influence, misrepresenting the company's imminent bankruptcy, induced plaintiff to surrender his notes and stock, evidence as to defendant's wealth and business experience, if inadmissible, in view of Civ. Code, §

\$294, was harmless to defendant, where the verdict awarded plaintiff only a sum which represented the actual value of his stock at the time of the transaction in question.

7. Trial \Leftarrow 248—Instructions having reference to facts not abstract.

Instructions which were not only correct in point of law, but had immediate reference to the facts as pleaded and proven in the case, were not abstract.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. W. Bozarth against A. Otis Birch. From a judgment for plaintiff, defendant appeals. Affirmed.

Schweitzer & Hutton, Geo. H. Woodruff, and Clyde C. Shoemaker, all of Los Angeles, for appellant.

John C. Stick and Muhleman & Crump, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of \$9,550 damages. The complaint set forth facts upon which the plaintiff predicated his prayer for damages in substance as follows:

That the Lyon-McKinney-Smith Company was a corporation having its principal place of business in Los Angeles, with a capital stock of \$100,000 divided into 1,000 shares of the par value of \$100 per share; that plaintiff was the owner and holder of 194 shares of the capital stock of said corporation from the time of its incorporation in the year 1902 up to the 20th day of August, 1916; that in the year 1912 the defendant became a stockholder in said corporation, and also a director thereof; that from time to time thereafter he acquired additional shares of stock therein, until on January 1, 1916, he was the owner of the majority of its stock; that during the same time the corporation had become indebted to the defendant in the sum of approximately \$100,000, so that he was on the last-named date the largest creditor thereof; that by reason of his said ownership of the majority of the stock of said corporation, and of the fact that he was its largest creditor, the defendant had come to completely dominate the board of directors of said corporation and the officers thereof, and also the control and financial policy thereof, and had thereby craftily stimulated and fostered in the minds of the said officials thereof the idea that, if he were to become dissatisfied or displeased with the conduct of the affairs of said corporation, he could and would wreck the business of the same; that the plaintiff had also, from time to time, loaned various sums of money to the corporation, until on August 19, 1916, it was indebted to him in the sum of \$13,000, evidenced by two certain promissory notes, one for the sum of \$10,500, bearing interest at the rate of 10 per cent. per annum, and one

for the sum of \$2,500, bearing interest at the rate of 7 per cent. per annum, which principal sums, with accumulated interest, were then due and unpaid; that these sums of money had been loaned by plaintiff to the corporation for its accommodation, use, and benefit, and that, in order to so loan the same, the plaintiff had himself borrowed the sum of \$9,000 of said moneys so loaned by him to it, upon which he was at said time paying interest at the rate of 8 per cent. per annum, and of which last-named indebtedness he would be unable to pay either the principal or interest except out of the moneys due as principal and becoming due as interest from the corporation to him; that on January 1, 1916, the plaintiff suffered a nervous breakdown, and was incapacitated for business, or for any proper understanding of the conduct and affairs of said corporation, which enfeebled mental and bodily condition of the plaintiff continued thereafter up to and after August 20, 1916; that at some time prior to August 19, 1916, the said defendant conceived the design of despoiling the plaintiff of his said 194 shares of the capital stock of said corporation without paying him any adequate compensation therefor through his control of said corporation, and through his manipulation and control of its board of directors, and that, on August 19, 1916, in furtherance of his said design, he falsely and fraudulently represented to plaintiff that said corporation was insolvent, and was in immediate danger of bankruptcy, and that, at a meeting of said corporation held on said day, with intent to intimidate the said plaintiff and lend stress to said representation, the said defendant proposed that an assessment be levied on the capital stock of said corporation at the rate of 20 per cent. of the par value thereof, if paid in cash, or of 40 per cent. of the par value thereof if paid in stock; that at said meeting the said defendant further falsely and fraudulently stated and declared that the plaintiff could not have paid to him his interest on his notes of said corporation any more; that at the time of the making of these statements by the said defendant they were knowingly false and untrue, in that said corporation was not insolvent, and was not in condition to make no more payments of the interest on plaintiff's notes to him, but that the said plaintiff, by reason of his enfeebled mental and physical condition, and of the fact that he had thereby been unable to keep himself informed as to the actual condition of the affairs of the corporation, believed the said statements and false assertions of the defendant to be true, and was greatly distressed thereby; and that, while he was in this state of distress, the defendant offered said plaintiff, immediately following said statements, to buy his said notes of

said corporation from him, paying him the face value thereof, without accrued interest, but only upon condition that the said plaintiff would turn over to said defendant all of his said stock in said corporation without any other consideration therefor than the payment of the said face value of the plaintiff's said notes, and that said plaintiff, under the belief and influence of said defendant's false assertions that said corporation was insolvent, and in immediate danger of bankruptcy, and unable to pay the interest on his notes, and also under the compulsion and distress occasioned thereby, and being thus overreached and oppressed by the defendant, transferred to him his said notes for the sum of \$13,000, the face value thereof, without accrued interest, and also transferred to him his said 194 shares of the capital stock of said corporation, without any other or further consideration therefor; that said notes were at said time of the reasonable value of the sum of \$13,000, and that said stock was at said time of the reasonable value of \$19,400; and that, by the aforesaid acts and grievances complained of, the plaintiff has suffered damage in the sum of \$25,000.

The defendant demurred to the plaintiff's complaint on several grounds, and also moved to strike out several portions thereof; and, the said demurrer having been overruled, and said motion denied, filed his answer, denying specifically most of the material averments of said complaint, and denying any unfairness or overreaching on his part in his transactions with the defendant. He also set up as a separate and affirmative defense that the plaintiff had, prior to the institution of this action, and after he had become mentally competent and thoroughly cognizant of all the acts and things of which he complained in this action, instituted an action against said corporation for certain recoveries, by which said action said plaintiff had confirmed his said transactions with said defendant, whereby he was now estopped from maintaining the present action.

The case went to trial before a jury upon the issues as thus framed, at the conclusion of which the jury rendered its verdict in the plaintiff's favor, fixing his damages at the sum of \$9,550, for which sum judgment was presently entered, and from such judgment defendant prosecutes this appeal.

[1-3] The first contention of the appellant is that the trial court erred in its order overruling its demurrer to the plaintiff's complaint, for the alleged reason that the cause of action attempted to be set forth therein was one based upon the exercise of undue influence upon the part of the defendant in procuring the contract from plaintiff for the transfer of his notes and stock, and that, this being so, it was requisite for him to have averred a rescission of said contract; and that, lacking such averment, the com-

plaint did not state facts sufficient to constitute a cause of action. In making this contention the defendant relies upon the two cases of *Bancroft v. Bancroft*, 110 Cal. 374, 42 Pac. 896, and *McDougall v. Roberts*, 185 Pac. 483. It may not be denied that, if the appellant's premise to the effect that this is an action based solely upon the defendant's exercise of undue influence over the plaintiff in the procurement of the contract in question, his conclusion as to the insufficiency of the plaintiff's complaint in the respect indicated would be correct under the foregoing cases; but an inspection of said complaint, as hereinbefore stated, in substance convinces us that this action is not based wholly, or chiefly, upon the defendant's undue influence over the plaintiff in the procurement of said contract, but that it is one essentially sounding in fraud, consisting in the fraudulent design and false representation of the defendant by which the plaintiff was induced to part with his notes and stock without adequate consideration. The two cases above cited as upholding the appellant's contention expressly limit the application of the doctrine therein declared to cases wherein undue influence is alleged to be the sole inspiring cause of the contract complained of; and, in our opinion, this doctrine should not be extended to cases, like that at bar, wherein advantageous contracts have been procured by false and fraudulent misrepresentations as to matters of fact, even though a plaintiff, by reason of mental infirmities, has been the more easily misled and unduly influenced thereby. This being so, the well-established rule applicable to cases sounding in fraud, which gives to the plaintiff his choice of remedies, either to disaffirm the contract through its rescission, or to affirm it and sue for damages, should be given application to the facts of the case at bar; and the plaintiff herein having elected to seek the latter remedy, his complaint must be held to have sufficiently stated a cause of action.

[4] As to the objections which the appellant urges to the plaintiff's complaint upon the other grounds, we think they are not well taken, for the reason that the defendant's alleged misrepresentations as to the insolvency of the corporation and its imminent danger of bankruptcy were not made as mere matters of opinion, but as statements of fact based upon the defendant's superior knowledge of the affairs of the corporation. Being so made to the plaintiff, at a time when, by reason of his impaired physical and mental powers, he was not in a condition to know or learn the truth respecting the defendant's assertions, he has, we think, sufficiently brought himself within the principles governing fair dealing between parties to contracts, as laid down in the case of *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011. We think, also, and for the reasons above stated, that the motion of the defendant to strike

out certain portions of the plaintiff's complaint was properly denied.

[5] The defendant's next contention is that the trial court erred in admitting evidence as to the plaintiff's unsoundness of mind. We confess ourselves not quite able to follow the refinement of the appellant's reasoning in support of this contention. The gravamen of the plaintiff's complaint was that, by reason of his physical and mental infirmities, he was the more easily misled by the defendant's representations as to matters of fact which, had he been in his normal state of mind and body, he would have known, or could have learned to be untrue. Seven witnesses testified as to his enfeebled condition, some of whom even went so far as to declare him entirely incompetent on the date of the transaction in question. Had he brought suit to set aside said transaction as entirely void, the above evidence would, it is conceded, have been admissible; and we fail to see why the same evidence would not be competent in an action wherein the defendant is alleged to have been able to successfully misrepresent an existing condition because the plaintiff's weakened mental state made it impossible for him to know or learn the truth. The case of *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276, cited by the appellant on this point, has no application to it that we can discover. The point is not well taken.

[6] The appellant further urges a number of respects wherein he claims the evidence is insufficient to support the findings of the jury upon the special issues presented to it for determination at the defendant's request. We have examined each of these findings in the light of the pleadings in the case and of the evidence adduced in support thereof, and from such examination we are satisfied the findings of the jury upon these issues are each sufficiently supported by the evidence in the case. It would not be profitable to review these in detail; nor do we deem the several alleged errors of the trial court in the admission of evidence, conceding them to be such, sufficiently prejudicial to justify a reversal of the case—as, for example, the alleged error of the court in admitting evidence as to the defendant's wealth and business experience. It is argued that this sort of evidence is only admissible in actions wherein exemplary damages may be awarded; and it is urged by the appellant that this is not, in its nature, such an action, since section 3294 of the Civil Code confines such damages to actions "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied."

It may well be doubted whether an action for damages founded upon misrepresentation and deceit, with particular circumstances of oppression, is not one of those actions upon

tort to which the rule governing exemplary damages would apply; but however that may be, the evidence upon which the appellant has urged this objection does not appear to have been prejudicial, since the verdict of the jury awarded to the plaintiff not the large amount of damages which he prayed for, but only a sum which represented the actual value of the plaintiff's stock at the time of the transaction in question, as fixed by the testimony of the defendant himself.

The final contentions of the appellant are that the court erred in the refusal to give, or in the modification of, certain instructions requested by him, and in the giving of certain other instructions which appellant insists are merely abstract statements of the law relating to fraud and deceit. As to the first of these contentions, we find that the alleged errors of the trial court had reference to the appellant's claim that, this being an action based upon undue influence, it was not maintainable, except upon proof of the rescission of the contract obtained thereby. This point has already been disposed of in an earlier part of this opinion.

[7] As to the point that the court's instructions upon the subject of fraud and deceit were merely abstract statements of law, and hence ought not to have been given, we hold that this contention has no merit, since the instructions complained of were not only correct in point of law, but had immediate reference to the facts as pleaded and proven in the case.

No error appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 215)

MORIYAMA v. VEYSEY et al. (Civ. 3478.)

(District Court of Appeal, Second District, Division 1, California. April 12, 1921.)

Injunction ~~146~~—**Injunction pendente lite** should not be granted where verified answer denies allegations of complaint.

An injunction should not be granted pendente lite upon a complaint, where, in response thereto, a verified answer is filed explicitly and unequivocally denying the allegations of such complaint; therefore where the lessee of lands sued to compel the lessor and mortgagee to reinstate and relocate 10 shares of water stock as an appurtenance to the land, and the mortgagee by verified answer denied that he was the purchaser of the stock or claimed to be the owner thereof, etc., a temporary injunction should not have been granted.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by S. Moriyama against Charles F. Veysey and others. From an order granting

a temporary injunction, defendant named appeals. Reversed.

Conkling & Brown, of El Centro, for appellant.

James L. Allen, of Brawley, for respondent.

CONREY, P. J. This is an appeal by the defendant Charles F. Veysey from an order granting a temporary injunction.

The complaint alleged that on the 12th day of September, 1918, the defendants Groshen, owners of certain land in Imperial county, leased to the plaintiff for a term of three years the said land for farming purposes, also giving to the lessee the right to the use of the water stock located on the land; that said water stock consisted of 416 shares of stock of Imperial Water Company No. 8 owned by the lessors and appurtenant to the land, which said stock was sufficient to provide for the furnishing of water to the land; that the corporation was organized for the purpose of distribution of water for irrigation, and that by the issue of the shares of stock the company obligated itself to furnish all water to irrigate the said land for farming and domestic purposes, and that said corporation at all times had sufficient water in its canals to supply the needs of the lands of all of its stockholders and other persons entitled thereto; that said land is valueless for farming purposes except when furnished with water for irrigation. It was further alleged that defendants Groshen, being indebted to defendant Veysey, mortgaged the described land to Veysey to secure that indebtedness; that as additional security therefor the defendants pledged to Veysey their said shares of water stock; that as additional security for the protection of Veysey against sale of the water stock for delinquent assessments and for the payment of taxes defendants Groshen assigned to Veysey the rents accruing from said lands, said rents to be applied against any overdue interest owing to Veysey, except sufficient amounts to be carried to cover taxes and water assessments to keep them from becoming delinquent; that on the 9th day of October, 1918, an assessment was levied by the water company on said water stock, which assessment, not having been paid, was declared delinquent, and afterwards, on the 29th day of November, 1918, the corporation sold 10 shares of said stock to pay said assessment, and Veysey was the purchaser at said sale and now claims to be the legal owner and holder of said 10 shares of stock; that the defendant corporation at all times knew of said facts existing respecting the mortgage and pledge to Veysey and his purchase of the stock at said delinquent sale; on information and belief, that said 10 shares of stock had not been transferred on the books of the corporation to other lands and remains and still is appurtenant to said land, and that the water company "has here-

tofore furnished to plaintiff, as tenant of said lands, sufficient water for the irrigation of said lands and plaintiff is entitled to have such water." It was further alleged that on November 29, 1918, the water company notified plaintiff "that said 16 shares of water stock had been sold and unless the owner of the land should purchase an additional 16 shares of stock in said corporation no future delivery of water would be furnished for use on said lands; that although plaintiff has demanded that said corporation furnish water to said lands, and offered to pay for such water, the said corporation refused and still refuses to furnish any water to said lands;" that plaintiff has demanded of the defendant Veysey that he arrange with the defendant water company to allow plaintiff to use said water stock and procure water for use on said lands, and said defendant Veysey has failed and refused so to do; that a like demand was made of the defendant Floren Groshen, to which demand the defendants Groshen have not replied; that the plaintiff has paid the rent due and for all water used on the land. Further facts were alleged showing loss and damage suffered and that will be suffered by the plaintiff by nondelivery of the water, and that the defendants Groshen are insolvent.

The defendant Veysey in his answer (which, like the complaint, was duly verified) denied that as additional security, or otherwise, for the payment of the indebtedness of defendants Groshen to him, said shares of stock were pledged to him; denied that he is now the equitable owner of said shares of stock or of said land, or of any thereof; denied that as additional security or for the protection of Veysey against the sale of said water stock for delinquent assessments, or otherwise, or for the payment of taxes, or for any other purpose, the defendants Groshen, or either of them, assigned to him the rents accruing or arising from the land described in the lease, or any of such rents; denied that the water company sold 10 shares of the stock mentioned in the complaint to pay any assessment, or for any purpose whatever, to the defendant Veysey, and denied that the defendant Veysey was the purchaser at any such sale, or that he is now the owner or claims to be the owner of said 10 shares of water stock, or any water stock in said corporation whatever. There are other denials in the answer of facts alleged in the complaint, but those herein stated are sufficient for the present purpose. At the hearing on the order to show cause which was first issued in this matter there was read in evidence, in addition to the complaint and answer, a complaint in an action commenced by Veysey against defendants Groshen on December 30, 1917, "to foreclose a mortgage on the land and shares of water stock described in the complaint herein, and in which complaint duly verified by said Veysey it was

stated, "That as collateral security for said mortgage said defendants pledged with said plaintiff 387 shares of stock in the Imperial Water Co. No. 8," which said stock and land were and are the same stock and land described in the complaint in this action. Said action of foreclosure of mortgage was thereafter dismissed without prejudice.

From the evidence thus produced, it was established (if we may presume that the mortgage and pledge in the foreclosure action were the same mortgage and pledge referred to in plaintiff's complaint herein) that the mortgage and pledge to appellant were executed prior to the making of the lease by defendants Groshen to plaintiff. It is likewise established that appellant, under oath, by his answer, denied the equities of the complaint, in this, among other things, that he denied that he purchased any of said shares of water stock, or that he is or claims to be the owner thereof. If this be true, it would be impossible for him to comply with the injunction which commands that he "reinstate and relocate said ten shares of stock as an appurtenance to the lands described in the complaint herein."

"The rule is well settled that an injunction should not be granted pendente lite upon a complaint alone where, in response thereto, a verified answer is filed explicitly and unequivocally denying the allegations of such complaint." *Martin v. Dansiger*, 21 Cal. App. 563, 564, 132 Pac. 284.

We think that plaintiff was not entitled to a temporary injunction against appellant. The order is reversed.

We concur: SHAW, J.; JAMES, J.

(45 Nev. 99)

SHUTE v. BIG MEADOWS INV. CO. (No. 2468.)

(Supreme Court of Nevada. June 6, 1921.)

1. New trial \S 1 — Granted only for cause good at common law or enumerated in statute.

If the trial court has inherent power to grant a new trial for causes other than those enumerated in the statute, it must be for some cause that was good at common law.

2. New trial \S 13—General rule at common law.

The general rule at common law was that a new trial would be granted where an injustice had been done.

3. Appeal and error \S 933(1)—Presumed that case was free from error.

On appeal by plaintiff from an order granting a new trial for causes other than those enumerated in the statute, it must be presumed that the case was free from error, and that the

judgment was a just one, where it does not appear that there was any irregularity or error in the proceedings or trial of the case, or that any injustice resulted.

4. New trial \S 94 — Mere loss of reporter's notes not ground for.

The mere fact that reporter's notes were lost and a party was "deprived of the use and benefit of the reporter's notes to make up his memorandum of errors" was not ground for a new trial, as the errors may have been few and simple, and such party may have been able to prepare a proper record from other sources.

Appeal from District Court, Pershing County; C. J. McFadden, Judge.

Action by James L. Shute against the Big Meadows Investment Company. From an order granting a new trial after judgment in its favor, plaintiff appeals. Reversed.

R. M. Hardy, of Susanville, Cal., and T. A. Brandon, of Winnemucca, for appellant.

M. B. Moore, of Reno, and J. G. Brown, of Lovelock, for respondent.

DUCKER, J. On May 12, 1920, the district court rendered judgment in this case in favor of appellant.

Respondent noticed his intention to move for a new trial, assigning in said notice several statutory grounds. Thereafter respondent filed a paper indorsed "Statement in Lieu of Memo of Errors" containing the following:

"Comes now the defendant above named, by its attorneys, and says: That in its notice of intention to move for a new trial, heretofore filed in said above-entitled action, one of the grounds named, and upon which defendant chiefly relies, is the ground as stated in section 5320, R. L. Nevada 1912, to wit: 'Error in law occurring at the trial and excepted to by the party making the application.' That the records in said case, and particularly the stenographer's report of the evidence, has [have] all been destroyed, and that therefore defendant is without any means or information with which to prepare, serve, and file, as required by law, its memorandum of errors upon which said defendant chiefly relies on its said 'Notice of Intention to Move for a New Trial.'"

Thereafter, on motion of respondent, the court made the following order, granting a new trial:

"It is hereby ordered that the motion of the defendant heretofore made for a new trial of the above-entitled action be, and the same is hereby, granted, and that a new trial of the issues in the above-entitled action be had, on the grounds that the stenographic notes of the official stenographer who reported the proceedings upon the trial of said action have been destroyed by fire, and the defendant is therefore deprived of the use and benefit of the same, with which to prepare, serve and file its memo of errors herein."

The action of the trial court in awarding a new trial for this cause is assigned as error by appellant.

In support thereof it is urged: (1) That the reason given by the court for awarding a new trial is not included in the grounds enumerated in the statute for granting a new trial, and that such grounds are exclusive; and (2) that no showing whatever is made that a proper record could not have been made by respondent upon which to base its motion for a new trial, notwithstanding the loss of the stenographer's notes.

[1, 2] The latter contention is well taken, and we therefore conclude that it is not necessary to determine whether or not the section of the Civil Practice Act prescribing grounds for a new trial includes all the cases in which a district court may grant a new trial. Assuming, but not deciding, that the statutory enumeration of causes for a new trial is not exclusive, we are nevertheless of the opinion that the loss of the reporter's notes in the instant case did not authorize the court to grant a new trial. If a trial court has inherent power to grant a new trial for causes other than those enumerated in the statute, it must be for some cause that was good at common law. The general rule at common law was that a new trial would be granted where an injustice had been done. 12 Ency. Pl. & Prac. 718.

This court in *Scott v. Haines*, 4 Nev. 426, speaking of the authority of courts to grant a new trial, said:

"Without saying that this section embraces all cases in which a district court may grant a new trial, it may be safely said that a verdict or other decision 'cannot be set aside where no irregularity or error whatever is shown, and the verdict or decision is in accordance with and justified by the evidence.' The court in such case has no more right to set aside a verdict or decision than it has to render a judgment without pursuing the forms prescribed by law. Error in some respects, or injustice in the result, alone authorizes an interference with a judgment or decree once rendered."

[3] It does not appear that there has been any irregularity or error in the proceedings or trial of this case, or that any injustice has resulted, and in the absence of any showing to the contrary, it must be presumed that the case is free from error, and that the judgment is a just one.

[4] It is urged that injustice will result from the loss of the reporter's notes because, by reason thereof, counsel for respondent is unable to prepare and present to the trial court a memorandum of errors upon which respondent chiefly relies on its motion for a new trial. But there has been no showing made to this effect. The errors claimed may have been few and simple, and the information necessary to the preparation of a proper record for the lower court and the appeal as well supplied from other sources than the

reporter's notes. The trial judge's recollection of what transpired at the trial as to the objections made, rulings thereon, and exceptions taken, and the evidence necessary to properly present the points, or counsel's own recollection or notes, so far as the record discloses, may have been ample in this respect. It does not appear by affidavit or other appropriate way that a sufficient record could not have been obtained from these sources. In fact, counsel for respondent seems to have relied solely upon the point that, because they were deprived of the use and benefit of the reporter's notes to make up their memorandum of errors, respondent was entitled to a new trial. This, as appears by the order of the court, was the sole ground upon which the new trial was granted. The order was not made upon the ground that the respondent had lost the benefit of his exceptions through the loss of the stenographer's notes, but upon the ground that it was deprived of the use and benefit of the same.

The court in its opinion cites 20 R. C. L. 288, where the rule is stated that, it seems to be well established as a general rule, where a party has lost the benefit of his exceptions from causes beyond his control, a new trial is properly awarded, although it has been held otherwise in a few jurisdictions. Conceding this to be the general rule in those states where the statutory grounds for a new trial are not exclusive, still it does not appear in this case that the respondent has lost the benefit of his exceptions through the destruction of the reporter's notes. The most that has been shown is that the notes have been destroyed.

In *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048, cited and discussed by the trial court, in which an order denying a new trial was reversed because a portion of the evidence, objections, and rulings of the court thereon, and exceptions, together with the depositions of witnesses read upon the trial, had been lost by the reporter who took down the shorthand notes of the trial and could not be duplicated, it appears that both parties agreed that, because of the inability of the plaintiff in error to furnish the necessary record, a new trial should be granted. Moreover, a confession of error signed by the Attorney General, prosecuting attorney, and special attorney who assisted the latter at the trial was filed, wherein manifest error, prejudicial to the rights of the plaintiff in error, was admitted in the proceedings of the court. These circumstances, together with the fact that the defendant had been convicted of the crime of murder and sentenced to death, lead us to regard *Richardson v. State* as an extreme case. Neither does it represent the weight of authority on this point. While it has been held in other jurisdictions that the loss or destruction of the reporter's notes is ground for a

new trial, yet the weight of authority upon the principle involved, in those jurisdictions where the statutory grounds for a new trial are not exclusive, is to the effect that where a record, papers, or evidence necessary to a determination of a case have been lost or destroyed without the possibility of substitution, a new trial will be granted. 20 R. O. L. 288; *Bailey v. United States*, 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A. (N. S.) 860.

As stated in the note to the last citation:

"This rule presupposes that there is no means available to appellant of restoring the record. Where such means are available, he is, of course, bound to avail himself of them."

Even though we grant, for the purposes of this decision, that the trial court was not limited in its jurisdiction by the grounds enumerated in the statute, it was without authority to order a new trial upon the mere fact of the destruction of the reporter's notes.

The order granting a new trial is reversed.

SANDERS, C. J., and COLEMAN, J., concur.

(45 Nev. 93)

Ex parte CONVERSE. (No. 2509.)

(Supreme Court of Nevada. June 4, 1921.)

1. Courts ~~42~~(8)—Juvenile delinquency act held valid, and not to have created a court of limited special jurisdiction.

Rev. Laws, § 757, making it a crime to contribute to the dependency or delinquency of a child, and providing that the prosecution therefor shall be had in district court, but in a juvenile department thereof, is not void for creating a court of limited and special jurisdiction, since it does no such thing.

2. Fines ~~41~~—Where party was given both jail sentence and fine for contributing to juvenile delinquency, a judgment for confinement until payment of fine was proper.

Rev. Laws, § 7268, provides for the commitment of defendant, convicted of crime, to the custody of the proper officer, and for his detention until the judgment is complied with, and section 7257 provides that, if the judgment is that defendant pay a fine, it may also direct that he be imprisoned until the fine be satisfied, so that on a conviction under Rev. Laws § 757, for contributing to juvenile delinquency where defendant was given the maximum jail sentence and maximum fine, it was proper for the judgment to provide that the defendant be confined in jail until the fine be paid, in accordance with the provisions of section 7257.

3. Fines ~~41~~—Statute providing for commitment until payment of fine held not unconstitutional.

Rev. Laws, § 7257, providing that a judgment of conviction, in which defendant is to pay a fine, may also direct that he be imprisoned until the fine is satisfied, and specifying the

extent of the imprisonment, which shall not exceed one day for every \$2 of the fine, or in that proportion, is not in violation of the spirit or letter of the Constitution, but is a statute enacted in the territorial days, and specifically continued in force by the Constitution itself.

Original proceeding in habeas corpus by E. R. Converse after conviction on charge of contributing to juvenile delinquency. Proceeding dismissed, and petitioner remanded to the custody of the sheriff.

Warren & Hawkins, of Winnemucca, for petitioner.

L. B. Fowler, Atty. Gen., and L. G. Wilson, Dist. Atty., of Winnemucca, for respondent.

COLEMAN, J. [1] This is an original proceeding in habeas corpus. Petitioner was convicted upon a charge of contributing to juvenile delinquency. He was sentenced to imprisonment for six months and to pay a fine of \$500, and for failure to pay such fine to serve a term in the county jail equal to one day for each \$2 thereof. Pursuant to such sentence, he was committed to the county jail. The section under which petitioner was prosecuted and convicted is 757 of the Revised Laws of 1912, which reads:

"Any person who shall by any act cause, encourage, or contribute to the dependency or delinquency of a child, as these terms with reference to children are defined by the statutes of this state, or who shall for any cause be responsible therefor, shall be guilty of a misdemeanor, and upon trial and conviction thereof, shall be fined in a sum not to exceed five hundred dollars or imprisoned in the county jail for a period not exceeding six months, or by both such fine and imprisonment. * * * All offenses under the provisions of this act shall be prosecuted in the juvenile department of the district court of the county in which said offense may be committed."

It is first contended that the act under which the prosecution was initiated and the conviction obtained is void, since it created a court of limited and special jurisdiction. There is nothing in this contention. The act did not create, nor undertake to create, a court at all. It simply provides that the prosecution shall be had in the district court, but in the juvenile department thereof. The act simply sought to keep the prosecutions thereunder separate and distinct from ordinary cases, as in probate proceedings (*Ludich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376), and not to create a new court.

[2] It is also contended that the court had no authority to order that for failure to pay the fine imposed the petitioner be confined in the county jail until the same is served out at the rate of one day for each \$2 thereof. Our attention is directed to certain statutory provisions which, it is said, are the only ones which pertain to this matter, and it is urged

that they do not contemplate a jail sentence and a fine, and for failure to pay the same that it shall be served out in jail. The sections alluded to read:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every two dollars of the fine, or in that proportion." Rev. Laws, § 7257.

"If the judgment be imprisonment, or a fine and imprisonment until it is satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with." Rev. Laws § 7266.

It was by virtue of section 7257 that the court ordered the jail sentence in case of petitioner's failure to pay the fine. The gist of counsel's contention is summed up in the following language contained in their brief:

"Now, if the court had only fined Converse, it might be urged that, under the provisions of section 7257, above quoted, it also could have directed that he be imprisoned until the fine be satisfied. But nowhere is there authority for the court to inflict three penalties upon a defendant, as was done with Converse, namely, imprisonment to the limit, fine to the limit, and commitment in case the fine is not paid."

Our attention is directed to the ruling of the courts of California and Utah, in support of the contention now made. *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372; *Roberts v. Howells*, 22 Utah, 389, 62 Pac. 892. The California and Utah authorities are not based upon the theory that three penalties were inflicted in the respective cases, but rather, as we understand them, that the statutes under which the penalties were inflicted contemplated that under no theory can a term in jail be inflicted in excess of that designated by statute for which a jail sentence as such may be imposed. In other words, if the sentence is for the maximum penalty which may be imposed as a jail sentence, and in addition thereto a fine is imposed, it is held that the payment of the fine cannot be enforced by an order that the guilty party be sentenced to a term in jail, in that it would result in the infliction of a double jail sentence, when only one is permissible. We do not take that view of it. Nor do we take our statute from Utah or California with the interpretation given it by the decisions of those states, since it was enacted by our territorial Legislature in 1861, long prior to said decisions, and has ever since remained unchanged upon our statute books.

Our statute contemplates only one jail sentence, or a fine, or both, in the discretion of the court, and authorizes the enforcement of the payment of the fine by confine-

ment in jail at the rate of one day for each \$2 thereof. At common law the payment of a fine was enforced by jail sentence (8 R. C. L. 270; 16 C. J. 1367), and it is evident that our Legislature, in adopting the statute providing for a jail sentence for failure to pay a fine, merely intended that the common-law rule should be declared.

[3] There is nothing in our Constitution prohibiting the enactment of such a statute. In fact, this statute was enacted in territorial days, and specifically continued in force by the Constitution itself; hence it cannot be said that it violates the spirit or letter of the Constitution. The interpretation which we put upon the statute is nothing more than that long put upon it by the courts and officers of this state. We might with peculiar application quote the language of the Supreme Court of the United States:

"To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. * * * The question is at rest, and ought not now to be disturbed." *Stuart v. Laird*, 1 Cranch. 308, 2 L. Ed. 115.

Corpus Juris lays down the rule as being in line with the views we have indicated. It says:

"The practice and authority for directing that one ordered to pay a fine stand committed until it is paid is now commonly authorized by statute. This is the proper means for the collection of a fine, and is not regarded as a part of the punishment." 16 C. J., pp. 1367, 1368.

Of the courts which have had occasion to speak on this question, a great majority have reached the same conclusion that we have; the last to fall in line being that of Idaho. *State v. Goodrich*, 196 Pac. 1043. See, also, *ex parte Londres*, 54 Mont. 418, 170 Pac. 1045; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *Ex parte Dockery*, 38 Tex. Cr. R. 293, 42 S. W. 599; *Irvin v. State*, 52 Fla. 51, 41 South. 785, 10 Ann. Cas. 1003; *Bishop*, New Crim. Proc. § 1301; *In re Newton*, 39 Neb. 757, 58 N. W. 436; *In re Beall*, 26 Ohio St. 195; *State v. Merry*, 20 N. D. 337, 127 N. W. 83.

For the reasons given, it is ordered that these proceedings be dismissed, and that the petitioner be remanded to the custody of the sheriff.

SANDERS, C. J., and DUCKER, J., concur.

(100 Or. 472)

EMERSON v. LUMBERMEN'S HOSPITAL ASS'N et al.

(Supreme Court of Oregon. May 24, 1921.)

1. Physicians and surgeons \S 18(9)—Not negligence, as matter of law, to take injured man on stretcher in railroad motor car from logging community to hospital.

Where plaintiff's minor son, whose leg was practically severed by the wheel of a logging train, died while being taken to defendant's hospital at A., it could not be held as a matter of law, in the absence of allegation and proof of negligence or unskillfulness, that it was improper under the circumstances to take him on a stretcher in a railroad motor car from a sparsely settled logging community to a hospital.

2. Evidence \S 512, 547—Physician may testify as to proper treatment, but should be informed what attending physician did and failed to do.

In a malpractice case the opinion of medical men may be received in evidence as to what would be the proper treatment, but they should be informed as to what treatment was given the patient, or what the physician in attendance failed to do.

3. Physicians and surgeons \S 15, 18(8)—Not liable for error of judgment; death of patient not evidence of neglect.

If a regularly licensed physician with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error of judgment, and the fact that the patient dies is not evidence of neglect.

4. Physicians and surgeons \S 18(9)—Nonsuit properly granted where evidence failed to show malpractice.

Where, in a malpractice case, there was an entire lack of testimony as to whether or not defendant adopted and applied the proper method of treating deceased, or to show what he failed to do, a motion for a nonsuit was properly granted.

Department 1.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by A. H. Emerson against the Lumbermen's Hospital Association and another. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action for damages on account of the death of plaintiff's minor son, Alexander Emerson, alleged to be due to the negligence of the defendants in caring for him after he had been injured on a logging railroad in Columbia county, Or. The complaint alleges the incorporation of the defendant, Lumbermen's Hospital Association, with its principal offices at the city of Astoria; that it was engaged in operating hospitals for hire and profit; that defendant B. L. Sears has been practicing medicine and surgery at

Neverstill, Columbia county, Or., and was employed by the defendant Lumbermen's Hospital Association as its representative physician in charge of its business in Columbia county; that the Kerry Timber Company was engaged in logging and manufacturing lumber in the vicinity of Neverstill, and transporting logs by rail to Kerry; that the Hospital Association had a contract with the timber company whereby the company should collect from its employees approximately 50 cents per month as hospital fees to be paid to the hospital association, in consideration of which the association agreed to furnish material and surgical attention to all persons becoming ill or injured in or about the logging and milling operations during the period for which such fees were paid; that during March, 1918, plaintiff's son was employed by the Kerry Timber Company and had paid the hospital fees for that month; and that on March 28, 1918, the son left the employment and the Kerry Timber Company issued to him a time statement, agreeing to transport him to Kerry, Or., where he could receive his pay for such services. The complaint then sets forth as follows:

"That while en route from the milling and logging camp of said Kerry Timber Company to Kerry, Or., the plaintiff's said son was accidentally injured by a wheel of one of the trains operated by said Kerry Timber Company running over and crushing his foot and leg.

"That upon sustaining said injury the plaintiff's said son was taken to the office of the defendants at Neverstill, at which time the defendants herein undertook and agreed to care for him, and from that time until his death he was under the care and control of the defendants herein; that the injury sustained by the plaintiff's said son was not such as would prove fatal had he received ordinary medical care or attention, but on account of the laceration of his foot and leg arteries and vessels were severed so that the blood flowed freely from said injuries; that the defendants herein carelessly, recklessly, and negligently failed to so treat or dress said injuries so as to stop the flow of said blood, although the same could have been stopped by the use of ordinary skill or attention, but, on the contrary, defendants permitted the plaintiff's said son to continue to lose blood from the time they undertook to care for him, to wit, about 1:30 p. m. on said 28th day of March until his death, and kept the plaintiff's said son in the office of the defendants at said Neverstill until about 4 p. m. of said day, giving little or no attention to him during that time, and then placed the plaintiff's said son on a train operated by the said Kerry Timber Company, taking him from said Neverstill to said town of Kerry en route to the hospital of the defendant Lumbermen's Hospital Association at Astoria, Or., and did nothing during said time to alleviate the shock resulting from said injury; that upon arriving at said station of

Kerry the plaintiff's son was left in a small waiting room near the railroad station at said place for approximately 1½ hours, without the presence or attendance of these defendants or of any one else, and that during said time the plaintiff's said son continued to grow weaker on account of the loss of blood and lack of attention hereinbefore mentioned, and as a result thereof died in said station about 6:30 p. m. of said day.

"That by the use of ordinary skill or attention the injuries received by plaintiff's said son could have been dressed and treated so as to permit him to fully recover, and that the death of the plaintiff's said son was due to the negligent, careless, and reckless conduct of the defendants herein in treating plaintiff's said son in the manner hereinbefore mentioned, and that said careless, reckless, and negligent conduct of said defendants was the proximate and sole cause of the death of the plaintiff's said son."

The complaint further avers that defendant B. L. Sears was not equipped, either by training or experience, to care for persons injured, which fact was known to the defendant Lumbermen's Hospital Association. The defendants answered separately. Defendant B. L. Sears answered, denying most of the allegations of the complaint, a portion of the answer being as follows:

"This defendant answering unto paragraph numbered VIII of said complaint denies the same, and the whole thereof, and each and every allegation therein contained, save and excepting this defendant admits that some time after the said Alexander Emerson had sustained an injury to his person arising from some accident unknown to this defendant occurring to said Alexander Emerson on the train or railroad track of the said Kerry Timber Company the said Alexander Emerson was brought to the office of this defendant at Neverstill, in Columbia county, Or., for medical and surgical aid; that this defendant furnished to and gave the said Alexander Emerson all of the necessary medical and surgical aid and gave to him all of the medical, surgical, and other aid that was in the power of this defendant to administer and give, but that the said wound received by said Alexander Emerson was a mortal wound, and, although this defendant, in the exercise of due care and skill, furnished said Alexander Emerson all necessary medical and surgical aid, the said Alexander Emerson died, for that his wound was mortal."

The defendant Lumbermen's Hospital Association answered, denying all of the allegations showing liability, and alleged that it had a contract for a consideration to be paid exclusively by the Kerry Timber Company whereby the defendant undertook to furnish the Kerry Timber Company surgical treatment and first-aid service at and near its place of business at Neverstill, Or., and hospital services at Astoria, Or., with the necessary medicines and supplies for such of its employes as should become injured or ill while in the actual employ of the Kerry

Timber Company; that Alexander Emerson, after he sustained the injury, was taken to the emergency hospital of this defendant at Neverstill; and that Dr. B. L. Sears, as a physician and surgeon, and not as a representative of this defendant, furnished Alexander Emerson all necessary medical and surgical care that could with the exercise of care and skill have been given to him from that time until his death, but that the injury was a mortal wound whereof Alexander Emerson died.

The cause was tried before the court and a jury. At the close of plaintiff's case defendants moved the court for a judgment of nonsuit which was granted as to both defendants, and judgment entered accordingly. Plaintiff appeals.

Roy F. Shields, of Salem (Howard K. Zimmerman, of Astoria, and Smith & Shields, of Salem, on the brief), for appellant.

G. C. Fulton, of Astoria (A. C. Fulton, of Astoria, on the brief), for respondents.

BEAN, J. (after stating the facts as above). Several errors are assigned by plaintiff upon this appeal. The first for consideration is the disposition of the motion for a nonsuit. It appears from the testimony that Alexander Emerson was injured by the wheel of a logging train running over his leg and practically severing it from his body. The accident occurred about 100 yards from a house where Mrs. H. E. Miles and her sister resided and about three-quarters of a mile from Neverstill, between Sunnyside and Neverstill. Mrs. Miles was a witness for plaintiff, and testified as to the circumstances of the accident. Soon after the logging train had passed her house she heard the boy cry, and she and her sister went to his assistance. He was attempting to jump from one railroad tie to another upon one foot with his hands in the air for balance, had proceeded about ten feet, and then sat down on a pile of logs. The torn clothing left a trail of blood where he passed over the track. She and her sister attempted to assist him to their house, and had arrived near it, when the so-called railroad jitney or motorcar came, and he was assisted by the men into the car and taken to Neverstill. When the two women got the boy near the house Mrs. Miles got a quilt for him to lie on, and when the jitney came she let them take the quilt for that purpose.

It appears that the boy was taken to the emergency hospital at Neverstill, and in a short time placed upon the jitney car and taken to Kerry, where he died about three-quarters of an hour after arrival. Dr. Sears looked after him, directed affairs at Neverstill, accompanied him to Kerry, and was with him working over him when he died.

The main allegation in regard to malpractice is that there was a failure to treat or dress the boy's wound so as to stop the flow of blood, although the same could have been done by the use of ordinary skill or attention. We have searched the testimony in vain to find anything as to what treatment was administered to the boy's injured limb, or what the doctor failed or neglected to do. It does not appear from the testimony whether he tried to staunch the flow of blood by binding the limb with a string, rope, wire, or a bandage, or what he did. Neither is there any evidence to show what he did not do, or that proper and skillful first aid was not provided for the patient.

There is evidence in the case showing that when the quilt upon which the unfortunate boy was placed was returned to Mrs. Miles it was saturated with blood and ruined. There was considerable blood upon it where the boy had laid, but there is nothing to indicate but what the blood so flowed from the wound onto the quilt before the doctor had any opportunity to treat the boy. Dr. Sears stated to the coroner that the boy died from nerve shock and from loss of blood. From the description given by Mrs. Miles of how the boy walked or jumped as best he could about 100 yards, putting one arm on her shoulder and one on her sister's shoulder, it is apparent that the poor boy bled considerably before there was any opportunity for treatment by any one, and prior to his being taken to the emergency hospital. The women who assisted him were frail, and it took about 25 minutes to assist him to make the distance to a place opposite the house. He was afterwards taken on the jitney about three-quarters of a mile to the emergency or first-aid hospital. T. S. White, the coroner of the county, was a witness for plaintiff, and testified that he took charge of the body soon after the boy's death. He was not interrogated in any way in regard to what had been done to treat the limb or stop the flow of blood, and was not asked to describe the condition of the limb at that time, as to bandages or the like. It seems there were several other persons present at Neverstill and Kerry, who saw the boy after the accident; yet no attempt was made to learn from them whether or not aid was rendered the sufferer. Dr. B. L. Sears was called as a witness, and stated that he returned the quilt that he took off from the stretcher upon which the boy was carried, and returned it to Mrs. Miles. The doctor was not asked as to what he did to staunch the flow of blood from the wound, nor anything as to the manner in which he treated the boy, or failed to treat him. The averments of the complaint, as to negligence in the care of the boy, are not supported by the evidence.

[1] The deposition of Dr. C. E. Cashett, a

regularly licensed physician and surgeon, was read to the effect that, in the case of an injury such as a lower limb being run over by a logging car in such a manner as to crush the leg or foot and cause a hemorrhage, the flow of blood should and could be immediately stopped. Dr. Cashett did not see Alexander Emerson after the accident, and was in no way informed as to what treatment, if any, Dr. Sears administered to the patient. For aught that appears in the record, everything suggested by Dr. Cashett was done by Dr. Sears. The complaint does not specify negligence or unskillfulness on the part of either of the defendants in attempting to take young Emerson from Neverstill to the hospital at Astoria for care and treatment. Plaintiff argues that the taking of the boy away from Neverstill on a car shows improper treatment. In the absence of an allegation and proof it cannot be assumed, or held as a matter of law that it was improper under the circumstances to take the injured young man on a stretcher from a sparsely settled logging community to a hospital.

The first question that naturally suggests itself is: What treatment was furnished the patient after he was placed in the care of Dr. Sears or did the physician fail to furnish proper treatment? Second, if treatment was accorded, was it proper or otherwise? It cannot be assumed that there was a total failure to render aid and staunch the flow of blood.

[2] In a malpractice case the opinion of medical men may be received in evidence as to what would be the proper treatment, but in order for such expert witnesses to have a basis for their testimony they should be informed as to what treatment was given the patient, or what the physician in attendance had failed to do. *Rodgers on Expert Testimony* (2d Ed.) § 64; 22 C. J. p. 663, § 758; *Lehman v. Knott*, 196 Pac. 476, opinion rendered March 29, 1921.

[3] The death of Alexander Emerson, while under the care of Dr. Sears as a physician and surgeon, or of either of the defendants, is no evidence of want of care, or of unskillfulness or failure to administer proper treatment. *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *Hills v. Shaw*, 69 Or. 460, 137 Pac. 229; *Merriam v. Hamilton*, 64 Or. 476, 130 Pac. 406.

Dr. Sears' qualifications as a physician and surgeon, although challenged by the complaint, are not assailed by the testimony. As far as shown, he is qualified and skillful. Alexander Emerson was seriously injured, and taken to the emergency hospital at Neverstill. He was attended by Dr. Sears, and as a result of the injury he died. When a physician or surgeon undertakes the treatment of a case he does not guarantee a cure, in the absence of a contract to that effect.

21 R. C. L. p. 391, § 36. The doctrine enunciated by the precedents is that, if a regularly licensed physician with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error of judgment, and the fact that an unfortunate result follows is not in any way evidence of neglect. *Hills v. Shaw*, 69 Or. at page 467, 137 Pac. 229, and cases there cited.

[4] There being an entire lack of testimony as to whether or not Dr. Sears adopted and applied the proper method of treating Alexander Emerson after he was placed under his care, or to show what he failed to do, the motion for a nonsuit was properly granted.

There is some controversy as to whether or not Dr. Sears was connected with or represented the defendant hospital in so caring for the boy. As we view the case, this and other questions raised become immaterial, and need not be considered.

It follows that the judgment of the circuit court must be affirmed.

It is so ordered.

BURNETT, C. J., and McBRIDE and HARRIS, JJ., concur.

(100 Or. 482)

ROOK v. SCHULTZ et al.

(Supreme Court of Oregon. May 24, 1921.)

1. Master and servant ⇨330(1)—Vehicle negligently driven presumed used for owner's purposes.

In an action by a volunteer who was riding on defendant's motor truck and assisting the driver to distribute milk, there is a presumption that the vehicle was being used for defendant's purposes at the time of the injury to the volunteer, who was thrown therefrom when it turned a corner.

2. Master and servant ⇨88(5)—Volunteer may recover on general principles of negligence.

While a volunteer assisting the driver of a motor truck may not recover on the basis of service, he yet may be entitled to the exercise of that degree of care owing to persons rightfully on employer's premises, and base a recovery on general principles of negligence, so that, where the volunteer places himself in a position of danger, even negligently, the employer is liable if the injury could have been avoided by the exercise of ordinary care on his part or that of the driver.

3. Negligence ⇨136(2)—Question of fact.

The question of negligence is one of fact.

4. Negligence ⇨136(18)—Negligence as to volunteer assisting motor truck driver held question for jury.

Where plaintiff, a boy of 14, acting as a volunteer, undertook to assist the driver of a

milk truck in making delivery, and for that purpose rode on the running board, the question whether defendant is liable for an injury resulting when the boy was thrown from the truck on the turning of an intersection, it being asserted that the truck was operated at a negligent speed and a sudden turn made without warning, held, under the evidence, for the jury.

Department 1.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Antone Rook, a minor, by Emmet Drake, his guardian ad litem, against J. E. Schultz and W. A. Ullman, partners doing business under the firm name of Willamette Dairy Company. From a judgment for plaintiff, defendants appeal. Affirmed.

It is alleged in the complaint and admitted by the answer that the defendants are partners engaged in maintaining and operating a dairy plant under an assumed trade-name, using in their business a number of vehicles propelled by gasoline; that they hire help for the purpose of operating them; and that on July 13, 1918, the plaintiff was riding on one of those vehicles and assisting the driver in distributing milk. It is further charged in the complaint, but denied by the answer, that on the date mentioned, while the plaintiff was riding on the motor truck, he was thrown therefrom, receiving certain injuries which he described, and that the defendant knew he was so riding and assisting the driver thereon. The charges of negligence imputed to the defendants are as follows:

"That said defendants carelessly and negligently permitted and allowed said Antone Rook to ride on the running board of its said motor truck.

"That said defendants carelessly and negligently operated the said motor truck at a high and dangerous rate of speed, while said Antone Rook was riding on said running board.

"That said defendants carelessly and negligently, on said 13th day of July, 1918, turned at the intersection of Michigan and Shaver streets, at a high and dangerous rate of speed, while said Antone Rook was riding on said running board, thereby throwing him therefrom.

"That said defendants carelessly and negligently failed to warn and advise said Antone Rook of their intention to suddenly and unexpectedly turn at said intersection of Michigan and Shaver streets."

The injuries mentioned are denied by the answer. That pleading affirmatively states that on July 13, 1918, the plaintiff, who is of the age of about 14 years, was riding on one of the defendants' motor vehicles without their knowledge or consent, and as a volunteer was assisting the driver in delivering milk, without any authority emanating from the defendants. Contributory negligence is

imputed to the plaintiff, in that he failed to hold on to any part of the vehicle, released his hold upon it, which he had theretofore maintained, and carelessly and negligently attempted to alight therefrom while it was moving, that being the cause of his hurt. This, in turn, is traversed by the reply.

The errors assigned are predicated on the refusal of the court to grant a motion for nonsuit at the close of the plaintiff's case, refusal to direct a verdict in favor of the defendants at the close of all the evidence, and upon giving the following instruction:

"If you find the evidence in this case that the defendants were careless and negligent, in that they permitted plaintiff to ride on the running board of their motor truck, or they operated their motor truck at a high and dangerous rate of speed, and that as a direct and proximate result of such negligence, without negligence on the part of plaintiff, plaintiff was injured, in that event your verdict should be for the plaintiff, if the accident was not a pure accident and plaintiff was not guilty of contributory negligence. Of course that takes into consideration the fact that they knew he was riding on the truck."

J. C. Veazie, of Portland (Veazie, McCourt & Veazie, of Portland, on the brief), for appellants.

W. E. Farrell, of Portland (Davis & Farrell, of Portland, on the brief), for respondent.

BURNETT, C. J. (after stating the facts as above). [1] For the purposes of this case we take the defendants at their own classification of the plaintiff as a volunteer, assisting their employé who was in charge of the vehicle in the distribution of milk which the defendants were selling. The case presented is one of the infliction of an injury by the management of the defendants' vehicle. As to the responsibility of the defendants, it is settled in *West v. Kern*, 88 Or. 247, 171 Pac. 413, 1050, L. R. A. 1918D, 920, that where the plaintiff proves that the vehicle which caused his injury belonged to the defendant, a prima facie case is made, since the jury may infer that at the time of the accident the vehicle was being used for the defendants' purposes. The presumption mentioned is here a platitude, for the ownership of the vehicle and its management by the servant of the defendants are admitted in the pleadings. It may be conceded, without deciding, that a volunteer takes the instrumentality of the services in which he engages, as he finds them, and the owner is not bound, as to his own servant, to furnish a reasonably safe place in which to work, and reasonably safe appliances for the service. But the condition of the appliance and the manner of its operation are two different things. The issue here is about the latter of this twain.

[2] What, then, was the duty of the defendants towards the volunteer? It is thus stated in 18 R. C. L. page 579:

"But while a volunteer may not recover on the basis of service, he yet may be entitled to the exercise of that degree of care owed to persons rightfully on the premises of the employer, and may found his right of recovery on the general principles of negligence."

The doctrine is thus announced in *Evarts v. St. Paul, etc., Ry. Co.*, 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663, 45 Am. St. Rep. 460:

"But if, after discovering that such volunteer has placed himself in a position of danger, even through his own negligence, the servants fail to exercise reasonable care to avert the danger, the master will be liable. * * * This liability does not rest on any contract obligation, but on the general duty not to inflict a wanton or willful injury on another. As respects this duty, a volunteer cannot occupy a less favorable position than a trespasser."

It is also said in *Cerrano v. P. R., L. & P. Co.*, 62 Or. 421, 427, 126 Pac. 37, 40, 9 N. C. C. A. 634:

"It is a culpable wrong to hurt one who has placed himself in a position of danger even negligently, if the injury can be avoided by the exercise of ordinary care, when the peril becomes apparent to the party conducting the instrument of danger."

[3, 4] The question of negligence is one of fact. *Palmer v. P. R., L. & P. Co.*, 56 Or. 262, 108 Pac. 211, 59 Am. & Eng. Ry. Cas. (N. S.) 68. The driver in charge of the vehicle, the alter ego of the defendants, without controversy knew that the plaintiff was riding on the running board, and that he was assisting in delivering the milk, in doing which he held on with one hand and reached for milk bottles with the other. In substance, the charge of negligence is that the truck was operated at a high and dangerous rate of speed while the plaintiff was on the running board, and that it made a sudden turn from one street into a cross street without warning to the plaintiff of the driver's intention so to do, with the result that the plaintiff was thrown off as by centrifugal force. Whether this was the ordinary care due to any one in the situation of the plaintiff, and whether that situation was one of danger known to the agent of the defendant in time to avert the peril, were questions of fact proper to be submitted to the jury. The instruction complained of is not at variance with the principles announced.

The judgment is affirmed.

MCBRIDE, BEAN, and HARRIS, JJ., concur.

(161 Or. 94)

IN re ANDERSEN'S ESTATE.***DE GOLIA v. ANDERSON.**

(Supreme Court of Oregon. May 17, 1921.)

1. Appeal and error \S 382—Undertaking on appeal from county court, which is limited to a definite sum, is insufficient.

An undertaking on appeal from a judgment of the county court, denying a claim against an estate which was limited to a definite and specified sum, is insufficient, and does not comply with Or. L., \S 551.

2. Appeal and error \S 390—Allowance of amendment to undertaking on appeal from county court, proper.

Where an appeal from a judgment of the county court, disallowing a claim against an estate, was taken in good faith, and the insufficiency of the undertaking, which was limited to a specified sum, was the result of a mistake, it was proper for the circuit court, in view of Or. L., \S 550, subd. 4, despite the filing of a motion to dismiss the appeal, to allow the filing of an amended undertaking complying with section 551.

3. Executors and administrators \S 227(1)—Facts constituting claim against estate need not be averred with particularity required in complaint.

Although a verified claim against the estate of a decedent takes the place of a complaint, the facts constituting the claim need not be stated with the degree of particularity required in a complaint filed in an action at law.

4. Executors and administrators \S 227(6)—A claimant must recover upon the claim as presented.

One making claim against the estate of a decedent must recover, if at all, upon the claim as presented.

5. Partnership \S 218(3)—Whether a partnership exists is question for the court.

Where the facts are undisputed, the question whether a partnership exists is one of law for the court.

6. Partnership \S 30—Person receiving money for automobile which was not delivered held agent of, instead of partner of, decedent.

One who received from claimant money for an automobile which was never delivered held the agent of, instead of the partner of, decedent; it appearing that such person had no interest in the profits, but was employed as agent receiving portion of the profits as compensation for his services.

7. Executors and administrators \S 227(6)—Recovery could be had against estate, on claim of liability as partner, on evidence that decedent was liable as principal.

In a proceeding against the estate of a decedent on account of money paid for an automobile, which was never delivered, where the evidence showed the liability of decedent as principal, it appearing that the one who received

the money was his agent, recovery could be had under the verified claim, which alleged a partnership between decedent and the agent receiving the money, the claim in effect alleging that claimant made a contract for the purchase of an automobile, and that the agent received the money, etc.

8. Appeal and error \S 1029—Incorrect instruction harmless, where correct result was reached.

Where the estate of decedent was in any event liable as principal, the giving of an incorrect instruction, which predicated liability on the theory that decedent was a partner with the one who in fact was his agent, was harmless.

9. Appeal and error \S 1058(1)—Exclusion of evidence harmless, if erroneous.

In a proceeding against the estate of the decedent on account of money paid for an automobile which was not delivered, where the verified claim alleged that a relation of partnership existed between decedent and his agent who received the money, held that, where claimant had testified that he had previously begun suit against agent, the exclusion of a complaint, alleging that agent was doing business under the name under which decedent did business, was harmless.

10. Witnesses \S 270(2)—Restriction of cross-examination, relating to immaterial matters held not error.

Where claimant and his wife both testified that she lent him the money which he paid to decedent's agent, it was immaterial whether claimant repaid his wife or not, for in no event could she recover, and hence the restriction of her cross-examination on the question of repayment by claimant was proper.

In Banc.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

In the matter of the estate of Frederick Andersen, deceased. Claim by G. E. De Golia, opposed by Charles Anderson, administrator. The claim was disallowed in the county court, and claimant appealed, and from a judgment allowing the same in the circuit court the administrator appeals. Affirmed.

*See, also, 188 Pac. 164.

Under date of April 8, 1918, G. E. De Golia, as purchaser, signed a writing addressed to the Elgin Motors Company, Incorporated. The writing was in substance an order for the delivery of an Elgin automobile for the price of \$1,250. The Elgin Motors Company, Incorporated, acting through C. S. Yates as manager and salesman indorsed upon the paper a written acceptance of the order. The writing may therefore be called a contract whereby the Elgin Motors Company, Incorporated, agreed to deliver and De Golia agreed to buy an Elgin automobile for the price of \$1,250. When De Golia signed the order he

paid to C. S. Yates the sum of \$20 on the purchase price; and Yates led De Golla to believe that the ordered automobile would be delivered to De Golla at the end of about four weeks. On May 4, 1918, Yates told De Golla that he had "a whole carload of cars," but that he did not have enough money to pay the freight bill. Yates requested De Golla to advance the additional sum of \$380 on the price of the automobile ordered by De Golla, and Yates stated that if De Golla would advance such amount "you can have your car to-morrow morning." De Golla informed his wife of the request, and after consultation they concluded to comply with Yates' request. De Golla delivered to Yates a check for \$36, and at the same time signed a note for \$850, payable to the order of "Elgin Motors Company, Incorporated," and directed Yates to go "to the house" and see Mrs. De Golla, who would pay him "the balance of the money, amounting to \$400." When Yates saw Mrs. De Golla she also signed the note, and at the same time paid Yates \$344 in cash, making a total of \$400 paid to Yates, which amount, together with the note, made up the full purchase price of the automobile. Yates failed to deliver the automobile as he had promised. He made excuse after excuse for his failure to deliver the automobile. Notwithstanding repeated promises of delivery, Yates never delivered any automobile, and, furthermore, he not only failed to deliver any automobile, but he also refused to return the sum of \$400 which had been paid to him.

Frederick Andersen was a resident of Astoria from some time prior to April 8, 1918, until October 26, 1918, when he died. After his death an administrator of his estate was appointed. Claiming that Frederick Andersen and C. S. Yates had been partners doing business under the name of the Elgin Motors Company, Incorporated, and engaged in buying and selling Elgin automobiles from April 7, 1918, to October 26, 1918, inclusive, G. E. De Golla filed with the administrator of the estate of Frederick Andersen, deceased, a claim for \$400. The administrator rejected the claim on December 27, 1918, and thereupon De Golla presented his claim to the county court for allowance. The county judge disallowed the claim, and De Golla immediately appealed to the circuit court. A trial by jury resulted in a verdict and judgment in favor of De Golla. The administrator appealed.

Norblad & Hesse, of Astoria, for appellant.
G. O. Fulton and A. C. Fulton, both of Astoria, for respondent.

HARRIS, J. (after stating the facts as above). The order of the county judge disallowing the claim is dated April 25, 1919. The notice of appeal served and filed by De Golla is dated May 13, 1919. On May 15, 1919, De Golla filed and served an undertaking on appeal, obligating him and his two

sureties "to pay all damages and costs which may be adjudged to him on the appeal, not exceeding the sum of \$100, to which amount we acknowledge ourselves jointly and severally bound."

[1] On September 16, 1919, the administrator filed a motion "for an order dismissing said pretended appeal, no valid appeal having ever been effected from the order of the county court." This motion was heard in the forenoon of October 24, 1919, and "at the conclusion of the arguments of counsel the court took the same under advisement." In the afternoon of October 24, 1919, after the motion had been argued to the court and by the court taken under advisement, De Golla served and filed a motion, asking for leave to file an amended undertaking on appeal, and with this motion De Golla presented the proposed amended undertaking on appeal, under the terms of which De Golla and two sureties "undertake and promise on the part of appellant that the said appellant will pay all damages and costs which may be adjudged to him on the appeal." On October 25, 1919, the court, after hearing the two motions, allowed the motion for leave to file the amended undertaking on appeal, and disallowed the motion to dismiss the appeal. The undertaking on appeal originally filed by the claimant was limited to a definite and specified sum, and consequently did not comply with section 551, Or. L., which requires an undertaking "to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal"; and since the undertaking did not comply with the statute it was insufficient. *State ex rel. v. McKinmore*, 8 Or. 206; *Sanborn v. Fitzpatrick*, 51 Or. 457, 91 Pac. 540; *Sutton v. Sutton*, 78 Or. 9, 150 Pac. 1025, 152 Pac. 271; *Rugh v. Soleim*, 92 Or. 329, 333, 180 Pac. 980.

[2] The administrator contends that the claimant's cross-motion for permission to file an amended undertaking was made too late, for the reason that it was not made until after the motion to dismiss was brought on for argument; and in support of his contention the administrator cites the following early precedents: *Cross v. Chichester*, 4 Or. 114; *Alberson v. Mahaffey*, 6 Or. 412; *State ex rel. v. McKinmore*, 8 Or. 206. The narrow and extremely technical rule announced in the three last-mentioned cases was, especially when viewed in the light of section 550, subd. 4, Or. L., without any good or substantial reason to support it; and hence *Cross v. Chichester*, 4 Or. 114, and the two cases which followed it were subsequently overruled, and the doctrine of those cases no longer prevails. *Elwert v. Norton*, 34 Or. 567, 571, 51 Pac. 1097, 59 Pac. 1118; *Fleischner v. Bank of McMinnville*, 36 Or. 553, 556, 54 Pac. 884, 60 Pac. 603, 61 Pac. 845; *Ferrari v. Beaver Hill Coal Co.*, 54 Or. 210, 213, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1018. See, also, *Menden-*

hall v. Elwert, 36 Or. 375, 380, 52 Pac. 22, 59 Pac. 805; Hanley v. Stewart, 54 Or. 38, 40, 102 Pac. 2.

It is manifest that the appeal was taken in good faith, and that the insufficiency of the first undertaking on appeal was the result of a mistake; and therefore the circuit court properly denied the motion to dismiss the appeal, and rightly permitted the filing of the amended undertaking. *Fildew v. Milner*, 57 Or. 18, 109 Pac. 1092; *Sutton v. Sutton*, 78 Or. 9, 11, 150 Pac. 1025, 152 Pac. 271; *Steed v. Cavanaugh*, 80 Or. 62, 151 Pac. 968; *Hodgson v. Martin*, 90 Or. 105, 107, 166 Pac. 929, 175 Pac. 671.

[3] The claim which was presented to the county judge for allowance was drawn upon the theory that Yates and Andersen were partners, and that therefore Andersen was liable for moneys paid to his partner, Yates. The verified claim presented by De Golla affirmatively states that Yates and Andersen were partners engaged in buying and selling automobiles, and had been doing business under the assumed business name of Elgin Motor Car Company, Incorporated; that on April 8, 1918, G. E. De Golla entered into a contract in writing with Yates and Andersen, partners doing business under the name of Elgin Motors Company, Incorporated, "which said contract was and is in words and figures following" (and then follows a full copy of the writing dated April 8, 1918); that De Golla paid \$400 to Yates and Andersen; that Yates and Andersen refused to deliver any automobile, and also refused to refund the sum of \$400; and that therefore De Golla is entitled to recover from the estate of Andersen the sum of \$400. Although the verified claim takes the place of a complaint, the facts constituting the claim need not be stated with the degree of particularity required in a complaint filed in an action at law. The facts constituting a claim against an estate may be averred in general terms; and, if the facts show a subsisting liability in favor of the claimant, the claim is sufficiently stated. *Wilkes v. Cornelius*, 21 Or. 348, 350, 28 Pac. 135; *Goltra v. Penland*, 42 Or. 18, 69 Pac. 925; 11 R. C. L. 194.

[4] Notwithstanding the liberal rule which is followed in determining the sufficiency of a claim presented to an administrator or executor, the trial, whether it be in the county court or on appeal in the circuit court, must be had upon the claim as presented and disallowed by the administrator or executor. The claimant must recover, if he recovers at all, upon the claim as presented. *Wilkes v. Cornelius*, 21 Or. 348, 352, 28 Pac. 135.

When at the trial in the circuit court the claimant rested, the administrator also rested without offering any evidence; and consequently, when the case was submitted to the jury, there was no evidence to be considered except the evidence offered by the claimant. After both the claimant and the administra-

tor had rested, the latter moved that the jury be directed to return a verdict for the administrator, for the reason that the claimant had failed to prove that a partnership existed between Yates and Andersen. The court denied the motion for a directed verdict, and submitted the cause to the jury.

The court instructed the jury "that the only question involved in the case for your determination is whether or not you believe the testimony of plaintiff introduced before you for the purpose of determining whether or not the relation of partnership existed between" Andersen and Yates at the time De Golla contracted for the automobile and paid the sum of \$400. The court further instructed the jury as follows:

"You have heard the evidence that has been offered in that particular, and I instruct you that if that evidence is true, that is, sufficient to establish the position or the relationship of partnership between these parties, but the question for you to determine is whether or not that evidence is true or not, and, if you believe it is true, then your verdict should be for the claimant, G. E. De Golla, for the amount of his claim."

The administrator duly excepted to the giving of the foregoing instructions. There was no contradictory evidence.

[5] Following the rule that, where there is no dispute about the facts, the question as to whether or not a partnership exists is one of law for the court to determine, the court, in effect, said to the jury:

"It is for you to determine whether the witnesses told the truth; if you find that they did tell the truth, then you must, as a matter of law, conclude that Andersen and Yates were partners, and return a verdict for the claimant." *Flower v. Barnekoff*, 20 Or. 132, 144, 25 Pac. 370, 11 L. R. A. 149; 20 R. C. L. 849.

[6] It now becomes necessary to ascertain whether the facts related by the witnesses created a partnership or other legal relationship. De Golla does not claim that when he signed the contract and paid the money he had been led to believe from outward appearances that Andersen and Yates were partners. De Golla alleges and has attempted to prove that a partnership actually existed between Andersen and Yates.

C. A. Nyquist testified that at some time prior to May 31, 1918 (probably late in April or early in May) Andersen requested him to clean and store an Elgin automobile. The car had been run only a hundred miles. Andersen told Nyquist "to lock it, so that nobody could touch it without his permission." This automobile was afterwards delivered to a Mrs. Lytle. When Andersen told Nyquist to store the automobile, the former said:

"Well, I want to store that because I paid the wholesale price on that car, and Yates-Yates has taken a couple of deposits on the car, and I want to keep it here for safe-keeping."

When asked, "Did he state what arrangements there were between him and Yates?" Nyquist answered:

"Well, he said that he was supposed to get half of the profits. He was supposed to pay the bill of lading on the cars until they got down here, and as soon as Yates got the notes fixed up, he was supposed to get half of the profits, to get his money back."

Nyquist was asked the following question:

"You don't know whether Mr. Yates had any ownership or any interest in that car at all, do you?" Nyquist, answered as follows: "Well, not any more than what the doctor (Andersen) told me that he had taken deposits on the car, but the doctor still owned it, because he had paid the bill of lading on it."

After Yates had refused either to deliver the automobile or repay the sum of \$400, De Golia caused him to be arrested. The grand jury investigated the charge against Yates, and among other witnesses the grand jury called Andersen as a witness.

E. C. Judd, who was district attorney in June, 1918, the time of the grand jury investigation, testified that Andersen told the grand jury that—

Andersen "advanced the money for the bills of lading, and the payment for the cars were to be made to Dr. Andersen, and they divided the profits on the deal. * * * His explanation to them of the transaction was that he put up the money, held the car until Mr. Yates completed the transaction, then the party who Mr. Yates completed the transaction with, Dr. Andersen, got the money, and Dr. Andersen turned the car over and gave Yates his half of the proceeds."

There was evidence from which the jury could have inferred that Yates had made a contract with Mrs. Lytle, and that he had received a deposit from her on the contract. The jury could have inferred also that when Andersen told Nyquist that Yates had taken a couple of deposits on the Elgin automobile stored with Nyquist he meant the deposits paid by De Golia and Mrs. Lytle. Although the jury was warranted in finding that Andersen knew that De Golia had paid \$400 to Yates, there is not a syllable of evidence, except the evidence already mentioned, upon which to base a finding that Andersen had personally received any of the money paid to Yates. The charges made by Nyquist for cleaning and storing the automobile were paid by Andersen. There is no evidence that Yates at any time paid any money to any person for anything. Andersen paid the bill of lading for every Elgin automobile received at Astoria. Every one of such automobiles, from the moment that Andersen paid the bill of lading, was the property of Andersen, and continued to be his property until delivered to a purchaser. When Yates procured a purchaser Andersen received and kept whatever amount was necessary to re-

imburse him for what he had paid for the automobile, and then Andersen divided the net profits with Yates. Until delivered to the purchaser the automobile belonged to Andersen, and Yates did not own any interest in it. All expenses, so far as is disclosed by the record, were paid by Andersen. The relation of principal and agent, and not that of partners, was created. The arrangement between Andersen and Yates was one whereby Yates rendered services as agent for a compensation which was to be measured by one-half of the profits. Yates had no interest in the business or power as a member of a firm, and no interest in the profits as such, but he was employed as an agent, and received a proportion of the profits as compensation for his services. *Flower v. Barnekoff*, 20 Or. 132, 144, 25 Pac. 370, 11 L. R. A. 149; *Bradley v. White*, 10 Metc. (Mass.) 303, 43 Am. Dec. 435; *Bradley v. Ely*, 24 Ind. App. 2, 58 N. E. 44, 79 Am. St. Rep. 251; 20 R. C. L. 834. See, also, *Northwestern Transfer Co. v. Investment Co.*, 81 Or. 75, 79, 158 Pac. 281.

[7, 8] The verified claim, which, as previously stated, takes the place of a complaint in an action at law, relates the execution of the contract of April 8, 1918, and then, after setting out a copy of the contract, the claim alleges:

"That upon the execution of such contract, and in accordance with the terms thereof, your petitioner duly paid to said Yates and Andersen the sum of \$400, which was then and there received by said Yates and Andersen."

In other words, the verified claim shows that the claimant made a contract with the Elgin Motors Company, Incorporated, and that the latter was represented by C. S. Yates. The verified claim alleges that the relationship between Yates and Andersen was that of a partnership. If the Elgin Motors Company, Incorporated, was the business name of the partnership then Andersen is liable for the \$400 paid to Yates because each partner is an agent of the other. If the Elgin Motors Company, Incorporated, was merely the business name under which Andersen did business as an individual, he is nevertheless liable because Yates was unquestionably acting as the agent of Andersen. We must presume that the jury obeyed the instructions of the court; and, in view of the instructions given by the court and the verdict returned by the jury, we must assume that the jury found that the facts were as stated by the witnesses. The facts, as related by the witnesses, imposed a liability upon Andersen, whether the relation between Andersen and Yates was that of principal and agent or that of partners. From the disclosed facts claimant and the circuit judge drew the conclusion of law that a partnership existed; but our conclusion is that the only relationship created was that of principal and agent. This amounted to the giving

of a wrong reason for a correct conclusion; and hence the administrator was not injured.

[8] The administrator offered in evidence, as a part of the cross-examination of G. E. De Golia, the original complaint filed by De Golia in the circuit court for Clatsop county in an action brought by him on July 30, 1918, against C. S. Yates, "doing business under the name and style of Elgin Motor Car Company, Incorporated." In that complaint De Golia alleged that Yates was engaged in the automobile business "under the assumed business name of Elgin Motor Car Company, Incorporated; that the contract of April 8, 1918, was made by Yates doing business under such assumed business name, and that De Golia was entitled to recover from Yates the sum of \$400, which he had paid to Yates as a deposit on the automobile contracted for.

When the complaint was offered in evidence, counsel for the administrator stated that he was making the offer for the purpose of showing "that he sued C. S. Yates, doing business under the name and style of Elgin Motor Car Company." The record shows that De Golia had previously testified on cross-examination and without objection that he "began suit against Yates on this same matter some time in July," and hence counsel for the administrator had already accomplished the purpose for which he stated he was offering the complaint. In the printed brief the administrator assigns additional reasons, and says that the complaint was competent to discredit De Golia's contention that C. S. Yates was a partner, "and also for impeachment purposes." These additional reasons were not called to the attention of the trial court at the time of making the offer; and, moreover, De Golia had not testified upon his direct examination, except remotely, concerning any relationship between Andersen and Yates. At any rate we do not think the administrator suffered any injury on account of the ruling of the court, even though it be assumed that the complaint was competent as evidence in behalf of the administrator. The jury knew from the answer given by De Golia that he had sued Yates in July, 1918, for the same money which he was seeking subsequently to recover from the estate of Andersen.

[10] It will be remembered that Mrs. De Golia paid Yates \$344 in cash. On direct examination she stated that this money was her money, and that she had paid it to Yates at the request of her husband. On cross-examination she testified that she gave or loaned this money to her husband. After she had been cross-examined at some length about whether or not the \$344 paid to Yates was her money, and as to whether or not her husband had repaid the money to her, the court upon objection of the claimant refused to prevent the administrator to cross-examine her any further upon those matters. The ad-

ministrator now contends that he should have been permitted to prolong the cross-examination, for the reason that he expected to develop the fact that this sum of \$344 belonged to Mrs. De Golia. The administrator was not injured by the ruling of the court. Mrs. De Golia testified that she paid the money at the request of her husband; and it makes no difference whether it was her money or his money, and it is utterly immaterial whether he has or has not repaid it to her. She says she gave or loaned it to her husband. In view of the facts disclosed by the record Mrs. De Golia cannot in any possible situation compel the administrator to pay her \$344. The judgment recovered by G. E. De Golia completely protects the administrator from any claim that Mrs. De Golia might assert.

The facts found by the jury show that Yates was the duly authorized agent of Andersen; and therefore the estate of the latter is liable for moneys received by Yates while acting within the scope of his agency. The judgment is affirmed.

(100 Or. 487)

SIMMS v. SULLIVAN.

(Supreme Court of Oregon. May 24, 1921.)

1. Customs and usages ⇨18—Local custom must be specially pleaded.

That a local custom relied on to take a case out of the general rule of law may be shown, it must be specially pleaded.

2. Customs and usages ⇨12(1)—Blind only those having actual or presumed knowledge.

That party may be bound by a trade custom or usage, he must have actual knowledge of it, or it must be so general that he will be presumed to have knowledge of it.

3. Customs and usages ⇨12(2)—No presumption of knowledge of custom of garage keepers not to drain water from stored car.

There is no presumption that the custom or usage of the garage keepers of Portland in failing to drain water from automobiles left with them for storage is known to persons storing them.

4. Customs and usages ⇨13, 15(1), 17—Part of contract by implication.

Valid customs known to the parties concerning the subject-matter of an agreement are part of it by implication, and are admissible to aid in its interpretation, and not to contradict or vary its plain terms.

5. Livery stable and garage keepers ⇨7—Cannot contract against liability for negligence.

A garage keeper with whom an automobile is stored, being a bailee for hire, cannot by contract so limit his responsibility as not to be liable for his own negligence.

6. Livery stable and garage keepers ¶7—
Keeper's liability not affected by owner of
stored car knowing of condition of place.

Liability of a garage keeper for injury to stored car is not affected by the car owner's knowledge of the condition of the place.

7. Livery stable and garage keepers ¶7—
Care required as to stored car stated.

A garage keeper must, with respect to a stored car, exercise such ordinary care as a man of ordinary prudence and discretion ought to exercise, and would be expected to exercise under all the circumstances if the car were his own.

8. Livery stable and garage keepers ¶7—
Burden of proof as to care in case of injured
stored car stated.

Proof that water in car stored in good condition in garage froze, causing parts to burst, makes out a prima facie case against the garage keeper, requiring him to show that he used due care.

9. Evidence ¶12—Judicial notice not taken
of changes in temperature.

Judicial notice cannot be taken of variations in temperature in particular places at particular times.

In Banc.

Appeal from Circuit Court, Multnomah County; William N. Gatens, Judge.

Action by W. H. Simms against L. I. Sullivan, doing business under the name of Fashion Garage. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

On or about the 27th day of November, 1919, W. H. Simms, the plaintiff and appellant, left his car at the Fashion Garage, located at 192 Tenth street, Portland, Ore. This was a public garage conducted for the storage of automobiles by defendant, L. I. Sullivan. By the acceptance of the car upon the part of Sullivan, the relationship of bailor and bailee for hire was established between the parties hereto.

The plaintiff asserted that the defendant did not take due and proper care of the said automobile, but, on the contrary, that he exercised so little care of the vehicle that the cylinders, radiator, and gasket thereon were allowed to remain filled or surrounded with water, and on or about December 20, 1919, the water therein became frozen, and said cylinders, radiator, and gasket were thereby broken, and greatly injured.

After admitting and denying certain allegations of the complaint, defendant, by way of a further and separate answer, alleged that—

" * * * On or about the 27th day of November, 1919, the plaintiff, well knowing the premises and garage of the defendant and the condition thereof, * * * made application to the defendant for a place to store his automobile, and he and the defendant agreed that

the defendant would rent him a space for his automobile for the sum of \$7.50 per month, * * * and that the only service which he (defendant) agreed to render was that the plaintiff had the right to leave his automobile in the garage of the defendant, and that he would render ordinary care in preserving same safely from loss or damage, and it was at all times understood and agreed that the plaintiff took the storage in the condition it then was, and that in case of any loss from the elements or acts of God, or any other than the ordinary care necessary, that the defendant would not be responsible therefor, and the defendant did all things which he agreed to do, and the loss, if any, was sustained by reason of the acts of God, on account of the freezing of the water in the radiator."

The matter alleged in the foregoing paragraph was denied by the plaintiff. During the course of the trial, the court admitted testimony of a local custom among the garage keepers of Portland, over the objection of the plaintiff, on the ground that the asserted custom had not been pleaded.

Trial by jury was waived, and the issue of fact determined by the court. Based upon the findings made and the conclusions of law drawn therefrom, the complaint was dismissed.

Ernest Cole, of Portland, for appellant.

P. J. Bannon, of Portland, for respondent.

BROWN, J. (after stating the facts above). The plaintiff alleges that the court erred in allowing the introduction of evidence as to the existence of a local custom among the garage keepers of the city of Portland. There was no allegation of any particular custom contained in the pleadings. At the trial a number of garage keepers were permitted to testify that a custom existed among the keepers of garages at Portland to the effect that the storage of an automobile did not contemplate or include the duty of removing water from the radiator.

It is a familiar rule of pleading that the issues in each case are confined to those made by the pleadings, and, in the trial, the evidence adduced should be limited to support the issues thus made.

Defendant, by his answer, gave notice to the plaintiff that his defense was based upon a specific contract. On the trial the defense was founded not upon the contract pleaded, but upon local custom. Defendant undertook to excuse the full measure of responsibility that the law of bailment places upon him by showing local custom among the garage keepers of Portland. The plaintiff objected, upon the ground that the custom was not pleaded. The weight of authority supports the general rule that evidence of a particular custom or usage such as was sought to be established by defendant, in any special line of business,

is not admissible, unless such custom or usage is specially pleaded. Some cases recognize exceptions to the general rule, but it is not necessary to refer to them here.

[1] As a rule, local usages and customs are facts which must be averred and proved in the same manner as any other material fact connected with the subject of litigation. According to the weight of the decisions, whenever a special custom is relied upon to take a case out of the general rule of law, such customs must be specially pleaded, and cannot be shown under the general issue or general denial. 22 Encyc. Plead. and Prac., pp. 406-408; Gladstein v. Levine, 49 Ind. App. 270, 97 N. E. 184; First National Bank v. Farmers' & M. Bank, 56, Neb. 149, 76 N. W. 430; Oriental Lbr. Co. v. Blades Lbr. Co., 103 Va. 730, 50 S. E. 270; Smith v. Stewart, 29 Okl. 26, 116 Pac. 182; Paine v. Smith, 33 Minn. 495, 24 N. W. 305; Pittsburgh Steel Co. v. Streety, 61 Fla. 393, 55 South. 67; Patton v. Tex. & P. R. Co. (Tex. Civ. App.) 137 S. W. 721; Windland v. Deeds, 44 Iowa, 98; Consolidated Coal Co. v. Jones & A. Co., 120 Ill. App. 139.

[2] Furthermore, it is a well-established principle of law that—

"In the absence of evidence that the party to be charged had actual knowledge of a trade custom or usage, it must, in order to be admissible against him, appear to have been so general that he will be presumed to have knowledge of it. * * * As will be seen, knowledge of a usage is necessary in every case, in order to bind a person by its terms. Sometimes this knowledge must be expressly proved, and sometimes, from its generality and notoriety, the law raises the presumption that the usage was known." 17 C. J. 454, 455.

[3] There is no general presumption that the custom or usage of the garage keepers of Portland in failing to drain water from motor cars left for storage is known to persons who leave their cars for purposes of storage, or for bailment. Before the plaintiff can be bound by a local custom of garage keepers in the matter of the bailment of his car, he must have knowledge of such custom.

[4] Valid usages, known to the contracting parties, concerning the subject-matter of the agreement, or usages of which the parties are chargeable with knowledge, are, by implication, incorporated therein, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary a contract, but upon the theory that the usage forms a part of the contract. But evidence of usage is not admissible to vary or contradict the terms of a plain, unambiguous contract, and in the more modern cases there has been strong judicial criticism of the tendency to resort to evidence of usage when to do so would indirectly control the true intention

of the parties to contracts. 17 C. J. 492-495; McCulsky v. Klosterman, 20 Or. 108, 25 Pac. 366, 10 L. R. A. 785; Holmes v. Whitaker, 23 Or. 319, 31 Pac. 705; Chadwick v. O.-W. R. & N. Co., 74 Or. 30, 144 Pac. 1165; Hurst v. Larson, 94 Or. 211, 184 Pac. 258. However, it has been held that, where evidence of custom or usage is offered for the purpose of showing what is merely incidental to an implied contract, and relied upon only as evidence of some fact in issue, it need not be pleaded. Harrison v. Birrell, 58 Or. 410, 419, 115 Pac. 141; 17 C. J. 518. But this does not govern the instant case.

[5] In the case at bar, the court committed error by admitting evidence of the particular custom of the garage keepers. It has been decided that—

"A custom of garage keepers contrary to the implied obligation of reasonable care for safe-keeping, arising in favor of an automobile owner by the storing of his car at a public garage, cannot absolve the garage keeper from observance of such care." McLain v. West Virginia Automobile Co., 72 W. Va. 738, 79 S. E. 731, 48 L. R. A. (N. S.) 561, Ann. Cas. 1915D, 956.

This court has said:

"A bailee for hire cannot by contract so limit his responsibility to the bailor as not to be liable for his own negligence or the negligence of his agents and servants." Pilson v. Tip-Top Auto Co., 67 Or. 528, 136 Pac. 642.

[6] Another assignment of error in the instant case relates to the introduction of evidence in support of defendant's allegation as to the condition existing in defendant's garage in which plaintiff stored his automobile.

"A garage keeper storing a car of another for compensation is classed as a bailee for hire, and as such he is bound to furnish reasonably safe accommodations and to exercise reasonable care and prudence to keep the machine in a safe manner. If guilty of negligence resulting in injury to the machine, he may be charged with the damage. The liability of a garage keeper for hire is not affected by reason of the knowledge of the owner as to the place where the property is kept. Its acceptance by the garage man imposes on him the duty of exercising due care for its safety and protection." Huddy on Automobiles (5th Ed.) § 202; Berry, Automobiles (2d Ed.) § 742; Stevens v. Stewart-Warner Speedometer Corp., 223 Mass. 44, 111 N. E. 771.

[7] Sullivan, defendant, was a bailee for hire, and as such he was under legal obligations to exercise, with respect to plaintiff's automobile, such ordinary care as a man of ordinary prudence and discretion ought to exercise, and would be expected to exercise under all circumstances if the property were his own. Schouler, Bailm. (3d Ed.) § 101; Willson v. Wyckoff, 133 App. Div. 92, 117 N. Y. Supp. 783; Smith v. Economical Garage, 107 Misc. Rep. 430, 176 N. Y. Supp. 479.

"The garage keeper is not an insurer of the automobiles left in his charge to be cared for, but he is bound to use reasonable or ordinary diligence in their care and keeping to the end that they be not damaged or destroyed or lost by reason of theft or otherwise." *Berry, Automobiles* (2d Ed.) § 742, and cases cited under note 9.

[8] From a case in point, we carve the following:

"Proof that a motorcar, when delivered to a garage keeper, was in good order, but when called for a few days later it was damaged, the water jacket having frozen and burst, makes out a prima facie case against the bailee, the garage keeper. It then became the duty of the garage keeper to rebut the prima facie case, by showing that he used due care as bailee. * * * *Smith v. Economical Garage*, supra.

A case illustrative of this principle is *Hansen v. Oregon-Washington R. & N. Co.*, 97 Or. 190, 213, 188 Pac. 963, 191 Pac. 655.

[9] We are unable to find in the record any substantial evidence, either direct or inferential, which justifies the finding that the plaintiff's car was injured by "an unexpected freeze that came on suddenly after the plaintiff left his auto with the defendant." Nor can the court take judicial notice that the water in the radiator of the car became congealed by reason of a sudden change in climatic conditions. It has been held that variations of climate in particular places at particular times cannot be judicially known. 16 Cyc. 855; *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197; *Haines v. Gibson*, 115 Mich. 131, 73 N. W. 128.

The judgment in this case is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(100 Or. 495)

TAYLOR v. FREMONT FUEL CO.

(Supreme Court of Oregon. May 24, 1921.)

Compromise and settlement ⇨24—Automobile owner's agreement to pay damages held for jury.

In an action against an automobile truck owner for negligence of driver, in which it was claimed that defendant on examination of damage to plaintiff's car agreed to pay for necessary repairs, the question of defendant's liability held for jury.

In Banc.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by W. M. Taylor against the Fremont Fuel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The substance of the complaint is that the plaintiff's automobile was parked on the street in front of his place of business, and that a delivery truck belonging to the defendant and driven by the defendant's employé was so operated in a careless and negligent manner by the driver that it collided with the plaintiff's automobile, damaging it so that he was compelled to pay for repairs \$10.55, and was deprived of the use of the car to his loss in the sum of \$10. The answer is a general denial of the allegations of the complaint.

The case was tried in the district court without a jury, resulting in a judgment for the plaintiff in the full amount demanded. On appeal by the defendant to the circuit court a similar trial resulted in a judgment for the plaintiff in the sum of \$15.55. The defendant appeals.

Oliver M. Hickey, of Portland, for appellant.

E. Earl Felke, of Portland, for respondent.

BURNETT, C. J. (after stating the facts as above). The testimony for the plaintiff is to the effect that his car was standing in front of his place of business, parked at about 4 to 12 inches from the curb, and that the defendant's truck was driven by, having on it some long timbers which struck the car in turning the corner, smashed the left rear fender, and bent the front axle. The plaintiff and his employé were in the plaintiff's store at the time and did not see the collision, but heard the noise. The plaintiff immediately ran out, accosted the driver of the truck, who had made no attempt to get away, and demanded payment for the damage. The driver said he would call up his employer, went into the plaintiff's store, called somebody by telephone, and told the plaintiff that his employer would come and see about the damage. Soon afterwards the defendant, E. H. Berland, who admits doing business under the assumed name of "Fremont Fuel Company," appeared at the plaintiff's store, examined the automobile, and directed the plaintiff's clerk, whom he interviewed, to have the automobile repaired, saying that he, the defendant, would pay the bill. The defendant disputes this testimony in part, admitting that he came and examined the automobile, but denying that he agreed to pay for repairing it. On the question of nonsuit, the only one presented for review, this is enough to carry the case to the jury.

The judgment is affirmed.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(100 Or. 528)

STONE v. FIRST NAT. BANK OF TILLAMOOK et al. (two cases).

(Supreme Court of Oregon. May 31, 1921.)

1. Liens —7—Contract for sale of logs held not to give an equitable lien; "Invoice."

A contract for the sale of logs which stipulated that the seller expected to discount the buyer's acceptances with a bank, wherein the buyer agreed that, in order further to secure payment of the acceptances, it would assign to the bank or such other person as the seller might direct the invoices of the buyer against its customers for the lumber manufactured from the logs, did not give an equitable lien in favor of the seller of the logs after transfer of their possession to the buyer, an "invoice" being merely a written account of the particulars of merchandise shipped or sent to a purchaser, consignee, or factor, with the value or prices and charges annexed; merely another term for bill rendered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invoice.]

2. Equity —57— Lien held not created by maxim as to regarding as done that which ought to be done.

The maxim as to regarding that as done which ought to be done means that which the parties agreed to do, and have not done, and cannot be invoked to create an equitable lien on property sold by contract passing title, and not evidencing intent to hold it as security.

Department 2.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

On petition for rehearing. Petition denied, and former opinion affirmed.

For former opinion, see 197 Pac. 304.

Bauer, Greene & McCurtain, of Portland, for appellant.

Botts & Winslow and S. S. Johnson, all of Tillamook, for respondents.

BURNETT, C. J. [1] In a brief critical in terms and savoring of diatribe, counsel for plaintiff urge that a rehearing should be granted in this case. We recall that the plaintiff was the owner of some spruce logs, and by a contract in writing, of date September 5, 1919, agreed as follows:

"Stone hereby sells to the company and the company hereby buys from Stone all those certain spruce logs got out by Stone under his contract dated March 11, 1919. * * *

It is further stipulated in the contract that—

"As each raft is completed and scaled, the logs therein shall become the property and at the risk of the company, and the company agrees that immediately upon the delivery to it of the certificate of the Columbia River Log Scaling and Grading Bureau showing the number of feet included in a raft, the company

will promptly execute and deliver to Stone the company's acceptance for the price of the logs included in such raft, at the rate of \$12 per 1,000 feet."

The language of the agreement upon which the plaintiff predicates his lien and the right to hold the proceeds of the sale of lumber manufactured from the logs, as well as the logs and lumber remaining on hand, is as follows:

"It is understood that Stone expects to discount said acceptance with the First National Bank of Tillamook, and the company agrees that in order further to secure payment of said acceptances (which shall mature 90 days after their respective dates) the company will assign to the First National Bank of Tillamook, or such other person as Stone may direct, the invoices of the company against its customers for the lumber manufactured from said logs."

As authority supporting plaintiff's contention, there is cited section 1235, 3 Pom. Eq. Jur. (4th Ed.), as follows:

"The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done. In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation."

[2] It is to be noted that the lien there described depends upon an express executory agreement in writing where the contracting party indicates an intention to make some particular property, real or personal, or fund therein described or identified, security for a debt or other obligation, whence arises an equitable lien upon the property, enforceable against that property, not only in the hands of the original contractor, but his successors in interest and purchasers or incumbrancers with notice. It is said that the doctrine is an application of the maxim that regards that as

done which ought to be done. In respect to this last observation, that which ought to be done is that which the parties contracted to do, but have not done. It is not grounded on mere moral obligation or upon a supposed advantage which either of the contracting parties has lost by his mere inadvortence. The lien must be some hold upon the identical property in dispute, and this in addition to the monetary obligation represented by the debt for which it is supposed to be security. The lien is ancillary to and separate from the debt itself. It must be more than a mere promise to pay out of some particular fund. Such a promise is of no more dignity or obligation than the original agreement to pay the debt itself.

Many cases are cited under the section of Pomeroy already quoted. For instance, in *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542, the effort was to charge an irrigation system in which the canal began in California, and, owing to the contour of the country, crossed into Mexico and back into the state of California. Because of the condition of the laws of Mexico, a foreign corporation could not hold title to lands within a certain zone adjacent to the international boundary. To overcome this obstacle a subsidiary corporation was formed to hold title to the part of the system in Mexico. The parent corporation held a large block of the shares in the Mexican corporation. A deed of trust covered those shares of the Mexican plant and authorized a sale of the property to pay the bonds of that concern. The principal question in the case was the power of a court of equity to compel the disposition of realty or other property situated beyond its jurisdiction, and it was held that, as equity operates upon the person in the enforcement of its decrees, the foreign property could be affected by the judgment of the court where the parties were within the jurisdiction of the court, and subject to its process. It was further held that the whole plant could be sold in its entirety, because the contract of the parties contemplated such a result. In other words, there was expression of the intent to create a lien, and designation of the property involved.

In *U. S. Fidelity & Guaranty Co. v. Fidelity Trust Co.*, 49 Okl. 398, 153 Pac. 195, there was an express written agreement to bond and mortgage a railroad to be built by subscriptions, which security was given to accomplish the repayment of those very subscriptions; and on this express agreement the lien was enforced against those in privacy with the railroad company to whom the subscriptions were made. In *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, there was an actual delivery of certain municipal bonds to the debtor, with the written agreement that they should be

placed as collateral to the debtor's note. In *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, the case depended upon a public statute which authorized St. Louis county to issue \$700,000 in bonds in aid of the Pacific Railroad Company, and required the custodian of the company's funds to pay certain monthly installments in liquidation of the bonds, and interest thereon. In *Hurley v. A. T. & S. F. Ry. Co.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, the company had a contract with a coal mining corporation whereby the latter agreed to furnish such coal as the railroad company required to operate its trains, and on the 15th of each month the railroad company should pay for the coal delivered during the preceding month. The coal company became involved, and in order to meet its payroll a supplemental agreement was made with the railroad company whereby the latter paid in advance for coal to a certain amount. It was held, as against the assignee in bankruptcy of the coal company, that he stood in no better plight than his assignor, and that the circumstances showed an intent to pledge the coal for the advances made by the railroad company. There, the coal to be mined was distinctly specified as the subject of the lien.

In *Ingersoll v. Coram*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208, it was expressly stipulated that Ingersoll was to be paid his fee as attorney for contestants of the Davis will, "out of the funds secured from the estate," and the amount of the fee was also specified. In all of these cases there is an express designation of the property to be affected and the amount for which it is to be charged, so as to leave nothing for future adjustment in that respect.

The instrument upon which the plaintiff bases his suit expressly provides that the property and possession thereof shall pass to the Silver Spruce Company. It is never intimated anywhere in the contract that there was any intention for Stone to retain possession of the logs or the lumber. All that the Silver Spruce Company agreed to do was to furnish security, not to Stone, but to those to whom he might negotiate the acceptances. We also note that it proposed to assign as security, not the property itself, but the "invoices of the company against its customers for the lumber manufactured from said logs." An "invoice in commercial transactions" is defined to be a written account of the particulars of merchandise shipped or sent to a purchaser, consignee, or factor, etc., with the value or prices and charges annexed. *Merchants' Exchange Co. v. Weisman*, 132 Mich. 353, 93 N. W. 869. "An 'invoice' of goods, is merely another term for 'bill rendered.'" *Pipes v. Norton*, 47 Miss. 61. It was held in *Dows v. Bank*, 91 U. S. 618, 23 L. Ed. 214, that—

"An invoice is neither a bill of sale nor evidence of a sale, and, standing alone, furnishes no proof of title."

It differs from a bill of lading.

This court, in *Walker v. First National Bank*, 43 Or. 102, 72 Pac. 635, speaking by Mr. Justice Bean, said:

"A bill of lading represents and stands for the property for which it was given, and the right and title of such property may pass by an indorsement of the bill, or by a mere delivery thereof, when such was the intention with which the indorsement or delivery was made. * * * But neither the indorsement nor delivery of a bill of lading has any effect in passing the title or dominion or control over the property, except as the result of a contract between the parties, and the real transaction may be shown by parol."

We have, therefore, at hand an instance where there is no expression of an intent to pledge or grant a lien upon the logs or lumber, but only to assign invoices which do not affect the title of the property one way or the other. Taken according to its legal effect, the contract is secured only by the personal responsibility of the Silver Spruce Company. Still further, we derive from 27 R. O. L. 571, an authority cited by the plaintiff, this doctrine:

"There has been much discussion and confusion in the cases as to the origin of the principle giving a vendor who has conveyed the legal title a lien for the purchase money. It is not a rule of the common law, but is exclusively a doctrine of equity, adopted, it has been said, from the civil law. This rule of the civil law applied to the sale of both real and personal property, and courts of equity, while adopting it as to realty, have not done so as to personalty, and it is held that a seller of personal property has no lien for the price after the delivery of possession."

As said by the same authority in the preceding section, "our statutes evidence an abhorrence of secret liens." Hence it would not be compatible with trade facilities, if every seller who parts with the possession of goods could assert an equitable lien without giving any notice of it. It was to illustrate this policy of the law that the citations of our statutes granting liens upon logs and lumber were entered in the former opinion.

It is to be regretted that the plaintiff disposed of his property so hardly earned, as loggers do, to some irresponsible concern. But, having parted with his property and given up possession, no lien can be devised for him. He stands in no better relation to the property than any other creditor of the Silver Spruce Company. Our statutes have made it easy for sellers of such chattels to secure themselves for the purchase price, and in view of the precedents against equi-

ty's recognition of a vendor's lien on personal property with which the seller has parted possession, we cannot give the plaintiff relief.

We adhere to the former opinion.

BEAN, BROWN, and JOHNS, JJ., concur.

(100 Or. 578)

GILDERSLEEVE v. LEE.

(Supreme Court of Oregon. May 31, 1921.)

1. Wills §456—Words construed in usual and ordinary sense unless it appears they were used in technical sense.

The words of a will must be taken in their usual and ordinary sense, unless it appears that they were used in a technical or special sense, or unless, when applied to the subject-matter, they have a technical or special meaning.

2. Wills §470—Testator's intention must prevail as determined from the whole will, and not from detached portions.

Or. L. § 10124, commands that all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true interests and meaning of the testator, so that his will shall prevail, and such intent may be gathered from the whole instrument, and not from detached portions of the will alone.

3. Wills §455 — Intention construed from meaning words of whole will convey per se.

In construing a will, the court seeks testatrix's intention as expressed in the will, and the court's conclusion may or may not give words their technical or literal import, or may give expressions their ordinary and grammatical sense, but the meaning settled upon, if settled intelligibly, is that which the words and language of the whole will, properly interpreted, convey per se.

4. Wills §616(1)—Grant of life estate with power of sale does not enlarge estate into a fee, but gives naked power to dispose of fee.

An absolute power of sale or disposal attached to an express life estate will not enlarge it into a fee, although the power is to convey a fee, and where an estate for life is expressly given, and the power of disposition is annexed to it, the fee does not pass under such devise, but the naked power to dispose of the fee, although it is otherwise in case there is a gift generally of the estate, with power of disposition annexed.

5. Wills §692, 693(1)—Gift of power to dispose of whole estate, annexed to life estate, with remainder to third persons, confers on tenant plenary power to convey fee.

A right of disposition is not property, but a mere authority and an absolute power of disposal is not inconsistent with an estate for life only, and a gift of power to dispose of the

whole estate annexed to an estate for life, with remainder over in fee to third persons, confers upon the life tenant plenary power to convey the fee upon the terms of the power granted.

6. Wills \S 616(1)—Where estate is given for life in definite terms, added power of disposition does not enlarge estate into fee simple.

It is a rule of construction that, where an estate is given for life in definite terms, an added power of disposition does not enlarge the estate into a fee simple, and this rule seeks to give effect to the intention of the testator, but regards specific terms such as "for life," "during his or her natural life," etc., as showing what the testator intended to give.

7. Wills \S 692, 693(1) — Will construed as giving life tenant power to dispose of fee.

Where testatrix gave residue of estate to her husband for life, remainder to their children, and provided that "he may sell and convey any and all of the property in the usual course of business, the same as I could or would do if personally present," held, that the husband had power to convey the fee.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Suit by Frank E. Gildersleeve against Robert E. Lee for specific performance of a written contract for sale of land. Case ordered adjudged, and decree dismissed, and the plaintiff appeals. Reversed, and remanded for further proceedings consistent with opinion.

This suit involves the right of plaintiff to convey a fee simple title to real property. It comes here from the court below, as the result of litigation between the parties to a real estate contract pertaining to the sale of 200 acres of land. The plaintiff, Frank E. Gildersleeve, instituted a suit for specific performance of a written contract relating to the sale of land, against defendant, Robert E. Lee, the purchaser. The defendant, answering, admits substantially all the allegations of plaintiff's complaint, but alleges as a defense that the vendor has a fee simple title to 120 acres only of the 200 sold, and avers the inability of the plaintiff to convey any greater estate than a life estate in 80 acres of the tract agreed to be conveyed, for the reason that, by will, he became vested with a life estate in the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 11, Tp. 2 south of R. 44 east, W. M., and has no lawful right to convey a greater estate.

From the record before us, it appears that on the 6th day of December, 1920, plaintiff and defendant entered into a contract in writing, whereby plaintiff sold and agreed to convey to defendant the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the N. W.

$\frac{1}{4}$, of Sec. 11, Tp. 2 south of R. 44 east, W. M., in Wallowa county, Or. This contract provides that—

"As the purchase price to be paid for said land defendant has paid to plaintiff the sum of \$10,000, the receipt of which is acknowledged * * *, and that, in addition to the payment of said sum so paid, defendant * * * shall assume and agree to pay a mortgage in the sum of \$15,000 given to Washington Mutual Savings Bank, a corporation of Seattle, Wash., covering all of said land, and a mortgage in the sum of \$10,000 in favor of John Fruitts covering the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 11."

The contract also recites that, within a reasonable time from December 6, 1920, and, in any event, within 30 days from said date, the plaintiff shall furnish and deliver to the defendant a complete abstract of title to the above-described land, and that, if such abstract shall show the title to the land to be vested in plaintiff and free from liens, incumbrances, and defects, with the exception of said mortgages, plaintiff shall then execute, acknowledge, and deliver to defendant a warranty deed conveying said land to defendant; that by said deed plaintiff shall convey to and vest in defendant an absolute fee simple title to said lands, subject, nevertheless, to the outstanding mortgage liens, and if plaintiff cannot convey to defendant a fee simple title to said lands, or any part thereof, then plaintiff shall repay to defendant the sum of \$10,000, with interest thereon at the rate of 8 per cent. per annum from the 6th day of December, 1920, until paid.

Plaintiff then alleges the various steps taken in complying with the provisions of the contract, including the execution, tender, and attempt to deliver the deed to defendant; that defendant failed and refused to accept or receive the deed, but demanded that plaintiff repay to him the sum of \$10,000, with interest; that plaintiff deposited the deed to the lands in court, for the use and benefit of the defendant.

For a defense to the cause of suit alleged in plaintiff's complaint, defendant alleges, among other things, that the abstract mentioned in plaintiff's complaint shows, and the facts are, that one Pearl D. Gildersleeve was the owner of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 11, the same having been conveyed to her by warranty deed bearing date July 29, 1919, duly executed by John Fruitts and Gertie M. Fruitts, his wife; that said Pearl D. Gildersleeve died on or about March 21, 1920, leaving a last will and testament, the material parts of which are as follows, to wit:

"Know all men by these presents: That I, Pearl D. Gildersleeve, being of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person or persons whatsoever, do make,

publish, and declare this my last will and testament, in language following, that is to say:

"I hereby revoke all former wills and codicils by me made.

"I direct my executor hereinafter named, as soon as he shall have funds on hand belonging to my estate, to pay my funeral expenses, expenses of my last illness and all my other just debts.

"I direct and request that my body be decently buried, proper attention being paid to my rank and station in life.

"I give, devise and bequeath to my son, Floyd W. Squibb, being a son by a former marriage, the sum of one dollar (\$1), lawful money of the United States.

"I give, devise and bequeath to my son, Edward A. Gildersleeve, and to my daughter, Violet M. Gildersleeve, each the sum of one dollar (\$1), lawful money of the United States.

"All the rest, residue and remainder of my property, real, personal or mixed, of whatever the same may consist or wherever the same may be situate, I give, devise and bequeath to my husband, Frank A. Gildersleeve, during his natural lifetime, the remainder over at the time of his death to go to my said children, share and share alike, it being my intention that my said husband shall have the full management and control of all of my said property and to that end he may sell and convey any and all of the property in the usual course of business the same as I could or would do if personally present, and that the proceeds shall be used by him for his comfortable maintenance and the comfortable maintenance, education and support of my said children, the residue as aforesaid at the time of his death to be divided, share and share alike, among my said children, or in the event of the death of any of them, among the heirs of the deceased and survivors, per stirpes. * * *

Defendant further alleges that, by reason of the facts set forth in the answer, plaintiff has only a life estate in the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 11, and the fee simple title thereto is vested in Floyd W. Squibb, Violet M. Gildersleeve, and Edward A. Gildersleeve, subject to said life estate; that, by reason thereof, plaintiff is not the owner in fee simple of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of said section 11, and that he cannot convey to defendant, nor vest in him, a fee simple title to said tract of land, and that the deed described in the complaint will not convey to, or vest in defendant, a fee simple title to said land as required by said contract.

A demurrer was filed by the plaintiff to the new matter alleged in the answer and set forth as a defense to the cause of suit alleged in plaintiff's complaint, which was overruled on the 12th day of March, 1921. The plaintiff refused to plead further, and the case was ordered, adjudged, and decreed to be dismissed.

Plaintiff appeals to this court, alleging error in overruling his demurrer, in dismissing the cause, and in rendering a decree in favor of defendant and against plaintiff for costs and disbursements.

A. S. Cooley, of Enterprise, for appellant.
Daniel Boyd, of Enterprise, for respondent.

BROWN, J. (after stating the facts as above). The pivotal point in this case is the right of the plaintiff to convey a title in fee to the land devised to him by his wife, Pearl D. Gildersleeve. The power of plaintiff to convey a fee simple estate depends upon the terms of the will.

[1] In construing a will, its provisions must be considered together; the words are to be taken in their usual and ordinary sense, unless it appears that they are used in a technical or a special sense, or unless, when applied to the subject-matter, they have a technical or special meaning; and the intention of the testator is paramount and controlling, so far as that purpose is within the law.

[2] It is but the statement of a commonplace rule of law to observe, in the interpretation of the provisions of a will, that the intention of the testator as therein expressed must prevail. The statute of this state commands that all courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true interests (intent) and meaning of the testator in all matters brought before them. Or. L. § 10124; Moreland v. Brady, 8 Or. 303, 34 Am. Rep. 581; Shadden v. Hembree, 17 Or. 14, 18 Pac. 572; Jasper v. Jasper, 17 Or. 590, 22 Pac. 152; Portland Trust Co. v. Beattie, 32 Or. 305, 52 Pac. 89; Love v. Walker, 59 Or. 95, 103, 115 Pac. 296; Kaser v. Kaser, 68 Or. 153, 158, 137 Pac. 187; Beakey v. Knutson, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955; Boehmer v. Silverstone, 95 Or. 172, 174 Pac. 1176, 186 Pac. 26; Bilyeu v. Crouch, 96 Or. 66, 69, 189 Pac. 222.

The controlling rule in ascertaining the meaning of the will of Pearl D. Gildersleeve, to which all technical rules of construction must give way, is to give effect to the true intent and meaning of the testatrix as the same may be gathered from the whole instrument; and in arriving at that intention the relation of the testatrix to the beneficiaries named in the will and the circumstances surrounding her at the time of its execution are to be taken into consideration, and the will read, as nearly as may be, from her standpoint, giving effect, if possible, to every clause and portion of it.

It has frequently been held by courts and stated by text-writers that a testator's intention is to be collected from the whole will taken together, and not from detached portions alone, for, as it is figuratively said, the meaning must be gathered from the body of the will, or, to use another familiar expression, from the four corners of the instrument. Schouler, Wills and Administration, § 468; 40 Cyc. pp. 1388, 1389, and cases cited.

[3] It is the expressed intention of the testatrix, that which her will imports, and not any conjectural intention of hers outside of

the will which might or might not be capable of demonstration, that the court relies upon; and, having ascertained that expressed intention to its satisfaction, the tribunal investigates no further. Its conclusion may give words their technical or literal import, or may not; it may give expressions their ordinary and grammatical sense, or may not; but the meaning settled upon, if settled intelligibly, is that which the words and language of the whole will, properly interpreted, convey per se. Section 571, and note 1, Schouler, Wills and Administration; 40 Cyc. pp. 1389, 1390.

[4] Did the will confer upon plaintiff power to sell and convey a fee simple title to the land in controversy, without affecting his life estate therein? This question must be answered in the affirmative. An absolute power of sale or disposal attached to an express life estate will not enlarge it into a fee, although the power is to convey a fee. 40 Cyc. 1626, 1627. The rule is this: Where an estate for life is expressly given, and a power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power to dispose of the fee. But it is otherwise in case there is a gift generally of the estate, with a power of disposition annexed. In this latter case the property itself is transferred. Beasley, C. J., in *Borden v. Downey*, 35 N. J. Law, 74, 77.

[5] The right of disposition is not property, but a mere authority. An absolute power of disposal is not inconsistent with an estate for life only. *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690.

Chancellor Kent, in *Jackson v. Robins*, 16 Johns. (N. Y.) 537, says:

"We may lay it down as an incontrovertible rule that, where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases."

Based upon a multitude of authorities, we quote the following from a text-writer:

"It is a general rule of law that a power to dispose of the fee annexed to a devise for life does not enlarge the estate given. Where the devisee is given a life estate only, a later clause granting such devisee the power to dispose of the fee is governed by the former provision, and the express limitation for life will control the operation of the power so as to prevent it from enlarging the estate first devised." 2 Commentaries on Wills, Alexander, § 973, and extensive list of authorities cited under note 88; likewise authorities cited in note, 9 Ann. Cas. at page 949.

A gift of power to dispose of the whole estate, annexed to an estate for life with remainder over in fee to a third person, confers upon the life tenant plenary power to convey the fee upon the terms of the power granted. *Grace v. Perry*, 197 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948.

[6] The rule of construction established by the great weight of authority is that, where an estate is given for life in definite terms, an added power of disposition does not enlarge the estate into a fee simple. This rule, of course, seeks to give effect to the intention of the testator, but regards specific terms such as "for life," "during his or her natural life," etc., as showing what estate the testator intended to give. Note, 9 Ann. Cas. 947, and the many cases there cited.

There is a minority rule prevailing in some states that the devise of an estate for life, coupled with an absolute power of disposition, either express or implied, gives the devisee an estate in fee. See list of authorities sustaining the minority rule, 2 Commentaries on Wills, Alexander, p. 1415, note 89.

In *Winchester v. Hoover*, 42 Or. 314, 70 Pac. 1035, this court has approved the legal proposition stated by Mr. Justice Field in *Brant v. Virginia C. & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927, that:

"Where a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended."

See *Bradley v. Westcott*, 13 Ves. 445; *Smith v. Bell*, 31 U. S. (6 Pet.) 68, 8 L. Ed. 322; *Boyd v. Strahan*, 36 Ill. 355.

It was held in *Winchester v. Hoover*, supra, that:

"Where there is a devise of real property for life in express terms, with power of disposal, the power does not enlarge the estate into a fee, and the devisee can convey only such estate as he received, unless there are words clearly indicating that a larger power was intended."

In the case of *Savage v. Savage*, 51 Or. 171, 94 Pac. 184, this court, speaking through Mr. Chief Justice Bean, said:

"Where there is a general devise without any specifications as to the estate devised, and absolute power of disposal, the donee may convey a title in fee, although he may be required to account for the proceeds as a trustee."

[7] In the case at bar, Pearl D. Gildersleeve clearly indicated that the devisee is empowered to convey a greater estate than he received. The estate devised is plainly specified as a life estate, and the power of disposal is absolute. Testatrix said, in devising her husband his life estate in the land, that:

"All the rest, residue and remainder of my property, real, personal and mixed, of what-

ever the same may consist or wherever the same may be situate, I give, devise and bequeath to my husband, Frank A. Gildersleeve, during his natural lifetime, the remainder over at the time of his death to go to my said children, share and share alike."

Manifestly, it was her intention, after providing for her three children in clause 5 of the will by bequeathing to each of them one dollar, that her property, personal and real, should be bequeathed and devised to her husband during his lifetime. The language of the testatrix establishes that she intended to devise to her husband a life estate in her property. She contemplated and said that the remainder over at the time of his death should go to her children, share and share alike. She then conferred upon him a power of disposal as follows, by stating that it was her intention—

"That my said husband shall have the full management and control of all of my said property, and to that end he may sell and convey any and all of the property in the usual course of business, the same as I could or would do if personally present."

These words clearly indicate that the testatrix intended to empower her husband with full authority to sell all of her property, which included the land, and to transfer the same title that she could have conveyed if personally present. That title is a fee simple title.

The demurrer should have been sustained.

This case is reversed, and remanded for further proceedings consistent with this opinion.

BENSON, J., not sitting.

(100 Or. 722)

MENO v. OTTO.*

(Supreme Court of Oregon. May 31, 1921.)

Animals §106—Under city charter, sale of impounded animals to be on notice "as" in case of execution.

Under the charter of city of Enterprise, providing that, after an animal running at large has been impounded and forfeited, the city may sell it "as provided by law for execution sales of personal property," notice of sale must be posted in three public places, not less than 10 days successively, as required by Or. L. § 237, before sale of personal property on execution; "as" applying not only to method of sale but manner of notice; so sale on notice by publication is void.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, As.]

Bean, J., dissenting.

En Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by Joe Meno against Frank Otto. Judgment for plaintiff and defendant appeals. Affirmed.

The complaint is in the usual form of claim and delivery, and charges that the plaintiff is the owner and entitled to the possession of a certain brown mare which the defendant wrongfully and unlawfully holds and retains in Wallowa county, Or., and prays for judgment for its possession or for its value if delivery cannot be had, and damages. The answer is a general denial. The evidence is conclusive that the plaintiff was the owner of the mare, and that in the fall of 1919 he placed her in a pasture about four miles from Enterprise. The defendant introduced in evidence the city charter of Enterprise of 1899 and the amendment in 1903; certain ordinances relating to the taking up and impounding and selling of animals found running at large in the city limits; the notice of the city marshal of impounding the mare in question and other animals, together with his affidavit as to the posting of notices of that fact and the notice of sale which was published in the newspaper; the affidavit of the printer; the marshal's return or certificate of sale and the sale of the mare to the defendant.

The city marshal testified that, in November or December of 1919, with other animals he found the mare in question running at large on the streets of Enterprise and took them up; that he afterwards learned that the plaintiff was the owner of the mare and wrote him a letter to the effect that she was in the city pound and would be sold if he did not come and pay the charges on or before December 18; that on December 19, pursuant to such notices, he sold the mare at the city pound at a public auction to the defendant for \$69; that there were a dozen or more people at the sale and quite a few bidders on the mare. It was stipulated that she was of the reasonable value of \$150. After the evidence was taken, both parties moved for a directed verdict, which motions were overruled. The court gave the following instructions to the jury:

"Under the view that the court takes of the law in this case, there will be but one question to be submitted to you, and that is as to the value of the use of the mare in question, during the time that she has been detained from the plaintiff by the defendant."

The jury found that the plaintiff was the owner of the mare and that she was of the value of \$150, and for the further sum of \$50 damages for the wrongful detention, upon which judgment was entered, from which the defendant appeals, assigning as error the overruling of his motion for a directed verdict for the defendant and the giving of the above instruction.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied June 21, 1921.

D. W. Sheahan, of Enterprise, for appellant.

J. A. Burleigh, of Enterprise, for respondent.

JOHNS, J. (after stating the facts as above). Section 16 of its charter authorized the city of Enterprise "to provide by ordinance for having domestic and other animals found running at large within the city limits restrained, impounded and forfeited, and may sell the same when forfeited, as provided by law for execution sales of personal property." Under this provision, the city passed Ordinance No. 51, section 1 of which is as follows:

"It shall be unlawful for the owner or owners of any horse, mare, gelding, foal, mule, jenny, sheep, goat, cow, steer, bull, heifer, hog, or shoat, to allow the same to be or run at large at any time within the corporate limits of the city of Enterprise in the state of Oregon.

"Sec. 2. It shall be the duty of the city marshal of the said city of Enterprise, when any or all of such animals are found wandering about, or running at large within the corporate limits of said city of Enterprise, to forthwith take up and confine the same, and as soon thereafter as can be done, give actual notice thereof to the owner or owners thereof, if known, and in case the owners cannot be found or determined, then by posting in three conspicuous places within the corporate limits of said city, a notice containing a description of said animals by both natural and artificial marks, and stating the time when such animals were taken up, which notice shall remain posted for a period of five (5) days inclusive.

"Sec. 3. At any time within said period of five days (5), the owner or owners of such animals shall be permitted to take the same from such confinement upon payment to said city marshal of all costs and expenses incurred in feeding, caring and giving said notice."

Section 4 provides that after the expiration of the 5-day period, the city marshal shall advertise the animals for sale by the publication of a notice for the period of 20 days in a newspaper published in the city of Enterprise. This section was amended by Ordinance No. 136 to read as follows:

"At the expiration of the period of five (5) days in case any and all of such animals are not claimed, or taken from their place of confinement by the owners thereof, the city marshal shall at such time, cause such confined animals to be advertised in a newspaper, published in said city of Enterprise, two times, once each week, in said newspaper and shall in said notice so advertising said animals describe the same by both natural and artificial marks, and stating the time when said animals were taken up and confined, and that the same will be sold on a day certain at public auction if not claimed and stating the time and place of sale."

Section 5 of the amended act provides that—

After the publication of such notice, if the owners fail or neglect to claim the animal and pay the charges the "marshal shall proceed to sell said animal so taken up at public auction to the highest and best bidder for cash and shall make and file with the city recorder a certificate of such sale."

The city marshal testified that he put the mare in the city pound and tried to find the owner; that she was shod all around, her foretop was cut off, and that she had no visible brand; that he posted her and that she then looked more like a bay than a light brown mare; that through inquiry he learned the animal belonged to the plaintiff, who was then near Elk Mountain, and that he promptly addressed a letter to him at Chico, which was the post office for that section, in which he advised him that his mare was in the pound and that if not taken out it would be sold on December 18. The plaintiff denies that he received the letter, although it was never returned. The proof is conclusive that after the impounding of the animal, the city marshal posted the notices of forfeiture in compliance with section 2 of Ordinance No. 51, above quoted. No one having claimed her after the five-day notice of impounding had expired, he advertised her for sale under the provisions of section 4 of the amended Ordinance No. 136, and caused a notice of such sale to be published once a week for three weeks in the "Wallowa County Reporter." After describing the mare and other animals and reciting that they were found running at large within the corporate limits of the city and that the city marshal has advertised them by posting three notices as follows, "one at the courthouse, one at the Enterprise livery barn, and one at the R. S. & Z. Corner within the city of Enterprise," the published notice recites that—

The marshal "will offer said animals for sale at public auction to the highest bidder for cash in hand. Said auction sale will be held on Thursday, December 18, 1919. Said animals were taken up November 20, 1919. Sale will be held at the city pound at 2 p. m. [signed] A. J. McInturf, City Marshal of the City of Enterprise, Oregon."

The proof of posting of the impounding notices and of the published notice of sale is regular and complies with the ordinance. Pursuant to the published notice and at the specified time and place, the marshal offered the animal for sale. The evidence is conclusive that at least a dozen persons were present; that a number of bids were made on the mare; that the defendant was the highest bidder; and that the marshal sold the mare to him for \$69, which the defendant paid and there took her into his possession. At the trial, it was contended by the plaintiff that the ordinance providing for the publication of the notice of sale in a newspaper and the sale made pursuant to such published notice was null and void and in

conflict with section 16 of the charter, which authorizes the city "to provide by ordinance for having domestic and other animals found running at large within the city limits restrained, impounded and forfeited, and may sell the same when forfeited as provided by law for execution sales of personal property." The record is conclusive that the mare was forfeited to the city within the meaning of section 16 of the city charter, and that pursuant to the notices published in the newspaper, she was sold at public auction to the plaintiff and that he was the highest bidder. Section 237, Or. L., provides that—

"Before the sale of property on execution, notice thereof shall be given as follows:—

"1. In case of personal property, by posting written or printed notice of the time and place of sale in three public places of the county where the sale is to take place, not less than ten days successively. * * *

It is not claimed that any written or printed notices of sale were ever posted. The defendant contends, first, that section 16 of the city charter, which says that when the animal is forfeited the city has the power to sell it "as provided by law for execution sales of personal property," applies only to the manner and method of sale, and that it does not carry with it or include the posting of the notices of sale. In other words, under the provisions of the charter, to sell an impounded animal which has been forfeited to the city, the publication in a newspaper of the notice of sale as provided for in Ordinance No. 136 is sufficient, and it is not necessary that the notices should be posted as provided in section 237, Or. L. It will be noted that the statute says "before the sale of property on execution notice thereof shall be given as follows," and that in the case of personal property, written or printed notices shall be posted in three public places not less than ten days successively, and the charter says that the city may sell the property "as provided by law for execution sales of personal property." Corpus Juris, vol. 5, p. 597, defines the word "as" to mean:

"Like; similar to; of the same kind; in the same manner; in like manner; likeness; like as; even; to the same extent with; when; while; at some time. * * *

On principle, the case of *Brownfield v. Weicht et al.*, 9 Ind. 394, seems to be in point. That was a suit to foreclose a real mortgage, and it appeared that the sheriff's notice of sale which the plaintiff saw followed the decree, and that there was no statement in the notice that the rents and profits would be first offered for sale, and the court held:

"The general law regulating the sale of real estate on execution, explicitly requires the rents and profits for seven years to be first offered. 2 R. S. p. 140, § 463. And the language of the statute directing sales in cases of foreclosure, is as follows: 'A copy of the order of sale and

judgment shall be issued, &c., to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest, and cost, as upon execution.' Id., p. 176, § 635. It seems to us that the phrase, 'as upon execution,' plainly shows a legislative intention that the law regulating sales on execution should apply to, and in all respects govern, sales under a decree of foreclosure."

The statute did not require that the advertisement should specify that the rents and profits should be first offered, but the court held that under the law, it was the official duty of the sheriff to first offer the rents and profits for sale and that it was unnecessary for him to advertise in effect that he would perform his official duty. That is to say, in a notice of sale of real property on a foreclosure decree under section 635, p. 176, of the Indiana statute (2 Rev. St. 1852), and without any specific mention of that fact in the notice, the words "as upon execution," in that section, shall be construed to mean that the rents and profits for seven years shall be first offered for sale as provided for on page 140, § 463, of the statute, which pertains to the sale of property on a plain execution. Appellant relies upon *Davis v. Magnes*, 58 Or. 69, 113 Pac. 1, where it is said:

"An execution sale without proper notice is in any event a mere irregularity, and such sale cannot be attacked collaterally. *Freeman, Executions*, § 286, and cases there cited."

That case grew out of the sale of real property, and with all the parties before the court the sale was confirmed without objection. The opinion further says:

"If the order had been taken without the appearance of the execution defendant in court, a different question might have arisen."

Under the statute many irregularities in the sale of real property are cured when the sale is confirmed, but there is no confirmation of the sale of personal property. It is true that section 286 of *Freeman on Executions*, cited in *Davis v. Magnes*, says:

"That the statutes requiring notice of the sale to be given are directory merely, and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault. This rule has been applied in cases where the purchaser was aware of the deficiency of the notice, and seems to be applicable in all cases in which the absence of the notice was not occasioned by some fraud or collusion of which the purchaser had knowledge, or in which he participated."

Apparently the same rule is stated in *Corpus Juris*, vol. 23, § 599. We have examined the large number of authorities cited under each of those sections. Many of them are founded upon other and different statutes, and neither of them is like the instant case upon either fact or principle. Whatever may be the rule under other statutes, it has been

the uniform practice in this state since section 237, Or. L., was enacted, that notice of sale of personal property on execution should be given by posting written or printed notices of the time and place of sale in three public places in the county not less than ten days successively. To now hold that such a sale of personal property could be made by publication in a newspaper would overthrow a continuous practice of 50 years and in legal effect nullify the plain provisions of the statute. It is true that the notice of sale was published in a newspaper and as provided in the ordinance, but any authority of the city to sell the mare must be found in section 18 of the charter, which says that after an animal is impounded, the city "may sell the same when forfeited as provided by law for execution sales of personal property." This means that the notice of sale should have been given in the manner specified in section 237, Or. L. The answer of the defendant was a general denial, under which the only issues of fact were the ownership of the mare, its value which was stipulated at the trial, and the damages, if any, for its unlawful detention.

Judgment is affirmed.

BEAN, J., dissenting.

(100 Or. 497)

PALDANIUS v. STRAUSS et al.

(Supreme Court of Oregon. May 24, 1921.)

1. Evidence §21—Common knowledge that electric signs are used for advertising purposes.

It is a matter of common knowledge that electric signs are used for advertising purposes.

2. Contracts §198(1)—Agreement to "equip" and "install" electric sign meant to put in place ready for use.

Under an agreement to "equip" and "install" an electric sign for a moving picture house, it was the duty of power company to install the sign and put it in place ready for use, and to furnish all the equipment, although the duty to "equip" would not carry with it the duty to put the sign in any specified place, or swing it in any particular manner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equip.]

3. Contracts §169—Customs and usages §15(1)—Evidence §442(5)—Parol evidence admissible to show how and where electric sign should be placed.

Where written contract to "equip" and "install" electric sign was silent as to where it should be placed or how it should be swung from the building, evidence was admissible of any parol agreement or understanding between the parties as to such matters, and, in the absence of any parol agreement, it was the duty of the one agreeing to install the sign to do

so in the usual and customary manner, and parol testimony would then be admissible for the purpose of showing what was the usual or customary method or manner for the installation of that kind of an electric sign, but any contract, verbal or written, must be construed as to the actual and physical conditions which existed at the time it was made.

4. Contracts §313(1)—Moving picture theater had no right to terminate contract for installation of electric sign because power company refused to change location of power line.

Where, at the time power company agreed to install an electric sign in front of a moving picture theater, there was a pole and power line or cable on the sidewalk in front of the theater, the theater had no legal right to terminate the written contract because the power company refused to make a requested change in the location of the pole and power line or cable in order to place the sign in a certain position, unless previously agreed upon.

5. Contracts §353(1)—In action to recover rental for electric sign installed, held that there was no evidence of any oral agreement that sign should be hung in particular place.

In an action by a power company against moving picture theater to recover rental for electric sign installed, held that there was no evidence of any parol contract that the sign should be hung in any particular place or specified manner, and instructions assuming that there was such evidence were erroneous.

6. Contracts §280(1)—Hanging sign at angle not compliance with contract to install by power company.

Hanging a swinging sign in front of a moving picture theater at an angle so that only one side could be seen was not installing it in the usual and customary manner, and hence power company did not comply with its contract to equip and install the sign, and proprietor of theater had the right to take it down and tender it back to the power company on its refusal to adjust the matter.

7. Appeal and error §1170(9)—Erroneous instruction held not to require reversal under constitutional provision.

On appeal from a judgment in favor of proprietors of moving picture theater in an action for rentals by a power company, the judgment must be affirmed, notwithstanding an instruction, erroneously assuming that there was evidence of a parol agreement as to the manner of hanging the sign, where the evidence was conclusive that the sign was not installed in the usual and customary manner under the conditions existing, power company having hung the sign at an angle, so that it would not give the results that the proprietors were supposed to have, and having refused to adjust the matter, under Const. art. 7, § 3.

Burnett, C. J., dissenting.

Department 2.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by Julia S. Paldanius against Joe Strauss and Will Madison, as the surviving members of the copartnership of Strauss, Dean & Madison. Judgment for defendants, and plaintiff appeals. Affirmed.

The Pacific Power & Light Company, a corporation, owns and operates an electric light plant in the city of Astoria, and the defendants were there engaged in the moving picture business, and on August 7, 1917, the power company made a written contract with them for an electric sign, the material portions of which are as follows:

"The company agrees to equip the premises or location, as the case may be, of the customer at 539 Commercial street, in Astoria, Oregon, with a system of electrical wiring and connections for the operation of one electric sign of 37 25-watt lamps, and to furnish and install said sign for the customer and also to furnish the necessary lamps for such service included in the monthly payment hereinafter named. The sign to be as follows: One double-face Novelite interchangeable three-line reading board 3' 6"x10' and 144 8" changeable letters and space plates; the word 'Crystal' will be on top of sign in 12" Novelite letters; the word 'Crystal' is to flash on and off; the interchangeable letters are to burn all the time."

For which the customer agreed to pay \$15.60 a month for the period of 36 months, and the customer also agreed to obtain the "property owner's permission to install such sign," and to notify the Power Company in writing and that "the company shall not be required to commence the installation of said sign or equipment until such permission has been obtained." The plaintiff alleges that the power company kept and performed all of the conditions of the contract by it to be kept and performed, and that on account of the failure and neglect and refusal of the customer to make the payments that the power company elected to declare all of the monthly installments due and payable, and that there is now due and owing on the contract \$561.40, no part of which has been paid; that for a valuable consideration, the claim was duly assigned to the plaintiff, who is now the owner and holder thereof, and that the money is now due and owing the plaintiff. For answer the defendants admit the partnership as alleged, and deny all other allegations. They plead two further and separate defenses in substance and to the effect that they did make a certain written contract with the power company, the exact terms and conditions of which are to them unknown; that the power company agreed to build and construct an electrical display sign, which was to be of iron, steel, sheet metal and glass fixtures, 12' 8" long, including the brackets, by about 4' high and 10" in width, which was to be used in advertising the title of all film pictures and the names of the principal "Stars"; that the Power Company agreed to properly place and in-

stall the sign on the premises used by the defendants for running a moving picture show house, and that one of its considerations was that another sign contract should be canceled, and they should have credit for \$100 upon the new one; that the defendants refused to accept the new sign, for the reason that it "did not meet with the requirements and specifications and representations as provided by the said contract; that by reason of its faulty construction the defendants refused, and now refuse, to accept and pay for the sign; that the power company maintained on the highways and streets in the city of Astoria certain poles, upon which were strung electric wires and cables at a distance of about 25' from the ground, immediately in front of the picture show house of the defendants, and that in about the front of said picture show house there was a pole located in the sidewalk about one foot from the south curbing of said Commercial street; that "the said sign as contracted for was for the purpose of attracting persons to the said show house"; that under its terms the sign was to be placed "directly over the walk in front of said picture show house, and on a straight line and parallel with the length of said picture show house"; that by reason of the wires and cables "it was impossible to permit the said sign to hang as agreed and stipulated, and it was necessary, by reason of the situation of said wires and cables, that the said sign hang only in a position with one face against the wall of said house, or protrude at an angle until the same came in contact with said wires and cables, thus permitting but one face of the said sign to be read by persons on the street, and it being impossible for persons at a distance from the show house to see or read the sign whatsoever"; that before its delivery, the defendants requested the power company to either remove its wires and cables, so that the sign might swing free and in the position as agreed upon, "or rehang the said sign at a point so the same would not come in contact with said pole, wires, and cables"; that the power company refused to remove its poles and wires or to rehang the sign where it would be visible and readable to persons traveling along the street; that for such reasons the defendants refused to accept it and canceled the contract. The reply denies all of the new matter in the answer, and further alleges that the sign was hung "strictly in accordance with the request, instructions, and directions of said copartnership of Strauss, Dean & Madison, and not otherwise." Upon such issues the case was tried to a jury. Among others, the court gave the following instructions:

"And if you find from the contract and the evidence in support thereof that it was the duty of the Pacific Power & Light Company under the terms of this contract to erect and

equip this sign in a manner substantially perpendicular to the face of the building, so that the building on the inside of the sidewalk would have attached to it a sign which would stand out lengthwise or in a northerly course across the sidewalk, and you find that the Pacific Power & Light Company have not done so, but have given it an angle or position which is not substantially in compliance with that required by the contract, then you would have a right to find that they have not complied with the terms of the contract, and have not performed their contract, and in that event the defendants would not be liable to them until they had so installed the sign as required."

"So that if you find that this sign was not erected in compliance with spirit and purpose of the contract, and that the prevention of the company from so erecting it was not due from any wrongful act on the part of the defendants, and you are of the opinion that the departure from the terms of the contract are material, so as to affect the value of the sign to the defendant, then your verdict should be for the defendant."

The jury returned a verdict for the defendants, upon which judgment was entered and from which the plaintiff appeals, assigning the giving of such instructions as error.

F. C. Hesse, of Astoria (Norblad & Hesse, of Astoria, on the brief), for appellant.

James L. Hope, of Astoria, for respondents.

JOHNS, J. (after stating the facts as above). [1, 2] At the time the contract was made, we must assume that any pole which was in front of the defendant's place of business or that any wires or cables stretched thereon or attached thereto were placed there by some authority or license from the city, and that the contract was made with reference to the conditions as they then and there existed. We must also assume that the defendants made the contract for the purpose of advertising their business. Although they deny its execution, one of the defendants testified that he signed the contract for the firm, and we must treat it as duly executed. The testimony is conclusive that the electric sign which is specifically described in the contract was delivered to the defendants. It will be noted that the contract does not specify where the sign shall be placed or how it shall be hung. The plaintiff relies upon the written contract, and claims that parol testimony is not admissible to change or vary its terms, and that, the power company having equipped and installed the electric sign, it fully complied with the contract. The defendants claim that, although the contract is silent as to where the sign should be actually located or how it should be swung, parol testimony is admissible for the purpose of showing the nature of their business and the reasons why they made the contract, and that it was to be used for advertising purposes, and that in the manner in which it was hung it had but little, if any,

value, and could not be seen or read by the traveling public. It is claimed that the duty of the company to "equip" and "install" the sign is not broad enough, and does not imply that the "sign" shall be so placed and swung that it could be seen and read by the traveling public. *Corpus Juris*, vol. 20, p. 1301, in defining equipment, says:

"The act of equipping or fitting, or the state of being equipped, as for a voyage or an expedition; whatever is used in equipping; the collective designation for the articles comprising an outfit. As applied to transportation, the necessary adjuncts of a railway; the rolling stock and other movable property used in operating the railroad, as cars, locomotives," etc.

In *United States Rubber Co. of California v. Am. Bonding Co. of Baltimore*, 86 Wash. 180, 149 Pac. 706, L. R. A. 1915F, 951, the court says:

"Equipment is, what the word imports, the outfit necessary to enable the contractor to perform the agreed service; the tools, implements, and appliances which might have been previously used or might be subsequently used by the contractor in carrying on other work of like character."

The duty to equip would not carry with it the duty to put the sign in any specified place or swing it in any particular manner.

Webster's New International Dictionary defines the word "install" as follows:

"To set up or fix in position for use or service; as, to install a heating or lighting system. Installation, the whole of a system of machines, apparatus and accessories set up and arranged for working, as in electric lighting, transmission of power, etc."

The New Standard Dictionary defines the word:

"To establish in a place or position; as to install a guest at the fireside. To place in position for service or use; as, to install a hot water system."

Although the use and installation of electric signs is modern, it is very common and general, and they are now very numerous in the cities, and can be found in almost every little town, and it is a matter of common knowledge that they are used for advertising purposes. We have a right to assume that the defendants made the contract to advertise their business. It was the duty of the power company to install the electric sign specified in the contract, and put it in place ready for use, and to furnish all the equipment.

[3, 4] The contract being silent as to where the sign should be placed or how it should be swung from the building, evidence was admissible of any parol agreement or understanding between the parties as to such matters, and, in the absence of any parol agreement between them, it was the duty of the

plaintiff to install the sign in the usual and customary manner, and parol testimony would then be admissible for the purpose of showing what was the usual or customary method or manner for the installation of that kind of an electric sign, but any contract, verbal or written, must be construed as to the actual and physical conditions which existed at the time it was made. After the contract was signed, the defendants did not have any legal right to have a change made in any of the existing conditions. Any proposed change in the location of the pole, wires, or cable should have been provided for in the written contract, or should have been made before it was signed. The defendants had no legal right to terminate the written contract, because the plaintiff refused to make any requested change in the location of the pole, power line, or cable.

[5] Although the proof is conclusive that the written contract was duly executed, the defendants pleaded an oral contract, and alleged that by its terms the power company agreed to hang the sign at a particular place and in a specified manner, and it will be noted that each of the above instructions are founded upon the alleged oral contract. The defendant J. D. Strauss, with whom the alleged oral contract, if any, was made, testified:

"Q. Do you know who put the sign up there? A. I was there the day they were working on it. The only man I know by name was this man Housh.

"Q. This man, the foreman of the Pacific Power & Light Company (indicating)? A. Yes, sir.

"Q. Did you have anything to do with the putting of the sign up there? A. Nothing at all.

"Q. Did you give him any orders as to where the sign was to be placed? A. No.

"Q. What, if anything, did you say to Mr. Housh that day? A. Mr. Housh told me the sign had arrived, and I said, 'Hang it up,' and I supposed they knew their business and would hang it properly.

"Q. Did you say anything to him further, or did he say anything to you that day about this feeder wire? A. No. * * *

"Q. Did you see the men working to put it up there? A. Yes, sir; I saw them hanging the sign."

For such reasons each of the instructions were both erroneous and prejudicial. There was no parol evidence of any contract that the sign should be hung in any particular place or specified manner.

F. M. Housh was the construction foreman for the power company, and the sign was installed under his directions. He testified that he had a talk with Mr. Strauss the morning that the sign was hung.

"Q. What was the talk? A. I simply asked him if he has any specific place to hang the sign. He said no, if I remember right. He told me no, and I suggested that we should hang

it there in the center of the building before the arch or on the side of the building lower down.

"Q. Did you ask Mr. Strauss where the sign was to be hung? A. I asked him if he had any preference as to where it was to be hung.

"Q. And he did not direct you to any particular place? A. No; only he said it was to be near the center of the building.

"Q. You knew that the high tension wire extended right out there a few feet, didn't you? A. Yes, sir.

"Q. You knew that the sign was to be a swinging sign? A. Yes, sir.

"Q. And swinging out from the entrance of the theater? A. Yes, sir.

"Q. And you knew when you were hanging it that it would be unable to swing out at that time? A. Yes, sir. * * *

"Q. You did not realize that the sign could not be swung out? A. Not until after the sign was swung up into place. * * * A. It was called to my attention that the sign was not swung out into the street the way it should have been."

Upon the question as to how the sign was installed Housh further testified:

"Q. Wasn't it practical to hang that sign out at an angle such as the sign was left at? A. No.

"Q. Leaving the sign out at the angle you did was not giving the results to these people that they were supposed to have and that they had paid for? A. No."

[6,7] This is strong evidence that the sign was not installed as it should have been, and, coupled with the fact that as it was put in place it could only be seen from one side of the street and for a short distance, and that it did not have any advertising value, makes it conclusive that for the purposes for which it was intended the sign was not installed in the usual and customary manner under the conditions then existing. For such reasons the power company did not comply with the contract. Strauss left for Boise on the day the sign was installed. After his return he promptly made a vigorous complaint about the way it was installed, and, upon the refusal of the power company to adjust the matter, tore the sign down, and tendered it back to the company. Although each instruction was erroneous, the judgment must be affirmed, under section 3, article 7, of the Constitution.

BURNETT, C. J., dissenting.

BROWN, J., concurs.

BEAN, J., specially concurs.

BURNETT, C. J. (dissenting). A jury trial within the meaning of the Constitution consists only in the admission of proper evidence according to the pleadings as the parties have framed them, coupled with instructions apropos to such pleadings. When either of these elements is wanting, the parties have not had the jury trial which the Constitution guarantees to all suitors. Admittedly, the

instructions mentioned do not conform to the evidence; there being no testimony to support them. In this there was plain and palpable error, a departure from one of the principal ingredients of the jury trial. The judgment should be reversed, and a new trial ordered.

For these reasons I dissent from the opinion rendered by Mr. Justice JOHNS.

BEAN, J. (concurring specially). The controversy in this case is in regard to instructions given by the trial court to the jury concerning a contract for an electric sign, the material portions of which, so far as written, are as follows:

"Upon the conditions hereinafter set forth, the company agrees to equip the premises or location, as the case may be, of the customer at 539 Commercial street, in Astoria, Oregon, with a system of electrical wiring and connections for the operation of one electric sign of 37 25-watt lamps, and to furnish and install said sign for the customer and also to furnish the necessary lamps for such service included in the monthly payment hereinafter named. The sign to be as follows: One double-face Novelite interchangeable three-line reading board 3' 6"x10' and 144 8" interchangeable letters and space plates; the word 'Crystal' will be on top of sign in 12" Novelite letters; the word Crystal is to flash on and off; the interchangeable letters are to burn all the time."

It will be observed that the contract stipulates that the company will equip the premises and furnish and install a sign for the defendants. The kind of sign is specified, but the manner in which it is to be installed or hung is in no way described in the written instrument. Under these circumstances, and without any exception being saved to the introduction of testimony, the court admitted evidence as to what the agreement was touching the manner of the installation of the sign, to the effect that it was to be at right angles with the show building of the defendants so that it might be read by the people approaching the sign from either direction. After stating the contention of the defendants as set forth in their answer, the court charged the jury that the duty of proving the contract rested upon the plaintiff, also—

"that the contract alleged and set out in the complaint was entered into, and that the Pacific Power & Light Company substantially performed all of the provisions of that contract as required. In considering the contract, you will notice that there is nothing in the language of the contract which indicates how the sign is to be erected with reference to the front of the building—whether it is to be laid out along the face of the building, or whether it is to extend across the face of the sidewalk, or down the sidewalk. It is not shown by the contract. So that is a question for you to determine, and you can determine it by the terms of the contract, and if that does not satisfy your mind you can determine it as re-

sort to circumstances surrounding the transaction, taking into consideration the purposes for which the sign was to be erected and the idea or thought that must have been in the mind of the parties at the time that the contract was entered into, and in that way determine what was the intention of the parties with reference to the fact at the time they entered into the contract, and if you find from the contract and the evidence in support thereof that it was the duty of the Pacific Power & Light Company under the terms of this contract to erect and equip this sign in a manner substantially perpendicular to the face of the building, so that the building on the inside of the sidewalk would have attached to it a sign which would stand out lengthwise, or in a northerly course across the sidewalk, and you find that the Pacific Power & Light Company have not done so, but have given it an angle or position which is not substantially in compliance with that required by the contract, then you would have a right to find that they have not complied with the terms of the contract, and have not performed their contract, and in that event the defendants would not be liable to them until they had so installed the sign as required."

The court further explained among other things that a slight or immaterial deviation was not sufficient to invalidate the contract. Counsel for plaintiff saved an exception to the instruction to the jury for the reason that the court referred to and based the instruction upon the second further and separate defense pleaded by the defendants, the objectionable portion of which pleading, as understood, is as follows:

"That under and by the terms of said agreement the said sign as contracted for was to be so placed by said company on the said wall of said picture show house so that the same would hang directly over the walk in front of said picture show house and on a straight line and parallel with the length of said picture show house; that said sign so attempted to be delivered by said company, together with the brackets upon which the same was hung, had about a length of between 12 and 13 feet; that when said company attempted to deliver said sign it placed and hung the same on the north wall of said house, at a point directly opposite said wires and cable as mentioned; being so situated, it was impossible to permit the said sign to hang as agreed and stipulated, and it was necessary, by reason of the situation of said wires and cables that the said sign hang only in a position with one face against the wall of said house, or protrude at an angle until the same came in contact with said wires and cables, thus permitting but one face of the said sign to be read by persons on the street, and it being impossible for persons at a distance from the show house to see or read the sign.
* * *

It is further averred in the answer that defendants requested the company to install the sign so that it could be read by persons approaching it from either direction. It is the contention of plaintiff that the written

contract does not include a requirement for the placing of the sign as desired by plaintiff.

While no exception was saved to the testimony, the real objection to the instructions of the court, as the record is understood, is that the charge is based upon oral evidence as to the agreement which is not contained in the written contract. There is no claim that oral evidence was submitted to the jury contradicting or varying the terms of the written contract in any respect where that memorandum expressed the terms agreed upon. The writing being silent as to the manner in which the sign should be installed, it was competent for the defendants to show, and for the jury to consider, that the details or specifications of the manner in which the sign should be installed were agreed upon between the parties to the contract, although not embodied in the written memorandum.

The rule of evidence that all preliminary negotiations and agreements are to be deemed merged in the final settled instruments executed by the parties does not prevent a contract from being partly oral and partly evidenced in writing. The question of whether an entire contract was reduced to writing, or an independent collateral agreement was made, is one of fact for the jury, if there is any evidence to sustain such parol agreement. 6 R. C. L. p. 640, § 55; Hines v. Willcox, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823; note, 3 L. R. A. 308; Roberts v. Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; McNell v. Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559; Horn v. Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617; Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521; Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328; Turner v. Abbott, 116 Tenn. 718, 94 S. W. 64, 6 L. R. A. (N. S.) 892, 8 Ann. Cas. 150; Am. Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138.

Mr. Wigmore treats of the subject at length in his work on Evidence. We quote in part:

"The most usual controversy arises in cases of partial integration, i. e., where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder. * * *

"(1) Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto. * * *

"(2) This intent must be sought where always intent must be sought (ante, sections 42, 1714, 1790), namely in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be

known till we know what there was to cover." 4 Wigmore on Ev. § 2430.

The rule is stated in 22 C. J. p. 1144, § 1531, thus:

"The parol evidence rule does not preclude the reception of parol evidence with reference to a matter evidenced by the writing, where such evidence relates to a matter in pais, or is of such a character that it does not tend to vary or contradict the written instrument. Thus there is no objection to the admission of evidence which is offered not to contradict or vary the terms of a written agreement, but simply to explain how it is to be carried out. * * *

See Salem King's Products Co. v. Ramp, 196 Pac. 401, 409; Atlantic Terra Cotta Co. v. Mason's Supply Co., 180 Fed. 332, 103 C. C. A. 462; Kansas City, etc., R. Co. v. Smithson, 113 Ark. 305, 168 S. W. 555, Ann. Cas. 1916C, 568; Shopper Pub. Co. v. Skat Co., 90 Conn. 317, 97 Atl. 317; Fountain v. Hagan Gas Engine, etc., Co., 140 Ga. 70, 78 S. E. 423; Foote, etc., Co. v. Southern Wood Preserving Co., 11 Ga. App. 164, 74 S. E. 1037; Gardner v. Denison, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108; Willis v. Fernald, 33 N. J. Law, 206; Smith Premier Typewriter Co. v. Rowan Hardware Co., 143 N. C. 97, 55 S. E. 417; Easton v. Woodbury, 71 S. C. 250, 50 S. E. 790; Missouri, etc., R. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Emerson v. Stratton, 107 Va. 303, 58 S. E. 577; Crawford v. Workman, 64 W. Va. 10, 61 S. E. 319; Mann v. Paper Co., 41 N. E. 199, 5 Dom. L. R. 596, 11 East L. R. 81; McLean v. Crown Tailoring Co., 29 Ont. L. 455, 5 Ont. W. N. 217, 15 Dom. L. R. 353; Bulmer v. Brumwell, 13 Ont. A. 411.

The plaintiff has no reason to complain because the court allowed the jury to take into consideration oral evidence as to how it was agreed between the company and the defendants that the sign should be installed.

The defendants are not held to any strict rule as to how such signs are customarily erected. It does not appear, in so far as it is observed, that the agreement as shown by the evidence differed in any way from the customary practical way of advertising by means of such a sign. It was not an unreasonable demand for the defendants to require the sign to be placed a few inches or feet away from the pole mentioned, so that they could have a double-faced sign, if it was so understood and agreed. A one-eyed sign would not fill the requirement of such a stipulation. The proceedings excepted to by counsel for plaintiff fairly submitted the cause to the jury. The language of the instruction may not be perfect but it is not subject to the challenge of plaintiff.

The judgment should be affirmed.

(109 Kan. 206)

(193 P.)

STEWART v. GISH et al. (No. 23621.)

(Supreme Court of Kansas. May 28, 1921.)

*(Syllabus by the Court.)***1. Schools and school districts §97(4)—Call for bond issue election must be made by district board.**

The call for an election to be held after the creation of a rural high school district to vote upon the question of issuing its bonds for the erection of a building is required to be made by the board of such district, and such an election held upon call of the county commissioners is a nullity.

2. Schools and school districts §67 — Rural high school district and ordinary high school district cannot unite to construct single building for joint use.

A rural high school district and an ordinary school district, formed in part from the same territory, each having statutory authority to erect a schoolhouse for its own use, cannot without further legislation unite in the construction of a single building for their joint use.

Appeal from District Court, Doniphan County; William I. Stuart, Judge.

Action by A. T. Stewart against G. H. Gish and others to enjoin a school bond issue. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Edwin Brown, of Troy, for appellant.

Wheeler, Brewster & Hunt, of Topeka, for appellees.

MASON, J. A. T. Stewart, a taxpayer having an interest as such in the matters referred to, brought an action against the officers of a rural high school district to enjoin the issuance of bonds for the erection of a high school building and against them and the officers of a school district to enjoin the erection of a single school building to be used by both organizations. He was denied relief by the district court and appeals.

[1] 1. The right of the rural high school district to issue the bonds is challenged on the ground that the election to vote upon the question of their issuance was called and canvassed by the board of county commissioners instead of by the rural high school district board, as required by the statute according to the plaintiff's interpretation. The defendants interpret the law as authorizing either of such bodies to act in the matter. As the statute existed prior to March 22, 1917, the power of a rural high school district board to issue bonds (except where such authority had been given by a vote taken at the election by which the district was created) was derived only from a provision giving it the same power as school dis-

trict boards. Gen Stat. 1915, § 9352. In this condition of the statute it was held that the board of the high school district, and not the board of county commissioners, was the proper body to call an election for school-house bonds. *Reynolds v. High School District*, 101 Kan. 231, 185 Pac. 860. On the date mentioned the section of the statute just cited was amended by the addition of provisions giving explicit authority to issue such bonds, in this language:

"The rural high school district board shall have authority to issue the bonds of the rural high school district for the purchase of a site and for the construction of a building or buildings for school purposes; provided, that no bonds shall be issued unless authorized by an election held in accordance with section 2 of this act [which authorizes a proposition to issue bonds to be voted upon at the election called to vote on the question of establishing the district] or by an election held in accordance with sections 9177 and 9178 of the General Statutes of 1915 [which relate to the issuance of bonds by ordinary school districts]; provided, that notice of all such elections in rural high school districts shall be given as provided in section 2 of this act. Except as herein provided, the laws relating to the issuing of school district bonds shall apply to rural high school districts formed in accordance with this act." Laws of 1917, c. 284, § 5.

The defendants' position is that this statute gives an option as to the manner in which the election may be ordered, authorizing it to be called either by the county commissioners upon the petition of two-fifths of the electors, or by the school board upon the petition of one-third of them. The plaintiff, on the other hand, contends, as we think correctly, that the meaning of the statute quoted is that the bonds may be issued only where authorized by a vote cast at an election called by the county board if to be held at the same time the proposal to create the district is voted upon, and called by the board of the district if petitioned for after the district has been created. An election to decide whether a rural high school shall issue bonds, if held in connection with an election to decide whether the district shall be created, would necessarily have to be conducted by some body already in existence, and the board of county commissioners was selected by the Legislature as the natural agent for the purpose. But after the district has been brought into being there is no occasion whatever for its invoking the services in that regard of any officers other than its own. The language above quoted relating to section 2 of the act is fully accounted for by the fact that the statute, in defining the conditions under which bonds may be issued, had necessarily to mention the contingency of authority for their issuance having been granted before the organization of the dis-

trict. The suggestion is made that unless the statute does offer a choice of methods of calling the election the amendment of 1917 made no change in the law as it already existed. If this were the case, the new enactment might have been justified as a mere clarification of the existing law by substituting express provisions for mere implications; no judicial construction having then been given it. However, a material alteration was made in this respect: Under the original law only a 10 days' notice of the bond election was required, that being the period named in the statute relating to ordinary school districts (Gen. Stat. 1915, § 9178), while by the amendment the time is fixed at 21 days (Laws of 1917, c. 284, § 2). We hold that the election was ordered by a body having no authority to take such action, and was without legal effect.

The validity of the election is also challenged on the ground that the notice was defective. This objection is probably not well taken, but the conclusion already announced makes it unnecessary to consider that matter.

[2]. 2. It remains to determine whether the rural high school district and the ordinary school district can lawfully unite in the construction of a single schoolhouse to be used by both. The question appears to be novel. Notes on the capacity of a municipality to be a part owner of property or to enter into a partnership contract for the construction of an improvement are found in 35 L. R. A. 737, and Ann. Cas. 1916C, 909; but the cases cited relate largely to agreements between public bodies and individuals or private corporations. It has been held that a city and county (the county board being made up of the city council and three additional members) may purchase and hold in common the title to land to be used for a city hall and courthouse and jail. *De Witt v. San Francisco*, 2 Cal. 289. The matter principally discussed in the opinion, however, was the somewhat technical one of the capacity of corporations to hold title to realty in common with each other. Moreover, while the doctrine of implied powers applies to some extent to all governmental subdivisions, a larger freedom of action (a wider discretion in the choice of methods) is allowed to a city (a municipal corporation proper) than to any other, and doubtless to a county than to a school district, because of the wider field of its activities. On the other hand, an arrangement by which a city was to buy an interest in the county courthouse for the purpose of accommodating it with public buildings has been held invalid because of want of power in the county authorities to enter into such agreement. *Bergen v. Clarkson*, 6 N. J. Law, 352, 363. In a case holding that the Legislature cannot require a city to bear the whole expense of a county build-

ing, it has been said that where "the Legislature authorizes such action," a city may establish improvements not exclusively for its own purposes, which will accommodate the larger bodies with which it is identified, and that it is common for cities to furnish accommodations in its public buildings, gratuitously or otherwise, for public officers and bodies which do not represent the city; and for city halls and similar buildings to be used for state and county court and executive purposes. *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677. An arrangement by which through contributing to the cost of the building of a private academy the public had acquired a beneficial interest therein has been held to authorize taxation to provide a lighting plant for it. *Brooks v. School Dist. of Franconia*, 73 N. H. 263. Where the same officer is empowered to provide a high school building and a primary school building, it has been held that he may in his discretion erect one building for both purposes, but there no question of divided control was involved. *Smith v. State ex rel.*, 187 Ind. 594, 120 N. E. 660. Under a charter specifically granting a city authority to purchase and hold any estate whatever in property for corporation purposes, it has been held that an undivided interest in land cannot be purchased unless the right of the city to its occupancy and use so long as it holds such interest is distinctly and unequivocally secured, the intimation being that such a provision would make the action valid. *Hunnicut v. City of Atlanta*, 104 Ga. 1, 30 S. E. 500. The right of a school district to use public funds in repairing a schoolhouse owned and controlled in part by several lodges has been denied, but the decision was affected by a statute requiring the trustees to take a fee-simple title to lands used for school sites. In the opinion it was said:

"Whilst it is possible that there might be some saving in this arrangement at the start, it is evident that, in the long run, complications might arise which would compel the abandonment of the use of the property by the common school district. It is better that both the spirit and language of the statute should be observed, and that the common school buildings should be devoted exclusively to the purposes for which they were intended." *Dawson v. Trustees Common School Dist. No. 40*, 115 Ky. 151, 72 S. W. 806.

Inasmuch as the rural high school district and the ordinary school district are separate organizations, we think that without express legislative authority they have no power to join in the erection of a schoolhouse for their common benefit. The situation that would be so created, involving a divided control, no provision being made for determining what course should be pursued if a difference of opinion should arise in some matter of policy relating to the use or the care, preservation,

or improvement of the building, is so anomalous that we cannot regard the authority to enter into such an arrangement as fairly inferable from that granted to each to erect a schoolhouse for its own use. It is true that in a particular case no difficulty in administration might ever in fact arise. But the possibility of such an occurrence is so obvious, and the advisability of the plan here sought to be followed out is so open to debate, that we feel constrained to hold that until further legislation on the subject a single building may not be erected by the two districts for their common use.

The judgment is reversed, and the cause remanded, with directions to grant the injunction prayed for.

All the Justices concurring.

(58 Utah, 196)

STEPHENS v. DOXEY. (No. 3614.)

(Supreme Court of Utah. May 7, 1921.)

1. Pleading \Rightarrow 364(6)—Unnecessary allegation of performance of condition precedent may be stricken out on motion.

In a suit to foreclose two mortgages, it was not error to strike out allegations of the complaint that plaintiff performed all things required of him; same being surplusage, no such duty resting on plaintiff under the terms and conditions of the mortgages.

2. Mortgages \Rightarrow 450 — General allegation of performance of conditions precedent sufficient, where such condition alleged in complaint.

In a suit to foreclose two mortgages, if the complaint alleges that they were given by defendant to plaintiff's assignor as a consideration for the latter's contract to build an apartment house on the mortgaged lots, a general allegation of due performance of the contract would be sufficient, under Comp. Laws 1917, § 6601.

3. Pleading \Rightarrow 364(6)—Averment of failure of mortgagor to apply rentals to mortgage may be stricken as surplusage, where mortgage does not impose such duty.

Where plaintiff sued to foreclose two mortgages, and defendant answered that plaintiff's assignor, in consideration of said mortgages, agreed to erect on the mortgaged lots an apartment house, according to certain plans and specifications, payments on the notes secured by the mortgage not to begin until after completion of the building, it was not error to strike from the complaint averments made as grounds for a receivership, that defendant had not applied to the payment of the notes and mortgages, the rentals received by her for the apartments; no such duty devolving on defendant under the terms and conditions of the notes and mortgages sued on, and plaintiff having the right to meet the issue by way of reply.

4. Pleading \Rightarrow 205(1)—Answer alleging non-performance of condition precedent to suit to foreclose held not vulnerable to general demurrer.

Where plaintiff sued to foreclose two mortgages, defendant's answer, that plaintiff's assignor, in consideration of the mortgages, agreed to erect an apartment house on the mortgaged lots, payments on the notes secured not to begin until after the completion of the building according to certain plans and specifications, and that the building had not been so completed, stated a defense, and, even if assailable by special demurrer, was not vulnerable to a general demurrer.

5. Mortgages \Rightarrow 454(1)—Answer to foreclosure suit alleging nonperformance of conditions precedent held bad on special demurrer for ambiguity and uncertainty.

In a suit to foreclose two mortgages given to plaintiff's assignor in consideration for the erection of an apartment house on the mortgaged lots, payments not to begin until after the completion of the building according to certain plans and specifications, defendant's answer that the building was incomplete, and not according to plans and specifications with respect to workmanship and materials, was ambiguous and uncertain, in that it did not allege in what particulars the building failed to meet the plans and specifications, or wherein it was incomplete, alleged no facts constituting fraud, and contained no statement of the kind or character of workmanship or materials to be used, so that a special demurrer to it was properly sustained.

6. Judgment \Rightarrow 570(5)—Dismissal not res judicata, if not on merits.

A judgment dismissing plaintiff's suit for foreclosure of certain mortgages on the ground it had been prematurely brought, the court making no finding as to the amount due on the mortgages and notes secured thereby, not being on the merits, is not res judicata at common law or under the statute. Comp. Laws 1917, § 6859.

7. Contracts \Rightarrow 295(1) — Building contractor must substantially comply with contract.

Under a contract for the erection of a building according to agreed plans and specifications, the law contemplates a substantial, but not punctilious, compliance therewith; the contractor not being permitted to profit by non-compliance with the contract, nor the owner to reap the benefits of the added value to his property by reason of labor performed and materials furnished by the contractor.

8. Contracts \Rightarrow 305(2)—Use and enjoyment of building not acceptance of faulty workmanship or inferior material.

Under a contract for the erection of a building according to certain plans and specifications, the fact that the owner had been in the use and enjoyment of the building did not amount to an acceptance of faulty workmanship or inferior material, and she was entitled

to all the damages arising from nonperformance of the contract.¹

9. Bills and notes \S 343—Notice to assignee of assignor's contract, made in consideration of note and mortgage assigned, does not charge assignee with liability for breach.

The fact that the assignee of certain notes and mortgages took the same with notice of his assignor's contract to build an apartment house on the mortgaged lots, in consideration of the notes and mortgages, did not charge him with the assignor's willful neglect to complete the building according to agreed plans and specifications.

10. Mortgages \S 415(1)—Mortgagor, who refuses to permit performance of mortgagee's contract to build on mortgaged premises, estopped to set up nonperformance as bar to foreclosure.

Where plaintiff's suit to foreclose two mortgages was dismissed, the defense being that plaintiff's assignor failed to complete the building of an apartment house for defendant on the mortgaged lots, as he agreed to do in consideration of the mortgages, and thereafter defendant refused to permit the building to be completed and the defects remedied, or to discharge her liabilities under the mortgages, and made no claim for credit for the damages sustained by nonfulfillment of the contract, she cannot be heard to say in a court of equity, in a second suit to foreclose, that the mortgages are not now due, and that no foreclosure can be had at this time.

11. Mortgages \S 411—Suit to foreclose only form of action permitted to recover debt secured by mortgage on real estate.

Under Comp. Laws 1917, § 7230, permitting but one action for the recovery of any debt or the enforcement of any right secured by mortgage on real estate, an assignee of notes and mortgages on lots on which the mortgagee agreed to build for the mortgagor adopted the proper form of action in bringing suit to foreclose the mortgages.²

12. Mortgages \S 415(3)—Mortgagor, on suit for foreclosure, may offset damages by failure of mortgagee to fulfill contract made in consideration of mortgage.

Where an assignee took two mortgages and the notes secured thereby with notice of his assignor's contract to build for the mortgagor on the mortgaged lots, in consideration of the notes and mortgages, the mortgagor, in suit for foreclosure, should be permitted to offset all damages sustained by her by reason of the assignor's failure to complete the building substantially in accordance with the contract.

Frick, J., concurring specially.

Appeal from District Court, Weber County; A. E. Pratt, Judge.

Action by Solomon C. Stephens, Jr., against Luella Doxey. Judgment for defendant, and

plaintiff appeals. Reversed and remanded, with directions.

E. T. Hulaniski, of Ogden, for appellant.
Geo. Halverson, of Ogden, for respondent.

CORFMAN, C. J. Plaintiff commenced this action in the usual form for the foreclosure of two mortgages given by defendant on city lots situated in Ogden, Utah, to secure the payment of two promissory notes dated November 4, 1914, aggregating a total sum of \$13,000. The first of said notes, for \$8,000, was made payable on or before 10 years after date in installments of not less than \$60 per month in addition to the interest at 8 per cent. per annum from date, and the second, for \$5,000, was made payable 10 years after date, with interest at 8 per cent. per annum from date. Interest on both notes was payable quarterly.

It was alleged in the complaint that the plaintiff is the owner and holder of the mortgages by assignment, and, as grounds for foreclosure, that the defendant had defaulted in the payment of interest due on the notes and the insurance and taxes on the mortgaged premises as stipulated in the mortgages; that at the time plaintiff had taken and accepted the notes and mortgages there was situated on said lots an apartment house of about the value of the sums mentioned in the notes, and upon which the plaintiff relied as security; that, by reason of defendant's failure to keep and perform the covenants and agreements in the mortgages contained, plaintiff had elected and declared the principal sums on the notes to be due and payable. Facts as grounds for receivership were also alleged and a receiver prayed for pending foreclosure proceedings.

The defendant, after denying certain allegations of the complaint, as special defenses thereto pleaded affirmatively: That on or about the 4th day of November, 1914, when said notes and mortgages were executed and delivered, one W. J. Stephens, an uncle of plaintiff, for and in consideration of the \$13,000 for which said notes and mortgages were given, agreed to erect on said city lots, as per plans of F. C. Wood, an architect, a two-story apartment house according to certain specifications as in said agreement provided; that it was also provided in said agreement that the said W. J. Stephens should pay off a mortgage of \$650 then existing on said city lots, and that said Stephens also at said time orally agreed to move a dwelling house situated on said lots from the front to the rear thereof, and make certain repairs or improvements on said dwelling; that it was also agreed on the part of the said W. J. Stephens, as contractor, that the interest payments and payments on the principal sums of said notes should not begin until 90 days after the completion of said build-

¹ Ryan v. Irrigation Co., 36 Utah, 383, 104 Pac. 218; Christensen v. Realty Co., 42 Utah, 70, 129 Pac. 412.

² Coburn v. Bartholomew, 50 Utah, 566, 167 Pac. 1156.

ing; that the said W. J. Stephens willfully refused to complete said building; that the same has never been completed and now remains in an uncompleted state, and that both workmanship and materials on said building were defective and inferior from that called for under said contract; that said Stephens has refused to complete the same or substantially comply with his said contract after repeated demands made by the defendant for him to do so; that plaintiff took and acquired said notes and mortgages with notice and full knowledge of the equities existing between the defendant and the said contractor and for the purpose of cheating and defrauding the defendant.

Further answering the complaint, the defendant pleaded that on the 19th day of December, 1917, in an action then pending in the district court of Weber county, Utah, wherein the plaintiff herein was the plaintiff and the defendant herein was defendant, for the foreclosure of the said mortgages and upon the subject-matters of this action, it was adjudged and determined in said action that the plaintiff take nothing by his complaint, and that said action be, and the same was, dismissed accordingly; that after an appeal to this court was taken from said judgment said appeal was dismissed, and that thereupon said judgment of said district court thereby became final. Defendant also moved to strike certain allegations of the complaint with respect to performance on the part of the plaintiff of all things required of him by law or otherwise, and also the allegations with respect to grounds for a receivership, which motion was granted by the court.

Plaintiff assailed the defendant's answer, with a demurrer both general and special, the latter upon the grounds that the answer was unintelligible and uncertain in this:

"That it cannot be ascertained from said answer what, if any, amount of damages defendant has sustained, or in what manner or how the building in said answer mentioned is incomplete, or is in an uncompleted state, in what manner or how the workmanship therein is defective, or what materials were inferior in quality or the value thereof, or in what manner or in what way, or the value thereof, that the defendant was to be or was cheated or defrauded by any act in said answer stated."

The demurrer was overruled. A reply to the answer was filed by the plaintiff, in effect denying all the material allegations of the answer, and also affirmatively alleging that since the alleged former adjudication of the case by the district court the contractor, W. J. Stephens, had offered to complete said building in the manner and as defendant desired the same completed, but that the defendant had refused to permit the same to be done.

Upon the trial the issues were found in defendant's favor and judgment entered dis-

missing the action at plaintiff's cost. Motion for a new trial was made and denied. Plaintiff appeals, and assigns as errors: The sustaining of defendant's said motion to strike out certain allegations of the complaint; the overruling of plaintiff's demurrer to the answer; the making of certain findings by the trial court; that the evidence is insufficient to justify the judgment; and that the same is against law.

[1, 2] 1. We think the first assignment of error relied upon by the plaintiff, the sustaining of defendant's motion to strike certain allegations of the complaint, is wholly without merit. Plaintiff's complaint was founded upon the defendant's failure to observe and comply with the terms and conditions of a mortgage. No duty of performance of a condition precedent rested upon the plaintiff under the terms and conditions of the notes and mortgages sued upon, and therefore it was mere surplusage for the plaintiff to allege in the first instance performance on his part. Had the plaintiff alleged in his complaint that the notes and mortgages sued upon were given by the defendant as a consideration for the contract entered into between the defendant and the contractor, W. J. Stephens, an entirely different issue would have been presented by the complaint. In that case the general allegation of due performance of the contract would have presented an issue, and the general allegation of due performance would have been, under our statutory rules of procedure (Comp. Laws Utah 1917, § 6601), proper and sufficient.

[3] So, too, were the averments as grounds for the receivership mere surplusage, and therefore properly stricken. These allegations, in substance and effect, were that the defendant had been in receipt of rentals for apartments which she had not applied to the keeping of the covenants and agreements of the notes and mortgages. No such duty devolved upon the defendant under the terms and conditions of either the notes or mortgages attached to and made a part of the complaint; nor was any such duty shown or alleged at all by the complaint. While it is true the answer of the defendant, in a general way, pleaded as a special defense failure of performance of a builder's contract and that the plaintiff had taken the notes and mortgages with notice of the conditions thereof and the equities existing between the contractor, W. J. Stephens, and the defendant, yet plaintiff had a right to meet that issue when properly pleaded by way of his reply. Plaintiff therefore suffered no prejudice by reason of the allegations being stricken from his complaint in the manner complained of by him.

[4, 5] 2. The next error complained of by plaintiff, that of overruling his demurrer to the answer, presents a more serious question. The demurrer, as has been pointed out, was both general and special. Undoubt-

edly the answer stated a defense and was not vulnerable to a general demurrer. Therefore plaintiff's demurrer, on the first ground stated by him, was properly overruled by the court. However, as pointed out, the plaintiff assailed the answer by his special demurrer upon the grounds that it was ambiguous and uncertain for the reasons specifically mentioned and set forth in said demurrer. We think there is much merit in the contention made by plaintiff that the special defenses relied on by the defendant in her answer were not stated with sufficient clearness and certainty. It matters not whether the several affirmative matters pleaded in the answer are viewed as technical defenses, counterclaims for damages, or set-offs to the demands of the complaint, the plaintiff was entitled to the particular facts relied on by the defendant and to be advised as to what he had to meet.

As illustrative of the insufficiency of the answer relied upon by the defendant to defeat the demands of the complaint, it is charged that the plaintiff in taking the notes and mortgages sued upon had knowledge of a certain agreement entered into between W. J. Stephens, as contractor, and the defendant, as owner, whereby said Stephens, as a consideration for said notes and mortgages, was to erect an apartment house for the defendant "as per plans drawn by F. C. Woods, architect," and as per specifications in said contract set forth. This agreement also provides "that interest payments and payments on the principal of said notes and mortgages are not to begin until ninety days after the completion of said building." The answer then proceeds to allege in a general way only "that said W. J. Stephens willfully refused to complete said building and has never completed said building, and the same is now in an uncompleted state and the work done thereon was of very defective workmanship and the materials of very inferior quality." In what particulars the building fails to meet the plans and specifications, or how or in what way it is incomplete, or the materials inferior or workmanship defective, the answer does not say. It is then charged that fraud was practiced on the defendant by the plaintiff and no specific facts alleged as constituting the fraud; that plaintiff took the notes and mortgages with notice of conditions imposed by said builder's contract and all the equities existing between the said W. J. Stephens and the defendant, and that said Stephens did not substantially comply with the terms of said contract. While it is true that a copy of said agreement was attached to and made a part of the answer, the so-called "specifications" contained therein are so general in character that it sheds practically no light as to what the plans of the architect were to be, nor does it contain within itself any statement of the kind or character of the workmanship to be per-

formed on the building, and only in a general way the kinds of materials to be used in the construction of the building. Therefore, for the reasons assigned in the special demurrer to the answer, we think the district court erred in not sustaining it.

3. Lastly, the plaintiff complains of the insufficiency of the evidence to support the findings and judgment of the trial court and that the judgment or decree dismissing the action is contrary to law. It appears as admitted facts in the record that upon the 4th day of November, 1914, the contract mentioned and set forth in the answer was entered into between W. J. Stephens, a contractor and builder, and the defendant; that at the time the notes and mortgages sued upon by plaintiff were given to secure the contract price of \$13,000; that said notes and mortgages were, on June 30, 1915, indorsed and transferred to the plaintiff for a consideration of \$10,000, which was used in paying for the construction of said building; that plaintiff took said notes and mortgages with notice of the terms and conditions of said contract; that while the defendant defaulted in making payment of taxes on the mortgaged premises and in keeping the same insured as stipulated in said mortgage she should do, also in the payment of interest and installments to apply on principal sums as stipulated in said notes, the plaintiff, under a provision of the mortgages declared the principal sums owing on said notes due and brought a first suit in the district court to foreclose; and that upon the issues then joined the said court found for the defendant, among other things, that said building had not been completed and "that there was not, at the time of the commencement of this action, and is not now [December 19, 1917], anything due upon the promissory notes sued on in this action, but the court does not make any finding as to the amount, if anything, that is owing or may hereafter become due on said notes and mortgages, or either of them." Predicated on the findings then made, a judgment was rendered and entered by the district court dismissing the plaintiff's action. An appeal was afterwards taken to this court, but subsequently dismissed without consideration upon merits.

It further appears, although not without some conflict in the evidence, that after the dismissal of said appeal to this court the contractor, W. J. Stephens, on or about May 26, 1919, took another contractor and builder to the building and had the defendant point out in what particulars she complained of the building not being completed according to contract. Thereafter said Stephens sent workmen to the building for the purpose of completing it in the particulars defendant had claimed and pointed out that it was incomplete and defective; but defendant refused to permit any repairs to be made or any work to be performed, although an offer

(192 F.)

was made to complete the building as desired by defendant. Some of the witnesses testified that the workmanship on the entire building was defective and the materials used of inferior quality. It further appears somewhat in detail from the evidence that the building was not equipped with a sufficient hot-water furnace and boiler, and that the heating system installed by the contractor was inadequate to properly heat the building; that the porches were not properly completed and not as large as called for by the specifications; that the roof was of poor construction and leaked very badly; that the interior work throughout the building was rough and in some respects incomplete; that the foundation walls under the partitions were not properly placed, and as a result thereof the partition walls sunk, the plaster cracked and some of the doors sagged. It also appears from the evidence that the defendant personally expended, in order to remedy the defects and increase the capacity of the heating plant, approximately \$500 and the further sum of \$385 for the placing of a new roof upon the building. The record further shows that in November, 1915, plaintiff leased the first apartment of the said building and has since been in possession of the building, drawing rentals therefrom amounting to not less than \$175 per month.

In the particulars complained of by plaintiff the trial court made findings to the effect that the contractor, W. J. Stephens, willfully refused to complete said building and on or about September 1, 1915, abandoned the same and all work thereon, and never substantially completed the same in accordance with specifications, but "knowingly and willfully departed therefrom in material parts and that the work done thereon was very defective and the materials used of inferior quality; that the defendant took possession of the building without accepting the same and thereafter made demand upon said W. J. Stephens from time to time to complete said building according to said agreement which he afterwards refused to do; that the plaintiff took said notes and mortgages with knowledge of the said contractor's failures and refusals, but paid to said contractor a consideration of \$10,000 for said notes and mortgages, with knowledge that they were not to be paid for a period of 90 days after the completion of said building." The court also made findings with reference to defective workmanship and inferior materials entering into the construction of the building in accordance with the foregoing evidence. It was also found by the district court that the former suit had been begun and a judgment rendered dismissing that action as alleged in the answer and that since the rendition of that judgment the said contractor, W. J. Stephens, had offered to make certain repairs on the building, which defendant refused to permit him to make or to enter upon

the performance of any work on said building. The district court concluded from the findings made that the present action should be dismissed, and thereupon rendered judgment accordingly.

[6] Before proceeding to discuss the sufficiency of the evidence to support the findings made and the judgment rendered by the district court it may be well to first consider the contention made by the defendant that the judgment rendered by the district court in the former case was *res judicata* and was a final determination of the issues involved in this action. The defendant insists that the former judgment was not only sufficiently pleaded, but absolutely supported by proof; that the parties to this action are the same, the pleadings practically the same, the subject-matter identical, and practically the same findings, conclusions of law and judgment as in the former action. Nevertheless we think the record of the former case conclusively shows that the adjudication then made by the court was not upon the merits and determinative of one thing only, that the suit had been prematurely brought. If a judgment, for any reason, is rendered upon a ground not involving the merits of a controversy, the doctrine of *res judicata* does not apply. *Peck v. Easton*, 74 Conn. 456, 51 Atl. 134; *Armstrong v. Manatee County*, 49 Fla. 273, 37 South. 938; *Pyle v. Piercy*, 122 Cal. 383, 55 Pac. 141; *Beronio v. Ventura County*, 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; *Robb v. New York & C. Gas Coal Co.*, 216 Pa. 418, 65 Atl. 938.

The court in the former action, as the record thereof clearly shows, made no attempt to determine the merits of the case as between the parties; but from the judgment roll thereof offered and received in evidence in this case, it expressly appears that the court did not make any finding "as to the amount, if anything, that is owing or may hereafter become due on said notes and mortgages." It is provided by our statute (Comp. Laws Utah 1917, § 6859) that "a final judgment dismissing the complaint, either before or after trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits." We think the finding of the district court above quoted was tantamount to saying that the action had been prematurely brought, that there was nothing before the court to enable it to say more than that, by reason of all the facts and circumstances disclosed by the evidence no recovery could be had on the notes and mortgages at that time. The ultimate rights and liabilities between the parties themselves were not adjudicated nor determined in the slightest degree, therefore there is nothing in the judgment relied upon that operates as an estoppel in the present action.

[7] This case, in many of its aspects, is a

most peculiar one, and presents many difficulties in attempting to arrive at the legal rights of the respective parties. The plaintiff seems to have proceeded in the trial on the theory that he was entitled to a full recovery of the amounts agreed upon and stipulated for under the terms and conditions of the notes and mortgages held by him, regardless of the admitted fact that he took them with notice. The defendant's theory seems to be that the building was not substantially completed, that the workmanship upon the building was bad, and the materials entering into its construction so inferior that no recovery on the notes and mortgages can be permitted at any time or at all. We may remark that one of the greatest difficulties to contend with is how to determine from this record just what class of workmanship and materials are required to satisfy the contract entered into between the contractor and the defendant. The contract pleaded by the defendant, within itself, certainly does not prescribe, and, as we view the evidence in the case, very little, if any, light is shed upon the question, as to what kind of workmanship and materials would satisfy the contract. Ordinarily, in this class of cases, where a contract is entered into for the erection of a building, the details are worked out through the medium of plans and specifications made a part of the contract, so that the kind and character of the completed structure called for can be readily ascertained.

In the present case, about all the contract calls for in the way of building is a two-story apartment house. The end contracted for seems to have been attained, although, from the standpoint of the defendant, not very satisfactorily. She complained of, and we think successfully proved at the trial of this case that the heating apparatus was inadequate to properly heat the building and that the roof badly leaked. According to the evidence, these defects were remedied by her at her own expense. Some other details of faulty workmanship and inferior materials used were testified to by the witnesses in defendant's behalf, but to what extent the contractor departed from the specifications with respect thereto was neither pleaded nor proved. In this class of cases the law contemplates a substantial compliance with the plans and specifications; that any structure should be so substantially erected and completed as to subserve the purposes and uses for which it is intended. Otherwise, the owner is not required to accept it and pay the contract price. It would be idle to review the modern decisions of the courts in this or other jurisdictions, with a view of applying the principles of law or equity announced therein to the facts and circumstances disclosed by this record. We may remark, however, that in this class of cases the trend of decisions in recent years has

been to hold that there must be a substantial, not a punctilious, performance of builder's contracts. So, too, it is generally held that on the one hand the contractor may not be permitted to profit by reason of his noncompliance with contract, while on the other hand the owner will not be permitted to reap the benefits of the added value to his property where, of necessity and in the very nature of things, substantial benefits have accrued by reason of the labor performed and the materials furnished by the contractor for the building.

[8] While defendant in the present case, since September, 1915, has been in the use and enjoyment of the building, that, in and of itself, does not amount to the acceptance of faulty workmanship or inferior material. Under such circumstances she is entitled, by way of recoupment, to all the resulting damages arising from nonperformance of contract. *Ryan v. Irrigation Co.*, 38 Utah, 383, 104 Pac. 218; *Christensen v. Realty Co.*, 42 Utah, 70, 129 Pac. 412; *Lloyd, Building Contracts*, p. 39. However, under the facts and circumstances of this case, we do not think there is a great deal of merit in the contention made by defendant, nor in the finding made by the district court in support thereof, that the building in question has not been substantially completed, nor that the same was not accepted subject to her right to make claims for faulty workmanship and inferior materials. The contract relied upon by defendant, and the notes and mortgages executed by her, were all a part of and entered into the same transaction. The parties are in a court of equity, and we are therefore compelled to take into consideration the situation of the respective parties and all the facts and circumstances surrounding them.

[9, 10] It is undisputed that plaintiff took the notes and mortgages with notice of the contract while the building was in course of construction. So far as the evidence shows, he in good faith paid to the payee of the notes approximately \$10,000 for the transfer of the notes and assignment of the mortgages. Notice of the contract, in our opinion, however, did not charge him with the willful neglect and conduct of the contractor. But, be that as it may, since the former suit, the evidence shows, we think quite conclusively, that defendant has not only refused to permit the building to be completed, and the defects pointed out by her to the contractor remedied, but has also refused to pay and discharge the liabilities incurred by her under the terms and conditions of the notes and mortgages. Moreover, under the facts and circumstances disclosed by this record, she has made no claim whatever, at any time, for credit by reason of the damages she may have sustained by reason of the nonfulfillment of the contract and has sat supinely by disregarding every obligation to be performed on her part in order to afford the

plaintiff security for the money invested in the notes and mortgages executed by her.

[11, 12] Taking into consideration the situation of the parties, and the facts and circumstances surrounding them since the former judgment in this case, we are of the opinion that the defendant may not be heard to say in a court of equity that the notes and mortgages are not now due and owing and that no foreclosure can be had at this time. Under our statute (Comp. Laws Utah 1917, § 7230) there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage on real estate. *Coburn v. Bartholomew*, 50 Utah, 566, 187 Pac. 1156. It must therefore be held that the plaintiff in this case adopted the proper form of action in bringing suit to foreclose the mortgages held by him against the defendant. However, as plaintiff took the mortgages with notice of the contract entered into between the defendant and the contractor, *W. J. Stephens*, the defendant, upon proper pleadings and showing made, should be permitted to offset against said notes and mortgages any and all damages she may reasonably have sustained by reason of the failure of the said contractor to erect and complete the building substantially in accordance with the contract, or as reasonably contemplated by the parties to it.

For the reasons stated, the judgment of the trial court, dismissing plaintiff's action, is reversed, vacated, and set aside. Let the cause be remanded to the district court, with directions that the plaintiff be granted a new trial, that plaintiff's special demurrer to the defendant's answer be sustained, and defendant permitted to make amendments thereto, counterclaiming for damages in accordance with the views herein expressed. Appellant to recover costs.

WEBER, GIDEON, and THURMAN, JJ., concur.

FRICK, J. I concur in the conclusions of the CHIEF JUSTICE. I feel constrained to add, however, that, while I am thoroughly convinced that the rule adopted by the courts that in actions on building contracts the contractor should not be permitted to recover on the contract, unless he shows that he has, substantially, at least, complied with its terms and conditions is just, sound and wholesome, yet I am also convinced that where the action is in equity, and it appears that the owner of the building is using it, and is benefited by its use, and where the

damage for defective materials and improper workmanship can be ascertained and adjusted between the parties, relief in toto should not be denied. Courts of equity are not created to enforce penalties, but they were called into existence to ascertain and preserve rights and to administer the law in accordance with the dictates of conscience, and so as to reflect equity and justice between the parties. Where, therefore, the owner of a building or structure in question can apply, and does apply, it to the use for which it was intended, and the damage which arises by reason of improper workmanship or defective materials can be ascertained and fixed in accordance with the established rules of evidence, the courts should not deny the contractor a right to recover, but should permit him to recover what, in view of the facts and circumstances, is equitable, just, and right. Such an adjustment cannot injure any one, and tends to maintain the respect for the law which is so essential in all governments.

This case affords a striking example of how injustice might result from denying the contractor any relief whatever. In this case the defendant is in fact enjoying the labor and materials furnished by the contractor, and is receiving an income from the building; yet, if this judgment is to prevail, she may do so without making any compensation therefor whatever. Moreover, it appears from the record that the contractor, with his own money, paid off and had discharged a mortgage which was a lien on defendant's property, and has thus relieved her property from a valid and subsisting lien. Notwithstanding that fact, however, he is denied all relief. It may be that he may have some remedy with regard to that matter, but, so far as this record discloses, it is hard to conceive why he should be denied relief in this proceeding, and, further, why, if this judgment stands, he is not entirely precluded from obtaining any relief. Moreover, if she can succeed in preventing a recovery upon the ground that the workmanship and materials are defective now, she may do so at any future time and is thus permitted to use another's labor and material as a permanent investment without rendering any consideration therefor whatever. The case should therefore proceed in accordance with the principles of justice and equity, and while the defendant should be awarded adequate damages and compensation for all defects she should not be permitted to hold the building discharged from all claims of the contractor or his assignee.

(116 Wash. 51)

DOWNNEY v. WILBUR et ux. (No. 16475.)

(Supreme Court of Washington. May 28, 1921.)

Appeal and error **§—48**—Supreme Court had jurisdiction of appeal from order setting real property aside as exempt from execution.

The Supreme Court has jurisdiction of appeal by a judgment creditor from an order setting aside as a homestead and exempt from levy and sale on execution the judgment debtors' residence property, though the original amount in controversy was but \$55.82; the thing in controversy on the appeal being real property alleged by the judgment debtors to be of the value of \$1,000.

Department 1.

Appeal from Superior Court, Pierce County; Wm. Daskren, Judge.

Action by James H. Downey against R. A. Wilbur and wife, resulting in judgment for plaintiff, on which writ of execution issued, the sheriff levying on property on which defendants resided and advertising it for sale, and defendants filing statutory declaration of homestead and commencing proceedings for order setting the property aside as exempt from levy and sale. From order setting the property aside as a homestead, etc., plaintiff appeals, and defendants move to dismiss the appeal. Motion to dismiss appeal denied.

Fayette J. Partridge, of Tacoma, for appellant.

Kelly & MacMahon, of Tacoma, for respondents.

MITCHELL, J. James Downey sued and recovered judgment against R. A. Wilbur and wife in a justice of the peace court in the sum of \$55.82. He then filed a duly certified transcript from the docket of the justice of the peace in the county clerk's office, upon which the clerk issued a writ of execution. The sheriff made a levy upon the property in which Wilbur and wife resided and advertised it for sale. Prior to the date fixed for the sale R. A. Wilbur filed in the office of the county auditor his duly acknowledged statutory declaration of homestead of the property advertised to be sold, and at once commenced proceedings in the superior court for an order setting the property aside as exempt from levy and sale. He alleged its value to be not exceeding \$1,000. This proceeding was contested by the judgment creditor, and upon a trial the court entered an order setting the property aside as a homestead, declaring it free from the execution and enjoining the sheriff from selling it. James Downey has taken an appeal from that order.

Wilbur and wife have moved to dismiss the appeal upon the ground that this court is without jurisdiction to hear it. The argument is that the original amount in controversy, \$55.82, is insufficient to give this court jurisdiction under article 4, § 4, of the Constitution. In our opinion the position is untenable. The thing in controversy in this appeal is real property, according to the order and judgment of the superior court, and which respondents allege to be of the value of \$1,000. It is an appeal not by Wilbur and wife, directly or indirectly, from the money judgment against them, but by Downey from a final judgment made in favor of Wilbur and wife at the conclusion of a separate proceeding instituted by them by which they have had removed from their real property the lien of a levy and had it declared free under the exemption laws. It was a proceeding on the equity side of the court that resulted in an injunctive order from which the appeal has been prosecuted.

Respondents rely upon the cases of *Leites v. Peterson*, 68 Wash. 474, 123 Pac. 773, *Wade v. Weber*, 82 Wash. 591, 144 Pac. 901, and *State ex rel. Swan v. Superior Court*, 105 Wash. 167, 177 Pac. 679. Those cases considered situations decidedly different from this one. In their order they were: (1) An appeal from an adverse judgment of the superior court in an action by a judgment debtor to restrain the enforcement of a judgment of a justice of the peace, which had been affirmed by the superior court, for less than \$200; (2) an appeal from an adverse judgment of the superior court affirming on a writ of certiorari a judgment of a justice of the peace for less than \$200; and (3) an original mandamus application in this court to compel the superior court to dismiss an action at law for the recovery of money in the sum of only \$125. In the two first cases just referred to the appeals to this court were taken by those who were debtors in the judgments of the justices of the peace to indirectly secure a review of those judgments—indirect methods of appeal in cases where direct appeals were denied by the law. Neither of the three cases just mentioned is applicable here, where the appeal is at the instance of the creditor in the original judgment because of an order procured after that judgment upon a proceeding by the debtors affecting their homestead exemption. The appeal in no way seeks a review of the judgment of the justice of the peace which is favorable to the appellant, and from which no appeal to this court is attempted in any manner by the respondents.

The motion to dismiss the appeal is denied.

PARKER, C. J., and TOLMAN, FULLERTON, and HOLCOMB, JJ., concur.

(116 Wash. 54)

WILLSON et al. v. BETSCHART et ux.
(No. 16441.)

(Supreme Court of Washington. May 31, 1921.)

Appeal and error §=41(1)—No appeal from action in tort for \$142 for cost of glass front in building.

The Supreme Court has no jurisdiction of an appeal in an action in tort to recover \$142 to reimburse plaintiffs for the cost of replacing a glass front in a building owned by them, broken through the negligence of the defendant, under Const. art. 4, § 4, the test of jurisdiction being in the character of the suit and the recovery sought, and not in the origin of the obligation.

Department 1.

Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by Herbert E. Willson and another, trustees, against Anton Betschart and wife. Judgment for plaintiffs, and defendants appeal. Appeal dismissed.

H. W. Lueders, of Tacoma, for appellants.
Jesse Thomas, of Tacoma, for respondents.

MITCHELL, J. Suit was brought in the superior court to recover the sum of \$142 to reimburse the plaintiffs for the cost of replacing a glass front in a building owned by them, which they alleged had been broken through the negligence of the defendants. They recovered judgment in the amount sued for. The defendants have taken an appeal.

The respondents have moved to dismiss the appeal, for the reason that the original amount in controversy is not sufficient to give this court jurisdiction. Article 4, § 4, of the Constitution, defining the appellate jurisdiction of this court, provides that—

"Its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of \$200, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute."

The provision is plain and emphatic, and, without doubt, covers this case. Such has been our uniform holding in similar cases. *Henry v. Thurston County*, 31 Wash. 638, 72 Pac. 488; *State ex rel. Lack v. Meads*, 49 Wash. 468, 95 Pac. 1022; *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670.

Appellants' argument that the rule is not applicable because the claim originally grew out of damage to real property is without merit. The title to real property is in no way involved. The test is not to be found in the origin of the obligation, but in the

character of the suit and the recovery sought. The language of the Constitution forbids appellate jurisdiction in civil actions at law for the recovery of money when the original amount in controversy does not exceed \$200. This is that kind of action.

Nor is it sound to argue that the rule is avoided because the action was one in tort, rather than one in contract. The words of the Constitution authorize no such distinction.

"When a recovery of money only is sought, no matter whether the action is in tort or in contract, the pecuniary restriction applies." 2 Cyc. "Appeal and Error," p. 545.

Appeal dismissed for want of jurisdiction.

PARKER, C. J., and TOLMAN, FULLERTON, and HOLCOMB, JJ., concur.

(115 Wash. 659)

CALLAHAN v. SACHS. (No. 16269.)

(Supreme Court of Washington. May 19, 1921.)

Appeal and error §=1008(1)—Findings of trial judge hearing testimony held conclusive.

In an action for balance due upon a loan, involving a counterclaim, where the trial judge had a better opportunity for weighing the testimony and measuring the credibility of the witnesses, his conclusions will not be disturbed upon appeal.

Department 2.

Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by John Callahan against Morris B. Sachs. Findings and judgment denying plaintiff recovery as prayed for on an account and awarding defendant recovery upon his counterclaim, and the plaintiff appeals. Affirmed.

Trefethen & Findley, of Seattle, for appellant.

Rummens & Griffin, of Seattle, for respondent.

PARKER, C. J. The plaintiff, Callahan, commenced this action seeking recovery of \$3,500 claimed as a balance due upon a loan made by him to the defendant Sachs. Answering the plaintiff's complaint, the defendant denies having procured or received from the plaintiff the alleged loan or any portion thereof. As an affirmative defense and counterclaim, the defendant alleges that he is the owner of 13½ shares of the capital stock of the Garrett-Callahan Company, a corporation, of the value of \$5,000, that the plaintiff procured and unlawfully withholds the same and has collected certain dividends

thereon and prays for recovery of the 13½ shares of stock, or, in the alternative, \$5,000 the value thereof and also for the amount of the dividends collected thereon by the plaintiff. These allegations of the defendant's affirmative answer and counterclaim are denied by the plaintiff's reply. The cause proceeded to trial upon these issues—all parties proceeding upon the theory that they were all properly triable in this one action—before the court sitting without a jury, resulting in findings and judgment denying to the plaintiff recovery as prayed for and awarding to the defendant recovery upon his counterclaim as prayed for. From this disposition of the cause the plaintiff has appealed to this court. The questions here presented are wholly questions of fact. Not a single question of law is presented, or citation of legal authority made in the briefs of counsel for the respective parties.

As to the alleged loan upon which appellant sought recovery, the trial court found in substance that it was not made by appellant to respondent, but was made by appellant to another person, for which respondent was in no way responsible.

As to the alleged ownership and unlawful withholding of the possession of the shares of stock by appellant from respondent, the trial court found, in substance, that the 13½ shares of stock were at all times in question the property of respondent; that they were included in a certificate for 133 shares of the stock issued in the name of appellant, which certificate was indorsed by him and placed in possession of respondent, leaving the separation of their respective shares to be made by the issuance of new certificates in the future; and that appellant had collected dividends thereon. The real controversy upon this branch of the case was as to whether or not 13½ of the shares represented by this certificate were in fact the property of respondent; the certificate for the 133 shares being delivered to appellant by respondent for the purpose of having new certificates issued, and, as claimed by respondent, having a certificate for 13½ shares issued and returned to him. We have critically read all of the evidence, and are convinced that it preponderates in support of the conclusions reached by the trial court, looking alone to the cold typewritten evidence, which is, of course, our only guide. It is therefore plain that, since the trial judge had a better opportunity for weighing the testimony and measuring the credibility of the respective witnesses, we should not disturb his conclusions. We think the case does not call for further discussion.

The judgment is affirmed.

MITCHELL, TOLMAN, MAIN, and MOUNT, JJ., concur.

(70 Colo. 140)

COCHRAN v. COCHRAN. (No. 15999.)

(Supreme Court of Washington. June 1, 1921.)

En Banc.

Appeal from Superior Court, Benton County; John Truax, Judge.

Opinion in department affirmed, and judgment below reversed.

For departmental opinion, see 195 Pac. 224.

Stephen E. Chaffee, of Sunnyside, for appellant.

G. W. Hamilton, of Prosser, and Thos. H. Wilson, of Yakima, for respondent.

PER CURIAM. This cause was reargued before the court en banc on May 24, 1921, in pursuance of the granting of respondent's petition for rehearing. Deeming ourselves fully advised in the premises, we are of the opinion that the cause was correctly disposed of by the decision of department 1, reported in 195 Pac. 224. For the reasons therein stated, the judgment is reversed as in the department opinion directed.

(114 Wash. 499)

GREAT WESTERN RY. CO. v. LEE.
(No. 9848.)

(Supreme Court of Colorado. April 4, 1921.
Rehearing Denied June 6, 1921.)

Railroads §—328(5)—Driver held negligent in not having automobile under control.

Where an automobile driver, knowing defendant's motorcar was about due, approached within 40 feet of the track at a speed rendering it impossible to stop before reaching the crossing, and after going about 20 feet with his brakes on concluded to speed up and cross ahead of the car, which was 50 feet away when he observed it after he passed the nearest obstruction 43 feet from the track, he was guilty of contributory negligence in failing to have his car under control.

Error to District Court, Weld County; Nell F. Graham, Judge.

Action by N. R. Lee against the Great Western Railway Company. Judgment for plaintiff, and the defendant brings error. Reversed, with directions to enter judgment for defendant.

Charles W. Waterman, Caldwell Martin, and Joseph D. Pender, all of Denver (H. N. Haynes, of Greeley, of counsel), for plaintiff in error.

R. E. Winbourn, of Greeley, for defendant in error.

TELLER, J. Defendant in error had judgment in an action against plaintiff in error for damages resulting to his automobile in a collision in which it was struck by a motorcar on the track of the plaintiff in error.

The complaint charged negligence in the operation of the car at an excessive rate of speed, and in failing to sound a signal for the crossing on which the collision occurred.

The answer denied that the defendant was negligent, and alleged that the driver of the car was guilty of contributory negligence. The driver was a son of the plaintiff, of the age of 20 years, and at the time of the collision was on his father's business. It is conceded that his negligence, if any, was the negligence of the plaintiff. It appears that on the day of the accident the young man approached the crossing, on a road from the east, with a slightly down grade for some 800 feet, with the crossing in full view. The motorcar was coming from the north and running on a regular schedule. The evidence shows that the nearest obstruction was the corner of an orchard fence, a distance of 43 feet easterly from the center line of the defendant's track. The nearest trees in the orchard were several feet back from this fence. From photographs taken immediately after the accident, and introduced in evidence, it appears that from the road opposite this fence corner a car approaching on the railroad track could be seen for some distance to the northward. It further appears that, at a point 75 feet east of the crossing, there was a clear view to the northward for a considerable distance, probably 300 or 400 feet. The driver of the automobile testified that, as he was approaching the crossing, which he had crossed many times, he was aware that the motorcar was about due, and had not passed; that he did not see it until he was about 40 feet from the crossing; it being then 40 or 50 feet distant; that he instantly applied his brakes; that when he had gone about 20 feet he concluded that he would not be able to stop the car before reaching the track, and he therefore applied the power in an attempt to cross ahead of the motorcar. The automobile was struck when the front wheels had reached the middle of the track. There was a side track to the east of the main track running northerly, but no obstruction between the orchard mentioned and the main track.

At the close of the evidence, the defendant

requested a directed verdict in its favor, which request was denied. The action of the court in that respect is here assigned as error.

We are of the opinion that the request should have been granted. The driver of the automobile was fully aware of the danger at the point of the collision. He had frequently been over the road. He is supposed to have known what, if anything, there was to prevent his seeing the motorcar at a distance from the crossing. Knowing that the car was due, it was his duty to approach the crossing at a speed such that he could stop the automobile before reaching the crossing, if it was necessary to insure his safety.

It is true that a person suddenly confronted with danger is not required to exercise the same judgment as would be expected under other circumstances, and the driver's conclusion to speed up and cross ahead of the motorcar need not be made the ground of a finding that he was guilty of contributory negligence.

His negligence upon which we determine the case consisted in what he did or failed to do prior to that time; i. e., his failure to have his car under such control as would have avoided the injury. From his own testimony it appears that he approached within 40 feet of the track at a speed which rendered it impossible for him to stop before he reached the crossing. That was negligence which directly contributed to the accident. It is therefore immaterial that the defendant might have been guilty of the negligence charged.

In *Chicago, R. I. & P. Ry. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286, this court laid down the rule that:

"If a railroad crossing is particularly dangerous, and requires extraordinary effort to ascertain whether it is safe to attempt to pass over it, one familiar with the locality and danger must use care proportioned to the probable danger."

Under these circumstances it was the duty of the court to direct a verdict for the defendant. *Headley v. Denver & R. G. Ry. Co.*, 60 Colo. 500, 154 Pac. 731.

The judgment is therefore reversed, with directions to enter judgment for the defendant.

DENISON and WHITFORD, JJ., concur.

(70 Colo. 192)

BACA DITCH CO. et al. v. COULSON.
(No. 9883.)(Supreme Court of Colorado. May 2, 1921.
Rehearing Denied June 6, 1921.)

Waters and water courses §152(8)—Evidence insufficient to show that proposed change in point of diversion of decreed water rights would work no injury to vested rights of other appropriators.

In a proceeding to change the point of diversion of decreed water rights from the headgates of two small ditches to that of a large one on the opposite side of the stream and several miles further down, petitioner held not to have sustained the burden of showing that the proposed change would work no injury to the vested rights of other appropriators from the stream.

Error to District Court, Las Animas County; A. C. McChesney, Judge.

Application by J. C. Coulson to change the point of diversion of decreed water rights, opposed by the Baca Ditch Company and others. The change was allowed, and the protestants bring error. Reversed and remanded, with directions.

Jesse G. Northcutt and Forrest C. Northcutt, both of Denver, for plaintiffs in error.

A. W. McHendrie and B. H. Shattuck, both of Trinidad, for defendant in error.

BAILEY, J. Application was by Coulson to the district court of Las Animas County to change the point of diversion of decreed water rights from the headgates of two small ditches on the Las Animas river to that of one large one located on the opposite side of that stream, and several miles further down. The change was allowed by the court. The several protestant ditch companies allege error and bring the decree here for review.

Coulson acquired by purchase portions of two earlier priorities, Numbers 10 and 11, in Water District Number 19. The water rights so purchased supplied two ditches, each less than two feet wide and one mile long. It appears that the priorities awarded to the two ditches much more water than ever was or could be carried or used by them. It was sought in these proceedings to divert the entire appropriations to the canal of applicant, which has a carrying capacity of one hundred and fifty second feet of water and is twelve miles long. The protestants contend that this enlarged use, both as to time and quantity, will impair their vested rights as junior appropriators of water out of the Las Animas river for irrigation purposes.

It is established by the evidence, in which there is no substantial conflict, that the two ditches above mentioned are small, located at no point more than a quarter of a mile from the river, and that they were used orig-

inally to irrigate not to exceed sixty acres of land. Also that the land under these ditches used at the most but a trifle over half the quantity called for by the decrees, and that the land was first bottom land, which sub-irrigated, sloping to the river, and that excess water used thereon flowed directly and quickly back to the stream. Moreover, that one of the ditches had been out of use for many years, and that the surplus water from all of the above causes remained in or returned to the river and aided in supplying the junior priorities of protestants. It is also established, beyond dispute, that under the change of point of diversion as allowed the water will be carried to uplands several miles from the river, that there can be but little or no seepage, waste or return waters, and if there should be any, it will reach the river below the headgates of the ditches of protestants and therefore can in no way advantage them.

Numerous errors have been assigned, but it will be necessary to consider one matter only, namely, whether petitioner established the fact, the burden under the law to do so being upon him, that the proposed change in point of diversion would work no injury to the vested rights of other appropriators from the stream. In *New Cache La Poudre Irr. Co. et al. v. Water Supply & Storage Co.*, 49 Colo. 1, this court at page 4, 111 Pac. 610 at page 611, said:

"Much stress is laid by learned counsel for appellant on the fact that the referee, in weighing the evidence and making his findings, disregarded the true rule in a proceeding of this kind respecting the burden of proof. They say that this court, in *Fort Lyon Canal Co. v. Chew*, 33 Colo. 392, which involved a temporary exchange or loan of water rights, said that the burden of proof rests upon the one who asserts the right to make or enjoy the same, and while the present proceeding is one concerning the right to change the point of diversion, the same principle should apply. In this connection, we think appellants are right. One who seeks to have made a change in the point of diversion of his ditch should make it appear to the court that the same will not injuriously affect the vested rights of others, although in a sense this may involve the proof of a negative."

The trial court found that the amount of seepage or return water was twenty-seven per cent. The record is barren of testimony to support such finding. All of the witnesses who estimated the amount of seepage fixed it at from fifty to seventy-five per cent. One witness said the amount of seepage would be "large." The testimony upon the question of seepage is clear and uncontradicted, and shows conclusively that it was largely in excess of twenty-seven per cent.

There is no serious conflict in the evidence on the matter of a greatly enlarged use re-

sulting from the proposed change in the point of diversion. It appears that the land to which the water was originally applied subirrigated, and that when water was used upon it through the ditches less than one-half of the appropriation was needed, and that after the water was sold, crops were grown without any irrigation at all. It is manifest, therefore, that to transfer the full amount of the appropriations and apply the water to uplands some distance from the river, must naturally adversely affect junior appropriators, whose headgates are above the intake of the ditch of the petitioner, particularly since it appears that there is in each season a shortage of water in the stream, the same being frequently insufficient to supply decreed rights.

In *Ft. Collins M. & E. Co. v. Larimer & Weld Irr. Co.*, 61 Colo. 45, 156 Pac. 140, there is a striking similarity of facts. It was there proposed to change the point of diversion of water used upon bottom lands through a small ditch close to the river to other lands not so favorably situated for quickly restoring waste and return waters to the stream. On page 53 of 61 Colo., on page 143 of 156 Pac., this court said:

"It is well settled in this jurisdiction that the law which is read into every decree awarding priorities, limits it to sufficient for the purpose for which the appropriation was made, and does not authorize a waste or excessive use regardless of the fact that the maximum amount awarded may, at times, be more than is needed for the purposes for which it was decreed. [Citing cases.] It is likewise well settled in this jurisdiction that the appropriators, from a natural stream having decreed priorities, are entitled to have the conditions existing upon the stream, at the date of their appropriations, substantially maintained, unless the change sought will not substantially injure them. [Citing cases.] The evidence discloses, and the trial court concedes, that the changed conditions will result in an enlarged use, both as to amount and time, for which reason this court has heretofore held that in such cases the change should not be granted for any amount, unless upon terms as to time and amounts, so it will not injure the rights of juniors, if a case where this can be done, otherwise it should be denied in toto. [Citing cases.]"

Since the actual amount of seepage and return water was, as matter of fact under original conditions, greater than twenty-seven per cent., as fixed by the court, and an enlarged use, both in point of time and amount, would result from the proposed change, in the very nature of things such change could not fail to adversely affect junior vested rights, and therefore, under the settled law of this jurisdiction, could not lawfully and properly be allowed.

It is contended that the water involved has as matter of fact been diverted at the

new point for several seasons, and that no injury to junior appropriators has resulted from such change. The record fails to support this contention. Indeed, the proposed change, through increased flow, greater evaporation, loss of seepage and return waters and more continuous and constant use, would of necessity deprive junior appropriators of water to which they were entitled. This being established, the change, under our authorities, should have been denied.

The judgment of the trial court is reversed and the cause remanded, with directions to dismiss the petition.

Judgment reversed and cause remanded, with directions.

Mr. Justice TELLER, sitting for Mr. Chief Justice SCOTT, and Mr. Justice ALLEN, sitting for Mr. Justice BURKE, concur.

(70 Colo. 115)

MARTIN et al. v. WILEY DRAINAGE DIST.
(No. 9687.)

(Supreme Court of Colorado. April 4, 1921.
Rehearing Denied June 6, 1921.)

Appeal and error \S 1009(3)—Findings in injunction suit on conflicting evidence not disturbed.

In a proceeding for injunction, where the findings and judgment were made upon conflicting evidence and are fully sustained by the evidence, they will not be disturbed upon appeal.

Department 2.

Error to District Court, Prowers County; A. F. Hollenbeck, Judge.

Suit by Scott Martin and others against the Wiley Drainage District for injunction. Restraining order vacated, and application for injunction denied, and plaintiffs bring error. Affirmed.

Hillyer & Kinkaid, of Lamar, for plaintiffs in error.

Todd & Underwood, of Lamar, for defendant in error.

TELLER, J. Plaintiffs in error, claiming to be the owners of a ditch used for collecting seepage water and conveying the same for irrigation of their lands at some distance away, instituted a suit for an injunction against the defendant in error, which was constructing a drainage canal projected for some distance upon the line of said seepage ditch.

Defendant answered, denying plaintiffs' title to the land over which the part of the ditch in question was located, admitting their

use of the water for irrigation, and alleging that the defendant was making provision for a diversion from its canal of the water claimed by plaintiffs, to be delivered into their ditch at a point where the drainage canal departed from it.

A restraining order was issued. On a hearing of the application for a temporary injunction, the court heard evidence, including that concerning the provisions for delivering to plaintiffs the water adjudicated to them, and found for the defendant. The restraining order was vacated, and the application for an injunction denied.

It is conceded that since the judgment was entered the drainage canal has been completed over the line in question, and provision has been made for delivering plaintiffs their water in their ditch at a point below where the two ditches diverge.

The findings of the court were made upon conflicting evidence, and are fully sustained by the evidence. Under those circumstances, we cannot disturb the findings or the judgment entered in accordance therewith.

The judgment is therefore affirmed.

DENISON and WHITFORD, JJ., concur.

(70 Colo. 116)

STATE BOARD OF MEDICAL EXAMINERS v. BROWN. (No. 9701.)

(Supreme Court of Colorado. April 4, 1921.
Rehearing Denied June 6, 1921.)

1. Physicians and surgeons ⇨5(3)—On certiorari to review action of board of medical examiners refusing license, allegations of petition require no answer.

On certiorari to review the action of the state board of medical examiners in refusing petitioner a license to practice chiropractic, the action of the court in holding the petitioner entitled to a license because the allegations as to his qualifications were not denied was error; the petition requiring no answer, it having served its purpose when the writ issued, and its allegations not being taken as tendering an issue.

2. Physicians and surgeons ⇨5(3)—On certiorari to review refusal of board to issue license the merits cannot be considered, but only excess or "abuse of discretion."

On certiorari to review the action of the state board of medical examiners in refusing an application to practice chiropractic, the review extends only to a determination from the record alone of the question whether the board regularly pursued its authority (Code Civ. Proc. § 337); the writ being granted only where the inferior tribunal exceeds its jurisdiction or abuses its discretion (Code Civ. Proc. § 331), and "abuse of discretion" meaning a failure by the tribunal regularly to pursue its

authority, and not including the commission of errors of law or mistakes in findings of facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Discretion.]

3. Physicians and surgeons ⇨5(2)—Applicant for license who appeared and introduced evidence as to qualifications four months after filing application not entitled to further hearing on 30 days' notice.

Under Laws 1917, p. 359, § 11, providing for 30 days' notice to an applicant for medical license, after an adverse finding as to his qualifications, to appear and present additional evidence, where an applicant appeared in person and introduced his evidence on the hearing four months after the filing of his application, he was not entitled to a further hearing on 30 days' notice or otherwise.

4. Physicians and surgeons ⇨5(3)—Failure of board refusing license to find as to required qualifications not prejudicial.

Where an application for a license to practice chiropractic was refused by the board of medical examiners, the failure of the board to specifically find that the applicant did not possess the required qualifications and to advise him as to which of the requirements he lacked was not to his prejudice; the dismissal of the application after hearing being, in effect, a finding that the applicant did not have the required qualifications, and the act (Laws 1917, p. 359, § 11), requiring only that the board reach a conclusion on the matter, not that it make findings in due form.

5. Physicians and surgeons ⇨5(3)—District court, on certiorari from board of medical examiners, cannot direct granting of license to petitioner.

On certiorari to the district court from the action of the board of medical examiners in refusing petitioner a license to practiced chiropractic, the court could not direct the granting of the license; its duty being to remand the cause to the board for rehearing, if it found the board had exceeded its jurisdiction or failed regularly to pursue its authority.

Department 1.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Certiorari by D. A. Brown to review the act of the State Board of Medical Examiners in refusing petitioner's application for a medical license. From a judgment in favor of the petitioner and an order directing the Board to issue him a license, the Board brings error. Reversed and remanded, with directions to dismiss writ.

Victor E. Keyes, Atty. Gen. (Charles H. Haines, of Denver, of counsel), for plaintiff in error.

Carle Whitehead and Albert L. Vogl, both of Denver, for defendant in error.

TELLER, J. The defendant in error applied to the plaintiff in error, under section

32 of chapter 94 of the Laws of 1917, for a license "to practice chiropractic." The application was refused. He then took the matter to the district court on certiorari, where the court required the board to send with the record certain letters which had been introduced in evidence on the hearing before the board. The district court entered judgment in favor of the petitioner and ordered the board to issue him a license as prayed in his petition. Plaintiff in error contends that the court erred in reversing the action of the board, and in ordering it to issue a license.

[1, 2] It appears from the record that the district court assumed to determine the right of the petitioner to a license, despite the fact that the matter was under consideration on a writ of certiorari. It is stated in the brief for plaintiff in error, though not shown by the record, that the court held the petitioner entitled to a license, because the allegations of the petition as to his qualifications were not denied. In this there was error for two reasons: First, the petition requires no answer; it has served its purpose when the writ issued, and its allegations are not taken as tendering an issue. *Morefield v. Koehn*, 53 Colo. 367, 127 Pac. 234. Second, the review extends only to a determination, from the record alone, of the question "whether the inferior tribunal regularly pursued its authority, and thereupon pronounced judgment accordingly." *County Court v. People*, 55 Colo. 258, 133 Pac. 752. We have several times held that a cause heard on certiorari could not be considered on its merits. *People v. District Court*, 22 Colo. 422, 45 Pac. 402; *Hallett v. Board of County Commissioners*, 27 Colo. 86, 59 Pac. 733; *Chenoweth v. State Board*, 57 Colo. 74, 141 Pac. 132, 51 L. R. A. (N. S.) 958, Ann. Cas. 1915D, 1188; *Thompson v. State Board*, 59 Colo. 549, 151 Pac. 436; *State Board v. Noble*, 65 Colo. 410, 177 Pac. 141; *State Board v. Boulls*, 195 Pac. 325 (No. 9700, recently decided).

Such holdings are only applying the provisions of the Code.

Section 331, Code Civ. Proc., contains the following provision:

"The writ shall be granted in all cases where an inferior tribunal, board or officer exercising judicial functions, has exceeded the jurisdiction or greatly abused the discretion of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy."

Section 337 is as follows:

"The review upon the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer."

The last-mentioned section indicates what is meant in the other section by "abuse of

discretion." It is a failure by the tribunal regularly to pursue its authority. This does not include the commission of errors of law, or mistakes in the finding of facts. *People v. Court of Appeals*, 34 Colo. 291, 82 Pac. 483.

In *Whitney v. B. of D.*, 14 Cal. 480, cited with approval in *City Council v. Hanley*, 19 Colo. App. 390, 75 Pac. 600, of the writ it is said:

"It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances, can the review be extended to the merits. Upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive."

[3] Defendant in error contends that under section 11 of the act in question he was entitled to a 30 days' notice of an adverse finding, and an opportunity to present additional evidence. He alleges that failure to give him such notice constitutes, on the part of the board, an abuse of its discretion. Said section, after setting out the grounds upon which a license may be refused or revoked, provides as follows:

"Said board, in determining whether any applicant for a license to practice medicine is morally, educationally and otherwise qualified to receive such a license, shall upon their own initiative make diligent inquiry and investigation whether such applicant possesses the qualifications required by this act and those adopted by the board under the authority of this act and whether such applicant has at any time done any of the acts herein made a ground for refusing or revoking a license and they may refuse to grant a license to practice medicine to any person who, after such inquiry and investigation, they shall find does not possess the moral, educational and other qualifications herein required or adopted by the board under authority of this act or who has done any of said acts. But said board shall not refuse to grant such a license under such circumstances until said applicant has had reasonable opportunity, and at least thirty days' notice to appear before the board in person, and by counsel and present in his behalf such statements, testimony, evidence, argument and authority as he may desire to call to the attention of the board."

This plainly provides for a hearing, on 30 days' notice to the applicant, before a final determination of his case, if from its investigations the board is inclined to refuse a license. It appears that the application in this case was filed on March 7, 1917, with affidavits showing good moral character. On April 3d following, consideration of the application was deferred for further investigation. On July 5, 1917, the applicant appeared before the board and submitted evidence in support of his application, and said application was dismissed "on the ground that the board was not satisfied that he pos-

sessed the qualifications required by the statute to entitle him to a license."

Inasmuch as the applicant appeared in person, and introduced his evidence on the hearing four months after the filing of his application, he was not entitled to have a further hearing on a 30 days' notice, or otherwise.

[4] Complaint is made, also, that the board did not specifically find that the applicant did not possess the required qualifications. The dismissal of the application, upon the grounds stated, after hearing had, was, in effect, a finding that the applicant did not have the required qualifications. The requirement is that the board find, i. e., reach a conclusion on the matter, not that it make findings in due form. While it would undoubtedly be better for the board to make formal findings, and make them a matter of record, the failure so to do is not to the prejudice of defendant in error.

This disposes, also, of the claim that defendant in error was entitled to be advised as to which of the requirements for a license he was lacking.

[5] The cases cited by defendant in error involving questions arising on mandamus are not applicable in this proceeding.

In no event could the district court, on a proceeding of this kind, direct the granting of a license. If it be found that the board had exceeded its jurisdiction, or failed regularly to pursue its authority, the duty of the court is to remand the cause to the board for a rehearing.

The judgment is reversed and the cause remanded to the district court, with directions to dismiss the writ.

WHITEFORD, J., sitting for SCOTT, C. J., and ALLEN, J., concur.

(27 N. M. 124)

GOLDEN GIANT MINING CO. v. HILL.
(No. 2269.)

(Supreme Court of New Mexico. Feb. 4, 1921. Rehearing Denied June 4, 1921.)

(Syllabus by the Court.)

1. Mines and minerals §23(2)—Expenditures for work on stamp mill held not part of annual assessment work.

Expenditures made for work performed, labor done, and repairs made upon a stamp mill do not tend to develop the mineral claim, or facilitate the extraction of ore therefrom, and consequently do not constitute any part of the sum required to be expended for annual assessment or improvement work, under section 2324, U. S. Rev. St. (U. S. Comp. St. § 4620).

2. Mines and minerals §25—One contracting to do assessment work cannot assert forfeiture for nonperformance.

Where one enters into possession of a mineral claim under a contract with a locator, by which the person entering undertakes to do the required assessment work, or do other work which would have been sufficient to constitute assessment work, he will not be heard to assert the forfeiture of the claim for nonperformance of the assessment work, where such nonperformance was the result of his own default, nor will he be permitted to take advantage, at any time, of the information obtained by him on account of such relation.

3. Mines and minerals §25—Failure to do annual assessment work does not forfeit claim in absence of relocation.

The failure to do the annual assessment work upon a mining claim does not of itself forfeit the claim, a relocation by a third party being essential to work a forfeiture of the original locator's rights.

On Second Motion for Rehearing.

(Syllabus by Editorial Staff.)

4. Appeal and error §888(2)—Issue decided by court below and presented in briefs of both parties held properly before the Supreme Court.

Where the trial court determined an issue as to whether there existed a fiduciary relation between appellant and appellee, and by agreement of appellee permitted appellant to file an amended reply raising such issue, the question having been presented to the Supreme Court in the briefs of both parties, the issue was properly before the Supreme Court.

Appeal from District Court, Grant County.

Action by the Golden Giant Mining Company against C. W. Hill. Judgment for defendant, and plaintiff appeals. On motion for rehearing. Reversed and remanded, with instructions.

K. K. Scott, of Breckenridge, Tex., and A. N. White, of Silver City, for appellant.

Wilson & Walton, of Silver City, for appellee.

BRICE, District Judge. Heretofore we handed down an opinion reversing the judgment of the court below, but upon more mature consideration we are satisfied that we fell into error in some particulars in the former opinion. That opinion will therefore be withdrawn.

This is an action brought by the Golden Giant Mining Company, a corporation, against C. W. Hill, to recover possession of two mining claims, resulting in a judgment against the plaintiff in the district court, from which it has prosecuted this appeal.

The facts briefly are as follows:

The appellant, Golden Giant Mining Company, is a domestic corporation, and for some

time had been the owner of two unpatented lode mining claims in Grant county, located as the "Mammoth" and the "Ninety-six" claims. One D. J. Hayden was its president, and the owner of 80,000 of its 100,000 shares of capital stock. On January 16, 1915, the said Hayden and the appellee, Hill, entered into a written contract, whereby Hayden agreed to sell the appellee 55,000 shares of his 80,000 shares of capital stock of the appellant corporation, to be paid for by the payment of \$3,000 in cash, and \$7,000 to be used:

"First, in the securing and paying a first-class engineer to examine the Golden Giant group of mines and the equipment thereof, and to formulate plans for successfully operating the same; second, in securing six Wilfry tables and one Huntington mill and installing the same, and in paying all expenses incurred in making all necessary improvements and repairs to the buildings, machinery, and equipments on said mining claims; third, in paying for all machinery, repairs, mechanics, material, and labor bills in putting the said Golden Giant mining plants and its accessories in perfect working condition and in operating the same continuously; fourth, in opening up and putting in perfect working condition the Golden Giant shafts and in operating the same when put in shape so to do."

The balance of the purchase price for said stock was to be paid from mining operations upon the property. Appellee went into possession of the mining property in February, 1915, under the terms of said contract with Hayden. He secured an assignment to the corporation of a certain outstanding lease to third parties of the property, and which is mentioned in the contract. The improvements on the mining claims in controversy consisted of houses, stamp mill, pumping plant, hoist, etc., of the value of \$25,000 or more, or at least the improvements cost this sum. After taking possession of the mining properties, the appellee and associates spent \$3,000 thereon for "labor and materials," as testified to by him, to be used to erect a tramway, "and everything for rebuilding the works inside, labor for shafting, money for bricks." These improvements were very largely made on the stamp mill located on the claims, and none of it was spent in the extraction of minerals, or the development of the mining claims themselves.

On June 9, 1915, appellee wrote Hayden a letter, showing that he was operating the mining property under the terms of said contract. In this letter he discouraged Hayden coming to the mine to work, advising him that it would be cheaper to employ Mexican labor than to pay Hayden for anything he could do, saying:

"And still until the mine will pay it is hardly worth your while to spend your time here."

Also:

"I think you had better accept the position mentioned or open an office and practice your profession. You will then be with your family and you can resign or quit office at any time that the mine or mill make enough money to let you live as a gentleman, and which I hope will not be long."

He further stated:

"I have got everything repaired (had to put new flues in boiler—rotted out), and the engine, mill, tables—everything running smooth; no belts coming off; no trouble to hold 80# steam. Governor handles engine with throttle wide open; no choking of mill; and last Saturday we run all the old stuff in the mill and thoroughly tested everything out and it is all O. K. We have not done anything this week—waiting for repairs for hoist. * * * So I think we will be running next week with double shift, and as soon as Mr. R. is able to come down it will not be long until the floors are filled with other tables and appliances for saving values."

Also:

"I do not anticipate any trouble with mill and will do the assessment work if nothing else."

On August 6, 1915, the contract was canceled by mutual consent, and nothing further was done on the property during that year, although the appellee remained and resided in a house on the property until after the 1st of January, 1916.

After midnight on the 31st day of December, 1915, that is, on the morning of the 1st day of January, 1916, the appellee for himself began the relocation of the Mammoth claim under the name of "Hill No. 1," built a monument at one corner, and placed the required notice therein, and later complied with the law in putting up monuments and doing the necessary discovery work. On June 1, 1916, he relocated the "Ninety-Six" mining claim under name of the "Bessie," and likewise complied with the law in the manner of locating and doing discovery work. He has been in possession of said claims since said attempted relocation.

Appellant, on December 31, 1915, filed for record its proof of labor on the two claims as follows:

"On the Ninety-Six (96) lode mining claim installation of new flues in boiler to the approximate cost of twenty-five dollars (\$25.00); mucking out and retimbering eighty (80) foot tunnel to the approximate cost of seventy-five dollars (\$75.00); erection of water filter in gulch to the approximate cost of twenty-five dollars (\$25.00); repairs on pump, pipe line and on watering works to the approximate cost of twenty-five dollars (\$25.00).

"And on the Mammoth lode mining claim re-setting Wilfry tables on cement pillars and repairing mill and buildings, etc., of the approximate cost of two hundred fifty dollars (\$250.00); building tramway from gulch to

top of hill of the approximate cost of one hundred fifty dollars (\$150.00); repairing engine and boiler to the approximate cost of fifty dollars (\$50.00); overhauling hoist to the approximate cost of fifty dollars (\$50.00)."

Appellee and other witnesses on his behalf testified, with reference to the work done, that on the Ninety-Six claim it was all done for the purpose of running the mill, and did not tend to development, or afford any means for the extraction of ores from the claim. Appellee testified that the tunnel was not re-timbered, but was only cleaned out, but did not deny that \$75 was spent thereon, also that the tunnel was used to furnish water for the mill; that no work by way of shafts or tunnels was done on the claims in 1915. The evidence clearly supports appellant's proof of labor on the Mammoth, but all such work done was in connection with the stamp mill situated on the premises. Such expenditures were not made by the corporation, but were made by appellee under his contract with Hayden, and by appellee's associates, Flores and Randin, who were stockholders of the corporation. The amount expended was something over \$3,000.

1. It is apparent from the foregoing statement of facts that the question is clearly presented as to what kind of labor or improvements upon a mining claim will satisfy the requirements of the federal statute (section 2324, R. S. U. S. [U. S. Comp. St. § 4620]) in regard to annual expenditures. In this case no work was performed upon either of these two mining claims for the purpose of developing them as mining claims, or for the purpose of facilitating the extraction of ores therefrom. The money was expended upon a mill for the purpose of putting the same in running order for the treatment of some tailings, on or near the premises, and of such ores as might thereafter be extracted from the mines themselves. We assume that the repair of the mill would constitute annual labor or improvement as much as the construction of the mill in the first instance. If one will satisfy the requirements of the statutes as to annual expenditure, the other would likewise do so. The question is, Will the erection or repair of a mill upon a mining claim, or group of claims, designed to treat and reduce the ores from said mines, satisfy the requirements of the federal statute in regard to the annual expenditure required to hold the claim? The federal statute (section 2324, R. S. U. S.), among other things, provides:

"On each claim located after the tenth day of May, eighteen hundred seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no lo-

cation of the same had ever been made.
* * *

Just what character of labor or improvements is required is not specified in the statute. The Land Department of the government has taken a definite stand upon this question, and is firmly committed to the doctrine that the labor or improvements contemplated by the federal statutes are such as bear some direct relation to the development of the mine, and which tends to facilitate the extraction of ores therefrom.

In *Monster Lode Mining Claim*, 35 Land Dec. 493, the question was as to whether a stamp mill upon a mine, used exclusively for that mine, could be considered an improvement going to make up the required expenditure of \$500 in order to obtain the patent. The Secretary of the Interior held that it was not, quoting from *Highland Marie and Manila Lode Mining Claims*, 31 Land Dec. 37, and citing *Smelting Co. v. Kemp*, 104 U. S. 636, 655, 26 L. Ed. 875, and other land decisions.

In *Highland Marie and Manila Lode Mining Claims*, 31 Land Dec. 37, it is pointed out that, while in a sense the mill promotes the development of the mine, because it enables the owner to reduce the ores without freighting them to reduction work, the relation of the mill to the mine is too remote to be said to facilitate the development of the mine and the extraction of ores therefrom. The Secretary of the Interior cited and relied upon *Smelting Co. v. Kemp*, 104 U. S. 636, 655, 26 L. Ed. 875. In *Schrim-Carey and Other Placers*, 37 Land Dec. 371, a lime kiln was held not to be an improvement on a placer claim, located upon the lime deposit, within the requirements of the statute. In *Fargo Group No. 2 Lode Claims*, 37 Land Dec. 404, a road partly on and partly off a mining claim, used to transport machinery and supplies to and ore from the mine, is held not to be an improvement within the \$500 requirements for patent. In *Zephyr and Other Lode Mining Claims*, 30 Land Dec. 510, it is held that work done according to a system for the development of a group of contiguous claims owned by one person is to be considered as an improvement within the \$500 requirement.

The Secretary of the Interior points out that the same kind of improvements required annually are required under the \$500 expenditure section of the federal statute, and for that reason the kind of improvement in that case was held to be sufficient for a patent.

In *Smelting Co. v. Kemp*, 104 U. S. 636, 655, 26 L. Ed. 875, the principal question was whether in a court of law a patent to a mining claim might be collaterally attacked because the land officers had made a mistake of law in issuing the same, and the court held that it could not. In the course of the

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discussion, however, Mr. Justice Field defined the meaning of the words "labor" and "improvements" under the federal statute, and said that they mean such labor and improvements as are performed or made for the development of the mine to facilitate the extraction of the metals it may contain. In his definition he included such improvements as are applicable to placer mining, and says that the work or improvement may "be at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material." This statement in no way modifies the general doctrine previously stated by him, namely, that the labor or improvement which satisfies the statute is something which directly facilitates the development of the mine and the extraction of ores therefrom, because in the case of a placer mine the diverting of a stream of water is necessary for the purpose of extracting the ores from the gravel, and a flume to carry away the debris is necessary in order that the mining may be continued. This definition of the statutory requirements is perhaps the earliest after the adoption of the statute.

In *Fredricks v. Klauser*, 52 Or. 110, 118, 96 Pac. 679, 682, the court said:

"There was no machinery or other fixtures of importance at the mines, the preservation of which necessitated a watchman, when the development work had ceased, and, this being so, the worth of the actual labor performed by Arbuckle in endeavoring to increase the world's wealth by making an honest effort to discover valuable minerals is the only credit to which he is entitled."

It is further said in this case:

"The word 'improvement,' as thus used, evidently means such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must reasonably be permanent in character."

In *Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co.*, 114 Cal. 100, 45 Pac. 1047, the jury had been instructed that annual expenditure might consist in digging, etc., "or, if the mine be idle, it may consist of the services of a watchman or custodian in looking after the property and taking care of the same." The court said:

"To constitute a general rule, this would require some qualification. If this sort of care was necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case work were resumed, I see no reason why it would not constitute work upon the mine as much as the erection of such structures in the first instance would. But if there was only the naked

claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine in the sense of the statute."

In *Hough v. Hunt*, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17, the same court in discussing whether the services of a watchman could be held to be assessment work, pointed out when and when not the same would be allowable as annual expenditures, and held that, where there were structures upon the mine which were likely to be lost if not cared for, and the structures would be required then work would be resumed, the services of a watchman might be allowed as assessment work.

In *Merchants' National Bank v. McKeown*, 60 Or. 325, 119 Pac. 334, the court said:

"The expense of the keeper is only allowable as annual labor when the mine is temporarily idle and the work is to be resumed again, the watchman being necessary to preserve the property needed when the work is resumed, and cannot be so applied from year to year indefinitely as a substitute for the annual labor."

In *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85, the court held that labor performed by the owner of a mine in constructing a wagon road thereto for the purpose of better developing and operating the same may be treated as a compliance with the law, relating to the annual assessment work thereon. The decision was based upon the language used in *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875, and the application of the doctrine that work done outside of the claim may be work done on the claim is applied to a road.

In *Nevada Exploration & Mining Co. v. Spriggs*, 41 Utah, 171, 181, 124 Pac. 770, 778, the court was discussing the principle that a system or plan of development was sufficient to meet the requirement of the annual expenditure on each of a group of claims, and in that connection said:

"We think that what is intended by the use of the term 'system' or 'general system' of work means simply this: That the work, as it is commenced on the ground, is such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be in the claims, or, if these are known, that the work will facilitate the extraction of the ores and mineral."

It was upon this theory that the Utah court cited *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85, and approved the same. But it is to be noticed that the court adhered to the proposition that work, in order to comply with the annual expenditure requirement, must be calculated to facilitate the discovery in or extraction of ores from the mine.

In *Book v. Justice Mining Co.* (C. C.) 58 Fed. 113, the court was likewise discussing the principle which allows work to be done

outside of or upon one of a group of claims for the benefit of all. But in that case the doctrine is reiterated that such work must be done for the purpose of prospecting or developing the mine.

In *Power v. Sla*, 24 Mont. 243, 61 Pac. 468, while the court had under consideration the question of pleading, it nevertheless adhered to the same doctrine that the annual expenditure, in order to hold a mining claim, must be made for the development of the claim and to facilitate the extraction of the minerals it may contain.

In *Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413, a man had been employed as a watchman to take care of the buildings and improvements upon a mining claim at a salary of \$500 a year. The improvements consisted of buildings, engine, boiler, machinery, hoisting works, etc., which were used in the development of the mine. The court held that the services of this watchman fulfilled the requirements of the federal statute; but it is to be observed that the improvements consisted of the instrumentalities necessary to be used, and which had been used by the owners in the actual working and development of the mine. In this case there are cited several cases in which the question was as to whether certain kinds of labor upon a mine would entitle the person performing the same to a mechanic's lien. This part of the opinion we do not regard as sound. Work and labor upon a mine within a mechanic's lien statute may or may not be the same thing as work and labor upon a mining claim within the requirements of the annual expenditure statute. The two requirements are founded upon an entirely and distinct principle.

In *Snyder on Mines*, § 498, the doctrine of the cases is summarized as follows:

"The test in all cases which should be applied to 'annual labor' is whether the work or improvements tend to develop the claim, and facilitate the extraction of the mineral and valuable contents therefrom. Any labor or improvements meeting this requirement will satisfy the statute; nothing else will."

In *Lindley on Mines* (3d Ed.) § 629, it is said:

"A stamp mill, even though located upon and used exclusively in connection with that particular mining claim, is not a satisfactory improvement, for it does not facilitate the extraction of the mineral from the claim; and the same rule applies to a lime kiln and to excavation for the foundation of a smelter."

In *Sexton v. Washington, etc., Co.*, 55 Wash. 389, 104 Pac. 614, a road built into a small unorganized mining district by all the miners owning claims it was held might be considered as work upon and for the development of all such claims, citing with approval *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85. This case certainly goes to great length in the application of the doctrine in regard to

roads serving as annual assessment work.

We have made a thorough examination of all the cases upon this subject, and find a comparative unanimity of opinion. The cases all, in effect, agree that work and labor or improvements to satisfy the statute must bear same direct relation to the development of the claim or the extraction of ores therefrom. In the case of labor actually performed in mining or improvements in the way of hoisting machinery, there is no difficulty. The relation of the same to the improvement of the claim is direct and apparent. In the case of a watchman, where he guards and protects machinery or improvements directly connected with the mining operations upon the property, there can be no controversy as to the applicability of such work as annual expenditure. In the case of roads over which machinery and supplies for the development and working of the mine are hauled to the mine, and ore is hauled from the mine, the applicability is less direct and logical. It may be said, however, that if hoisting machinery with which waste and ores are to be removed from the mine is an improvement, a road over which such machinery is hauled to the mine is likewise such an improvement. So it may be said that such road over which the ore, when raised to the surface, may be hauled directly facilitates the development of the mine and the extraction of the ores, because they must be removed from the shaft or tunnel in order to continue the mining operations. In this sense the holding that the services of a watchman and the building of roads is work upon the mine is justifiable.

On the other hand, it is to be observed in this connection that the federal statutes contain not a single word relative to the reduction of ores and the extraction of the precious metals therefrom. The legislation on the subject deals solely with mining operations, and Congress has not concerned itself by a single expression with reduction works or the reduction of ores, except in section 2337, R. S. U. S. (U. S. Comp. St. § 4645), which provides that five acres of noncontiguous, nonmineral land may be embraced and included in an application for a patent for a lode claim, and that the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may likewise receive a patent for his mill site. It is contemplated by the congressional legislation therefore that reduction works are to be separate and apart from mining operations, and mill sites upon which reduction works are to be erected by the owner of a claim must consist of noncontiguous and nonmineral lands. No annual expenditure is required to be made upon mill sites, and the improvements thereon bear no relation whatever to the mining operations in so far as the federal legislation is concerned. A mill erected upon noncontiguous and nonmineral lands

would as much facilitate the development of a mine in connection therewith as a mill erected upon the mine itself, and yet no one would contend, we believe, that such an improvement would satisfy the requirements of the federal statute.

[1] From what has been said it would seem clear that the work and labor performed, and repairs made upon the mill in question in this case do not meet the requirements of the federal statute in regard to annual expenditure upon the mining claims of the appellant.

[2] 2. The district court held: That at the time of the relocation of the ground in controversy by the appellee he occupied no fiduciary, contractual, or other relation with the appellant, so as to preclude him from making such relocation. An issue was made in the pleadings in this regard, and presented in the briefs of the parties in this court. The relation existing between the parties at the time appears from the statements of facts in the case, with these additional facts, which inferentially are drawn from the evidence, and in our judgment no other inference could be drawn therefrom. That at the time or prior to the cancellation of the contract between appellee and Hayden the appellee conceived the idea of relocating the mines for his own benefit and in his own name. This inference is drawn from the fact that he remained in a house upon the mine and lived there for several months after the termination of the contract, and did attempt to relocate the land at the very first opportunity. The explanation given by him to the effect that he had no money to go elsewhere is so unreasonable that it cannot be taken as substantial evidence in the face of his acts in connection therewith. He apparently had sufficient means for subsistence without labor during this time, and was only away once from the claim for a few days. We can easily understand that he might not have the means to remain upon the claim without work to obtain them, but our reason will not be convinced that he remained upon the claim without other reason than that he had no means to go elsewhere. The evidence shows that appellee had no particular knowledge of the value of the mine or its improvements, nor had he seen it, until after he went into possession under the terms of the contract with Hayden. That the information he had with reference to the mine of material value was obtained by him while it was in his possession under the contract to purchase the controlling interest. While he had no contract with the corporation, his contract with its principal stockholder, under which he took and held possession for six months during the year 1915, created such a relation with Hayden as that would preclude him from relocating the same to Hayden's disadvantage to the same extent as had such contract been directly with the corporation. The contract

provided that all improvements placed upon the mine by appellee should vest in the corporation in case of its cancellation, so that the corporation was a beneficiary in the contract, and to that extent interested therein.

Under the law a mine owner has the whole calendar year within which to do the assessment work, and he is not limited to doing any particular part of it at any particular time. 2 Lindley on Mines, § 624. But the duty to perform exists during all of that time, and one in possession under contract to purchase, or under a lease, is duty bound to perform the annual assessment work to prevent a forfeiture by relocation.

In the case of *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718, the Boston & S. D. Company, through its superintendent, had a contract for the purchase of the Dave and Faust lodes, and their superintendent did the necessary representation work upon the mines. It was contended that this was not proper, as they were not authorized to do the work. The court said:

"The work, therefore, done by the Boston & S. D. Co. under the contract above referred to, inured to the benefit of the defendant, as it was not only the right of the Boston & S. D. Co. to do the assessment work, but, being in possession upon this contract, it was its duty to do the work in order to preserve the defendant's right to the property."

In the case of *Lowry v. Silver City, etc., Mining Co.*, 179 U. S. 193, 21 Sup. Ct. 104, 45 L. Ed. 151, lessors of a mining claim attempted to make relocation thereof, and the Supreme Court of the United States said:

"This was plainly an attempt on the part of the plaintiffs in error—two of whom were lessees of the defendant in error—under the forms of law to appropriate to themselves property which for years had been in the unchallenged possession of the defendant in error, and upon which it had expended many hundreds of dollars. That such attempt was unsuccessful in the courts is no more than was to be expected.

"The Supreme Court of the state placed its decisions upon two grounds: First, that although the *Evening Star* claim included the original discovery shaft of the *Wheeler* claim, it did not thereby destroy that claim, in view of the fact that long prior to the location of the *Evening Star* the owners of the *Wheeler* had located a new shaft and developed the mine in that shaft. * * * The other ground was estoppel, by virtue of the lease under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court."

In the case of *Stewart et al. v. Westlake*, 148 Fed. 349, 78 C. C. A. 341, it was held that the lessee of a mining claim, who was in possession and who had contracted to do work upon the claim that would be sufficient for the assessment work, and who relocated

the claim in the name of third parties, obtained no right. The court said:

"The law of the case is well settled. The lessee of a mining claim who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot, upon failing to perform his obligations, secretly relocate the claim, and so secure and hold for himself the title. A patent obtained under such circumstances will be decreed to be held in trust for the lessor."

The testimony shows that the appellee recognized his duty to perform the assessment work. In his correspondence with Hayden he agreed to do this, if nothing more. If he had done the work contemplated by the terms of his contract, there would have been no question but what sufficient labor or improvements would have been performed or made upon the claim to have satisfied the law. It was just as much his duty to perform the assessment work during the six months in which he had possession of the claim as it was for the appellant to do it during the other six months. He failed in his duty, if the work was not done, as much as the appellant, and now seeks to take advantage of his failure to perform the labor which he recognized was his duty to perform and to use the information he obtained under his contract with Hayden to further his own interests. His relation placed him in a position where he could injure Hayden and the appellant, just as though he had been their confidential agent, and persons placed in such a position are not permitted to take advantage of the information obtained thereby, even after the relation has ceased. 1 *Mechem on Agency*, §§ 1209, 1210, 1216, 1217, 1218; *Ringo v. Binns*, 10 *Pet.* 269, 9 *L. Ed.* 420; *Trice v. Comstock*, 121 *Fed.* 620, 57 *C. C. A.* 646, 61 *L. R. A.* 176.

The case of *Trice v. Comstock*, supra, reviews the authorities generally on this subject. In that case, *Trice* and *Beemer*, real estate men, had a tract of land listed with them, although they had no contract to purchase. They employed *Rietmeyer* and *Comstock* to secure purchasers for this and other lands. After obtaining information as to the value of this land during the time they were so employed, the agency was canceled. Thereafter *Comstock* bought the land himself. In a suit to hold them constructive trustees, the court said:

"Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client, or of any agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term. *Eoff v. Irvine*, 108 *Mo.* 378, 383, 18 *S. W.* 907, 32

Am. St. Rep. 609; *Robb v. Green* [1895] 2 *Q. B.* 315, 317-320; *Louis v. Smellie* [1895] 73 *Law Times* (N. S.) 226, 228. * * *

"Nor was discretion or authority to sell these 1,925 acres of land requisite to disable this agent from buying and holding them adversely to his principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established. In *Gardner v. Ogden*, 22 *N. Y.* 327, 343, 350, 78 *Am. Dec.* 192, the clerk of the brokers of the plaintiffs, was held to be disabled from buying the plaintiff's property, although he never had any discretion or authority relative to the sale of it. In *Winn v. Dillon*, 27 *Miss.* 494, 497, *Dillon* was declared to be disabled from purchasing the lands he acquired, although the only authority he ever had was to search out and report their descriptions. In *Davis v. Hamlin*, 108 *Ill.* 39, 49, 48 *Am. Rep.* 541, an agent of a lessee to procure amusements for his theater, who never had any authority to deal with the leasehold estate, was held to be disabled from taking a renewal of the lease himself, and was adjudged to hold the leasehold interest which he had secured for the exclusive use and benefit of his principal.

"The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interest, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the parties whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employee, as completely as the relation of trustee and cestui que trust. In *Greenlaw v. King*, 5 *Jur.* 19, Lord Chancellor Cottenham, speaking of this doctrine, says: 'The rule was one of universal application, affecting all persons who came within its principle, which was that no party can be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser.' * * *

"The rule upon this subject was clearly and not too broadly stated in the American note to *Keech v. Sanford*, 1 *White & T. Lead. Cas.* in *Eq.* (4th *Am. Ed.*) p. 62, *page 58, in these words: 'Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.'

"The facts of the case in hand brought it squarely within this rule, charged the title which the agent *Comstock* acquired with a constructive trust for the benefit of his principals, and furnished substantial ground for

their application to a court of equity for appropriate relief. * * *

"But the fiduciary relation through which agent C. W. Comstock procured his information and knowledge of the location, character, and value of this tract of land, his acceptance of the agency, his leading of the probable purchaser to the property, his receipt from his principals of the expenses of this trip, forbade him from purchasing this land for himself, and thereby preventing his principals from affecting a sale of it, and charged it in his hands with a constructive trust in their favor."

In the case of *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609, the Supreme Court of Missouri held that an attorney who had been consulted with reference to the title to property, and having given advice in connection therewith, although his employment was repudiated by the owner of the land, yet he was precluded from purchasing an outstanding title, the information with reference thereto having been obtained from an abstract furnished him by the owner of the land, notwithstanding the relation had long terminated.

There are many cases decided by the courts holding that a person occupying fiduciary relations with the owner of a mining claim is precluded from relocating the same. *Lockard v. Rollins*, 2 Idaho (Hask.) 540, 21 Pac. 414; *Argentine Mining Co. v. Benedict*, 18 Utah, 183, 55 Pac. 559; *O'Neill v. Otero*, 15 N. M. 707, 113 Pac. 614; *Largey v. Bartlett*, 18 Mont. 265, 44 Pac. 905; *Fisher v. Seymour*, 23 Colo. 642, 49 Pac. 32; *Lockhart v. Leeds*, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; *Lowry v. Mining Co.*, 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719; *Utah Mining & Mfg. Co. v. Dickert, etc., Co.*, 6 Utah, 183, 21 Pac. 1002, 5 L. R. A. 259.

"With reference to what occurs after the agency is ended, it is not generally true that the duty and responsibility of the agent terminates with the agency. On the other hand, there is, as has been seen, a considerable class of cases in which it is held that an agent will not be permitted, after the termination of his agency, to take advantage of information which he acquired in a confidential capacity, during the agency, respecting the principal's business plans or purposes to obtain for himself rights or interests which he thus learns that the principal intended to acquire and the acquisition of which by the agent would defeat the purposes of the principal" (citing *Trice v. Comstock*, 121 Fed. 620, 57 O. C. A. 646, 61 L. R. A. 176; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; *Dennison v. Aldrich*, 114 Mo. App. 700, 91 S. W. 1024). 1 *Mechem on Agency*, par. 1235.

The principle involved is not unlike that in the case of *Lockhart v. Mining Co.*, 16 N. M. 237, 117 Pac. 837, in which Mr. Justice Parker, in summing up the case, said:

"We have thus a case pleaded, proved, and found by the court as follows: A prospector under contract posts a location notice and initiates a location; he is charged with the duty

of performing the several acts of location; he enters into a fraudulent conspiracy to refrain from perfecting the location and to cause a forfeiture thereby; he does refrain from doing said acts and, upon forfeiture, delivers possession to the conspirators. This certainly makes out a case, and, irrespective of the other allegations in the complaint, entitles the plaintiff to the relief sought."

[3] The failure to do the annual assessment work required by the federal statute does not forfeit a mining claim, but it requires the intervention of a third party and a relocation of the ground. 2 *Lindley on Mines*, § 651; 1 *Snyder on Mines*, § 560; *Morrison's Mining Rights*, p. 128.

"Although the owner of a location has failed to do the necessary assessment work, so that the ground is subject to a relocation, yet if, before any such relocation by others, he perform the amount of assessment work required by the statute, then his rights are revived, and a subsequent relocation is invalid." *Justice Mining Co. v. Barclay et al.* (C. C.) 82 Fed. 554.

So that at the time the appellee attempted a relocation of the mine the appellant's interest therein had not forfeited, but was only subject to forfeiture. The proofs of assessment work made by appellant were filed on the 31st day of December, from which it might be inferred that, depending upon appellee to do this assessment work, the making of these proofs was delayed until it was impossible to do other work. This, however, would be immaterial as the rights of the appellant would be intact except for the unlawful acts of the appellee.

Other questions are raised which we do not find it necessary to decide.

The motion for rehearing will be denied, and the judgment of the court will be reversed, and the cause remanded, with instructions to enter judgment for the appellant, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

On Second Motion for Rehearing.

BRICE, District Judge. I. Appellee contends that the Supreme Court had no jurisdiction to entertain or consider this appeal, because it was allowed more than one year after the rendition and entry of the final judgment. This question was heretofore raised in this case on the 19th day of September, 1918, by a motion to dismiss. This motion was overruled without an opinion on January 8, 1919, under the authority of *Romero v. McIntosh*, 19 N. M. 612, 145 Pac. 254, and no motion for rehearing of that question was filed. Thereafter the case was submitted on its merits, and reversed and rendered in favor of the appellant on August 19, 1919, and a motion for rehearing was overruled February 14, 1921. This question was not raised in appellee's original brief on the

merits, nor in his motion for rehearing, and now it is sought to have us review our original action in overruling the motion to dismiss this appeal by a second motion for rehearing on the merits. Under these circumstances, this court will not, at this time, review its former action.

[4] IL It is further contended that no issue appears in the pleadings that would authorize the Supreme Court to consider the question of whether or not there existed such fiduciary relations between appellant and appellee, as would preclude appellee from making a relocation. The trial court decided this question, and by agreement of appellee permitted appellant to file an amended reply raising this issue. The district court having determined the question, and it having been presented to the Supreme Court in the briefs of both parties, the issue was properly before the Supreme Court. *Canavan v. Canavan*, 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064.

III. The third point raised is to the effect that there is nothing in the testimony offered by plaintiff to sustain its claim of estoppel against defendant that would preclude the defendant from making relocations. This question has been heretofore thoroughly considered by the court and its decision based thereon. Our reasons are given at length in the opinion filed upon the first motion for rehearing, and we find no reason for changing the views expressed in that opinion, and adhere thereto.

The second motion for a rehearing is overruled, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(27 N. M. 41)

JONES v. ROCKY CLIFF COAL MINING CO. (No. 2405.)

(Supreme Court of New Mexico. Jan. 24, 1921.
Rehearing Denied June 4, 1921.)

(Syllabus by the Court.)

I. Deeds 32—Quitclaim deed held to pass title as against previous warranty deed in blank as to grantee.

A. and wife owned certain property. They executed a warranty deed in blank as to grantee and delivered it to B., the president of a corporation C., who kept it unchanged for six years, and then had O.'s name written in as grantee and recorded. In the meantime D., who claimed to be the intended grantee in the original deed, secured and recorded a quitclaim deed from A. and wife conveying to her said property for the nominal consideration of \$1, while the original deed was still in the possession of B., with no grantee named. B. was acting both for the corporation and for D. in the transaction, and neither C. nor D. knew

of the other's claim. Held that, at the time of the execution and delivery of the quitclaim deed, the warranty deed was ineffective as a conveyance, and the title, being in A. and wife, passed by the quitclaim deed to D., and this notwithstanding the consideration therefor was only nominal.

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

2. Frauds, statute of 129(5)—Under parol agreement to convey, payment of full purchase price insufficient to vest equitable title in purchaser.

Under a parol agreement to convey land, the payment of the full purchase price, without some further part performance, such as delivery of possession, the making of valuable improvements, etc., is not sufficient to vest an equitable title in the purchaser.

Appeal from District Court, McKinley County; Raynolds, Judge.

Suit by Annie A. Jones against the Rocky Cliff Coal Mining Company and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Statement of the Case.

This is a suit to quiet title in statutory form brought by Annie A. Jones, appellee, against the appellant, Rocky Cliff Coal Mining Company, and others. The defendants with the exception of appellant made default. Appellant answered denying title in appellee, asserting title in appellant, and praying that title be quieted in it. The case was tried to the court, a judgment entered quieting title to the property in the appellee (plaintiff), from which the appellant (defendant) appeals.

Statement of the Facts.

On August 1, 1910, Elmer and Ellen Wilson, his wife, were the owners of lots 17 to 24, inclusive, of block 26, of the Railroad addition to the town of Gallup. On that day they executed a warranty deed for said premises in which the name of the grantee was left blank. The deed after execution was left with Sam Bushman, the attorney who prepared it, for two years, and then by him delivered to the defendant Stephen Canavan, who during all this time was president of the appellant, the Rocky Cliff Coal Mining Company, a corporation, which he apparently controlled. This deed was in the possession of Canavan unchanged until about two years prior to the trial of this case in the district court in December, 1918.

Canavan, at the time the Wilsons executed the deed last mentioned, was indebted to the appellee, Annie A. Jones, in some sum of money, and he agreed with her to purchase for her the lots in question in consideration

of the cancellation of this indebtedness. After the deed mentioned was obtained by Canavan, he showed it to the appellee, stating to her that it was her deed, and that he would keep it safely for her. Nothing was said between them as to the name of the grantee not appearing therein. The appellee paid the taxes on the property from the time the deed was made until the trial of the case. It does not appear that either the appellant or appellee ever went into actual possession of the property.

In the year of 1915 there was some disagreement or difficulty between the appellee and Canavan in El Paso, at which time some threats were made, from which appellee inferred that Canavan intended to deprive her of the property, and upon the advice of counsel appellee secured from Wilson and wife, the grantors in the original deed, a quitclaim deed to the same property for the nominal consideration of \$1. At the time this quitclaim deed was executed and delivered to appellee (on July 11, 1916), the original deed mentioned was still in the possession of Canavan unchanged, with no grantee named therein. Thereafter Canavan requested Bushman, who had written the original deed, to write the name of the appellant, the Rocky Cliff Coal Mining Company, therein as grantee, which Bushman did. This occurred late in 1916, and was filed for record in September, 1917.

Canavan testified that the property was purchased for the appellant, the Rocky Cliff Coal Mining Company, paid for with its money by check upon its bank account for \$300, drawn by him, and the grantee's name left blank on account of financial troubles of himself and the corporation. This testimony is corroborated in a vague sort of way by the attorney Bushman, who wrote the deed. He testified in substance that he wrote the deed and that the deed was executed in his office and he saw it executed and delivered to Canavan by Mrs. Wilson; that his recollection was that \$300 consideration was paid, and "as near as I remember a check was given by Canavan, and I think it was the Rocky Cliff's check, signed by him, given to Mrs. Wilson"; that the name of the grantee was left blank at the direction of Canavan; that he could only state his impression from the conversation who was the actual grantee. "I gathered the impression at the time from the conversation that occurred that Mr. Canavan was buying for the Rocky Cliff Coal Company."

Upon cross-examination the following testimony was elicited by attorney for appellant from appellee:

"Q. Don't you know whether or not you gave anything for this quitclaim deed, plaintiff's Exhibit G? A. I think she said to me you have already paid for this, but to make it legal pay the dollar, and it is good, for it is already paid for.

"Q. Who said that? A. My lawyer.

"Q. Mrs. Pearce? A. Yes, or words to that effect.

"Q. You don't know whether she gave the dollar for it or not? A. I suppose she did; I don't know.

"Q. You didn't talk to Mrs. Wilson about it when you got that deed? A. I talked to her about making it for me. Would she be willing to do that. While it was not necessary—Mr. Canavan hadn't given me the deed.

"Q. Did she say she would give it to you? A. She said yes, she knew it had been bought for me.

"Q. Did she ask you to pay her any thing for it? A. No, she didn't ask me. She said it had been paid for. I cannot remember what she did say about it. I know she said that much."

J. O. Seth, of Santa Fé, for appellant.

E. A. Martin and McFie & Edwards, all of Gallup, for appellee.

BRICE, District Judge (after stating the facts as above). [1] Many assignments of error are advanced in this court, but it will be unnecessary to consider them separately. If there was error in the admission of testimony, it was harmless, as will be seen from the view we take of the case.

At the time the quitclaim deed was made to appellee, the title was in the grantors named in that deed, for until some name was inserted as grantee in the original deed it was ineffective as a conveyance.

"The deed in blank passed no interest, for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. * * * There are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." *Allen v. Withrow*, 110 U. S. 123, 3 Sup. Ct. 523, 23 L. Ed. 90.

Even though the deed was delivered to the corporation, and it had implied authority to fill in its name as grantee, following the rule of some courts (1 Dev. on Real Estate [3d Ed.] § 457), there is no evidence from which the court could infer the corporation authorized its name to be inserted as grantee in the deed. But assuming that the corporation did authorize Canavan to authorize Bushman to fill in its name as grantee in the deed, at the time this was done the appellee had obtained title through the quitclaim deed from the Wilsons. *Mable-Lowrey Hdwre. Co. v. Ross et al.* (N. M.) 189 Pac. 42. The consideration of \$1 given for the quitclaim deed is sufficient consideration to pass title, unless it was made in bad faith. 2 Dev. on Real Estate (3d Ed.) §§ 813, 814. Whether or not a purely nominal consideration is a sufficient protection of a bona fide purchaser against a holder of an unrecorded deed is

not necessary to determine (*Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 N. E. 994, 31 Am. St. Rep. 809); for it is our conclusion that, at least until the grantee's name had been inserted in the original deed, the title remained in the Wilsons, for the deed was ineffective until some grantee was named therein. *Allen v. Withrow*, supra; *Board of Education v. Hughes*, 118 Minn. 404, 136 N. W. 1095, 41 L. R. A. (N. S.) 637.

The deed under which appellant claims being ineffective as a conveyance at the time of the execution and delivery of the deed to appellee, and she having no knowledge of any interests of the appellant in the property, the quitclaim deed conveyed a good title.

Courts have long disagreed over the construction of deeds executed without a grantee being named therein. Some hold that such a deed is absolutely void; others that an agent duly authorized in writing only could fill in the name of the grantee; others that parol authority could be given, but the grantee's name must be written in before delivery; others that such parol authority could be exercised after delivery; others that the delivery of such a deed would carry with it implied authority for the intended grantee to fill in his own name as grantee at any time. The most extreme cases are to the effect that when such deed is duly executed and delivered to the intended grantee, who long thereafter held the property in actual, open, adverse possession, that such possession coupled with the deed was effective in passing title, although the name of the grantee was never supplied.

The following authorities contain the several views of the courts on the subject: *Barden et al. v. Grace et al.*, 167 Ala. 453, 52 South. 425, Ann. Cas. 1912A, 537 and note at page 538; *Allen v. Withrow*, 110 U. S. 128, 3 Sup. Ct. 517, 28 L. Ed. 90; *Montgomery v. Dresher*, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. (N. S.) 423 and note; *Guthrie v. Field*, 85 Kan. 58, 116 Pac. 217, 37 L. R. A. (N. S.) 326; *McGrew v. Lamb*, 60 Colo. 463, 154 Pac. 91; *U. S. v. Lumber & Mfg. Co.* (D. C.) 198 Fed. 893; *Reed v. Reed*, 98 Miss. 354, 53 So. 691, Ann. Cas. 1913A, 1194; *Lafferty v. Lafferty*, 42 W. Va. 789, 26 S. E. 264; *Cribben v. Deal*, 21 Or. 215, 27 Pac. 1047, 28 Am. St. Rep. 749; *Sayles v. Quelrolo*, 71 Misc. Rep. 566, 130 N. Y. Supp. 806; 3 *Washburn on Real Property* (8th Ed.) § 2091; 2 *Tiffany on Real Property*, § 434 (p. 1597), also section 461 (p. 1745); *Board of Education v. Hughes*, 118 Minn. 404, 136 N. W. 1095, 41 L. R. A. (N. S.) 637; *Vanderbilt v. Vanderbilt*, 54 How. Prac. 250; 1 *Devlin on Real Estate* (3d Ed.) § 457; *Osby v. Reynolds*, 260 Ill. 576, 103 N. E. 556, Ann. Cas. 1914D, 387, and note at page 390; *Threadgill v. Butler*, 60 Tex. 599; 8 R. C. L. p. 956.

We do not find it necessary to pass upon this question, as the deed under which appellant claims contained the name of no

grantee, nor was he ever in possession of the property so far as the record shows, at the time of the execution, delivery, and recording of the quitclaim deed to appellee; and this falls short of coming within any of the rules of construction we have found.

It follows that the judgment of the district court ought to be and is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

On Motion for Rehearing.

BRICE, District Judge. The appellant has filed a motion for rehearing, in which it is claimed that at the time the quitclaim deed was made to appellee the appellant had the equitable title to the property in controversy, which equitable title was created by or resulted from appellant's paying the Wilsons the purchase price for said premises, together with the fact of the execution of the deed by the Wilsons with the name of the grantee blank and its delivery to appellant.

Assuming that the quitclaim deed, bearing a nominal consideration, was not effective as against a prior equitable title (which question it is unnecessary to decide), then, if appellant was possessed of such equitable title at the time of the execution and delivery of the quitclaim deed by appellee, it would appear that appellant's motion for a rehearing should be sustained.

[2] Under a parol agreement to convey land, the payment of the full purchase price without some further part performance, such as delivery of possession, the making of valuable improvements, etc., is not sufficient to vest an equitable title in the purchaser. *Ward v. Stuart*, 62 Tex. 333; *Grindling v. Rehl*, etc., 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466; 5 *Pomeroy, Equity Jurisprudence*, § 2246; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; *Note to Houston v. Townsend*, 12 Am. Dec. 120; *Osborne v. Osborne*, 24 N. M. 96, 172 Pac. 1039; *Scheuer v. Cochran*, 126 Wis. 209, 105 N. W. 573, 4 L. R. A. (N. S.) 427; 25 R. C. L. 68.

If an equitable title was vested in appellant, it must necessarily have resulted, either from the execution and delivery of the deed with the grantor's name left blank, or else on account of the payment of the purchase money, together with the execution and delivery of such deed. We are assuming, for the sake of argument, that such payment was made by appellant, and that the deed in question was delivered to it with authority, express or implied, to fill in its name as grantee, and, acting under such authority, it authorized Bushman to fill in its name. That there is authority for the contention of the appellant is found in decisions of the Texas courts:

"Here it clearly appears that the purchase money was paid to McDonough, and that the

sale and conveyance was, in every respect, complete, save that the name of the grantee was not inserted in the deed. It also appears that it was intended by the parties that the title should vest in Latham at once, and he was expressly authorized by McDonough, at the time the deed was delivered, to insert his own, or any other, name in the deed as grantee. This was a power coupled with an interest vested by McDonough in Latham for the benefit of the latter, and is therefore irrevocable." *Threadgill v. Butler*, 60 Tex. 601.

And this case was followed by the Court of Civil Appeals of Texas in the case of *Schleicher v. Runge et al.*, 37 S. W. 982, and *Fennimore v. Ingham*, 181 S. W. 513.

In the *Threadgill* Case, just quoted from, Latham, after a sale of the property to Butler, wrote his name in as grantee in a deed from McDonough to Latham. In that suit by the heirs of McDonough against Butler, which was brought after the deed had been properly corrected, it was held that Latham still had power to perfect the instrument by inserting his name as grantee. This case would not be authority in the case at bar because the quitclaim deed to the appellee had been executed before the insertion of the appellant's name as grantee.

The case of *Schleicher et al. v. Runge et al.* (Tex. Civ. App.) 37 S. W. 982, would seem to support appellant's contention, for it is held that, notwithstanding the name of the grantee was never filled in during his lifetime, his heirs were entitled to recover the land from the heirs of the grantor; and the same conclusion was reached by the Court of Civil Appeals of Texas in the case of *Fennimore v. Ingham*, *supra*. If the conclusion of the Texas Court of Civil Appeals is correct, then our original opinion is not the law. In the early days of Texas, it became a custom to transfer real property by the execution and delivery of deeds with the grantee's name in blank, with authority to write in the name of the grantee or any other name as grantee in such conveyance, and title was passed by delivery of the deed until some purchaser inserted his own name therein. It is believed that this custom affected land titles to such a degree that Texas courts took this into consideration in adopting this rule (*Schleicher v. Runge*, 37 S. W. 982); but we are unable to assent to the doctrine laid down in these decisions.

If the deed in question conveyed any title, it was a legal title. We have held such deed to be void, at least until the intended grantee's name was supplied. If void, then such deed was ineffective as a conveyance; a nullity. If a nullity, title to the property was not affected by its execution and delivery. We cannot see how efficacy could be given to it by reason of the fact (if it be a fact) that appellant had paid the purchase money. The payment of the purchase money was inef-

fective to transfer the equitable title, and the void deed did not add to its efficacy. 2 *Tiffany on Real Property* (2d Ed.) § 461, p. 1145; also section 434, p. 1597; 25 R. C. L. 655; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366.

Our conclusion is that no equitable title was vested in appellant at the time of the execution and delivery of the quitclaim deed to appellee, for which reason the motion for rehearing should be, and is, denied.

ROBERTS, C. J., and PARKER, J., concur.
REYNOLDS, J., having heard the case below, did not sit.

(27 N. M. 50)

JONES v. ROCKY CLIFF COAL MINING CO.
(No. 2406.)

(Supreme Court of New Mexico. Jan. 24, 1921.)

(Syllabus by the Court.)

Deeds — 193—Claimant of real property under deed executed in blank held to have burden of justifying insertion of name.

One claiming title to real estate under a deed ineffectual as a conveyance because executed with the name of the grantee in blank, but whose name was later inserted as grantee, is burdened with the proof of explaining and justifying such change in the instrument, to give it validity as a conveyance.

Appeal from District Court, McKinley County; Reynolds, Judge.

Suit by Annie A. Jones against the Rocky Cliff Coal Mining Company and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Statement of the Case.

This is a suit to quiet title in statutory form brought by Annie A. Jones, appellee, against the appellant, Rocky Cliff Coal Mining Company, and others. The defendants with the exception of appellant made default. Appellant answered denying title in appellee, asserting title in appellant, and praying that title be quieted in it. The case was tried to the court, a judgment entered quieting title to the property in the appellee (plaintiff), from which the appellant (defendant) appeals.

Statement of the Facts.

It is conceded by the briefs of both parties that Elizabeth G. Kunz and husband, O. W. Kunz, were the owners of the property in question on the 16th day of June, 1916. The evidence shows them to be the common source from which both the appellant and appellee claim title. Prior to the 16th day of

June, 1903, the appellee gave Canavan \$650 with which to purchase said property. At this time appellee was employed by Canavan and a more or less confidential relation existed between them. Thereafter Canavan exhibited to appellee a warranty deed executed by said Elizabeth Kunz and husband purporting to convey said property, in which the name of the grantee was left out; stating to her that the deed was hers; that he would hold it for her for safe-keeping. She went immediately into actual possession of the property and resided on it until some time in 1913 or 1914, and thereafter rented it and collected the rent from tenants occupying the property holding under her until January 11, 1918; during all of which time she paid all taxes thereon.

The only evidence introduced by appellant Rocky Cliff Coal Mining Company was the deed originally taken by Canavan, which had been changed by inserting therein the name of said Rocky Cliff Coal Mining Company as grantee. This deed recited a consideration of \$650. It was filed for record in February, 1917. The name of appellant as grantee was supplied at some time between the date of its being exhibited to appellee after delivery to Canavan by the grantors, and the date of its record in 1917. The appellee had no actual knowledge of any claim of appellant to the property prior to the recording of this deed. There is no testimony to show who the grantor intended should be grantee in said deed; to whom it was delivered; who, if any one, was authorized to fill in the name of the grantee; the consideration, if any, paid by appellant; the reason the grantee's name was left blank; how the appellant secured possession of the deed; when or by whom its name was supplied as grantee.

In the year of 1915 the appellee and Canavan had some sort of difference in El Paso, Tex., at which time Canavan made threats from which appellee inferred that he intended to deprive her of this property. Thereupon, acting on advice of her attorney, she secured a quitclaim deed from Elizabeth G. Kunz and husband, grantors in the original deed, reciting a nominal consideration of \$1. This deed was dated June 15, 1915, and was filed for record June 19, 1915, and recorded the same day.

J. O. Seth, of Santa Fé, for appellant.

E. A. Martin and McFie, Edwards & McFie, all of Gallup, for appellee.

BRICE, District Judge (after stating the facts as above). This is a companion case to cause No. 2405 (198 Pac. 284) between the same parties and decided at this term of the court.

At the time Canavan exhibited the deed to appellee, it had been executed by the grantors named therein, but was blank as to grantee.

This was in 1903. It next appears at the trial of this case many years later with the name of appellant written in as grantee. In its original state this deed was ineffectual as a conveyance (*Jones v. R. C. Coal M. Co. et al.*, supra), and the burden was on appellant at the trial to explain and justify the change, which it did not meet. Devlin on Real Estate (3d Ed.) §§ 456, 456A, and 463; *Jones v. Rocky Cliff Coal Mining Co. et al.*, supra.

The quitclaim deed from Elizabeth Kunz and husband to appellee was sufficient proof of title in her, as against appellant's claim.

No substantial error appearing, this cause ought to be and is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(22 Ariz. 418)

MOON v. STATE. (No. 501.)

(Supreme Court of Arizona. June 7, 1921.)

1. Burglary \Leftrightarrow 41(1)—Evidence held to sustain conviction.

In burglary prosecution, evidence held to sustain conviction of first degree burglary.

2. Criminal law \Leftrightarrow 472—Finger prints admissible.

Evidence of the correspondence of finger print impressions for the purpose of identification, when introduced by qualified finger print experts, is admissible in criminal cases; the weight and value of such testimony being for the jury.

3. Criminal law \Leftrightarrow 388—Finger print test held proper.

In burglary prosecution where the state introduced copies of finger print impressions left at the scene of the crime to identify accused by comparison with his finger prints, a demonstration or test of a finger print expert with finger prints of the jurymen held proper, under the rule giving to the trial court discretion as to experimental testimony.

4. Criminal law \Leftrightarrow 490—Allowing finger print expert on redirect examination to relate experience in other cases not error.

In burglary prosecution, where accused was identified by his finger prints, and, on searching cross-examination sought to impeach a witness as a finger print expert, it was proper to allow the witness on redirect examination to relate his experience in other cases.

5. Criminal law \Leftrightarrow 1170½(1)—Error in questioning expert about details of other cases held not reversible.

In qualifying a witness as a finger print expert, error in questioning him about the particulars of other cases within his observation, which tended to introduce collateral issues, held of a technical nature not calling for reversal.

6. Criminal law §393(1)—Introduction of finger print photographs held not compelling accused to give evidence against himself.

In burglary prosecution, where accused had voluntarily suffered the taking of his finger print impressions which were photographed, and there was no claim of force or improper duress in taking the finger prints, there was no violation of accused's constitutional rights, as compelling him to give evidence against himself, in suffering the photograph to be introduced in evidence.

7. Criminal law §144(12)—Presumption on appeal that ruling of court was obeyed.

In burglary prosecution, where, upon the introduction of a card containing a photograph of finger prints of the accused previously taken by the San Francisco Bureau of Identification, which card also contained the criminal record of accused, the court ruled that the card would be admitted only upon covering the written part so as to render the printing thereon invisible, but the record did not show what was done in respect to concealing the printed matter when the card was introduced, it would be presumed on appeal that the ruling was obeyed.

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Charles Moon was convicted of burglary, in the first degree, and appeals. Affirmed.

The defendant has appealed from a judgment of the superior court of Cochise county, whereby he was convicted of the offense of burglary in the first degree, and pursuant to which he was sentenced to the state prison at Florence for an indeterminate period of not less than 5 nor more than 15 years.

The facts are substantially as follows: John Treu's butcher shop, situated in Bisbee, was burglarized, in the nighttime, on the 6th of September, 1919. The safe in the shop was broken open and rifled and about \$1,700 to \$1,750, belonging to John Treu, was stolen. The cash register was removed a few feet from the counter and broken.

On the following morning the sheriff of Cochise county, together with others, carefully examined the premises, at the scene of the burglary. It appears that the sheriff had had previous experience with finger printing, and that he at once examined the doors of the safe and tools and other surfaces upon which he might reasonably expect to develop finger prints; that among other things he discovered finger prints upon a porcelain slab on the front of the cash register which had been removed from the counter to the floor; that upon the development of the finger prints upon this porcelain slab it was seen that a right hand had been laid upon this slab leaving the impression of four fingers, the entire print being sufficiently clear to distinguish the impression of the four fingers. However, the impression of two of the fingers, to wit, the index and little

fingers, were blurred beyond possibility of identification. The print of the middle finger was blurred at the center, but on development well-defined ridges were found along the margin of this finger print. The print of the ring or third finger, however, was exceptionally perfect—perfect in the sense that it was approximately a complete and perfect picture of what is technically called a "dab" impression of the end of the ring finger of the right hand. The officer caused the finger prints to be carefully photographed by a competent photographer and the photograph of the print, together with the original slab, was positively identified and introduced in evidence in the case. One of the officers, who aided in the preliminary examination of the premises, discovered a piece of human skin adhering to a closet door situated alongside the safe which had been broken open; that this piece of skin which he found was bloody, and that drops of blood were found upon the closet door at and about the place where the piece of human skin adhered to the door; that blood was spattered over the front door of the safe and about the interior of the safe, so that it was obvious that the same person who had rifled the safe had injured some part of his hand, and that working about and in the safe the wound had bled sufficiently to have sprinkled drops of blood.

The officers at once made search about the town for a man whose hand had been hurt, and soon ascertained that the defendant had an injured hand, and he was thereupon arrested and taken to the sheriff's office where his hand was examined and finger prints taken without any objection upon his part.

Upon examining the defendant's hand it was noticed that there was a similarity between the wound on his hand and the piece of skin found at Treu's butcher shop. One of the officers brought the piece of skin and compared it with the wound. The piece of skin was submitted to a doctor, who also compared it with the wound. Both the officer and the doctor testified that the piece of skin conformed to the wound upon the right hand of the defendant.

Enlargements of the photograph of the finger print on the porcelain slab and of the actual finger print of the defendant were made for the purposes of comparison and submitted to five finger print experts, each of whom testified that the finger print upon the porcelain slab was made by the hand of the defendant.

Louis B. Whitney and Alexander B. Baker, both of Phoenix, for appellant.

R. N. French, Co. Atty., of Tombstone, and the Attorney General, for the State.

BAKER, J. (after stating the facts as above). [1] Error is assigned upon the usual

ground that the evidence is insufficient upon which to base the conviction or sustain the judgment. After a very careful review of the evidence in the case, we fail to see any merit in the assignment. The evidence for the prosecution rests principally upon the correspondence or exactness of certain "finger prints." This evidence was introduced by several expert witnesses, who testified in detail as to their study of and inquiry into the subject of finger prints as a means of identification. They claimed to have made a close study of the subject, to have had extensive, practical experience in the comparison of finger print impressions, and to be able by comparison of enlarged photographs of finger prints to determine questions of identity, claiming that it furnished an accurate means thereof, since "never in the world were there two sets that exactly corresponded." The experts agreed in their testimony that the admitted finger print impressions of the defendant corresponded exactly with the finger print impressions appearing upon the porcelain slab of the cash register which the proof showed had been attempted to be rifled at the time the safe was burglarized and the money stolen, and that these impressions were made by the same person. The additional evidence that the defendant had a bleeding wound upon his right hand, early in the morning after the commission of the burglary, and that the piece of human skin found adhering to the closet door situated alongside of the safe which had been broken open corresponded with the wound upon the defendant's hand, tended also to connect the defendant with the commission of the crime.

The defendant does not deny that the safe was burglarized, but he claims that during the whole time he was so far from the place where the crime was committed that he could not have participated in it. He attempts to explain the wound on his hand by saying that he received it while cutting some kindling on the morning after the burglary. Of course, evidence of this character conflicted with the evidence for the prosecution, but it was for the jury to settle this conflict. There can be no doubt, if the evidence for the prosecution was true, that the defendant was present at the scene of the burglary and committed the crime.

[2] The case is one of first impression in the courts of this state and is a novel one, although students of the science claim that the use of finger prints in making personal identification was known to the Chinese before the birth of Christ. They claim that a finger print is "an unforgeable signature" and is the most positive and certain means of identification known to men. Mr. Frederick A. Brayley, in his work entitled "Finger Prints Identification," uses the following emotional language:

"'God's finger-print language,' the voiceless speech and the indelible writing imprinted on the fingers, hand palms, and foot soles of humanity by the all-wise Creator for some good and useful purpose in the structure, regulation, and well-being of the human body, has been utilized for ages before the civilization of Europe as a means of identification by the Chinese, and who shall say is not a part of the plan of the Creator for the ultimate elimination of crime by means of surrounding the evily disposed by safeguards of prevention, and for the unquestionable evidence of identity in all cases where such is necessary, whether it be in wills, deeds, insurance, or commercial mediums of finance, as well as in the discovering and identification of lawbreakers."

It seems to be well settled, both in England and in this country, that evidence of the correspondence of finger print impressions for the purpose of identification, when introduced by qualified finger print experts, is admissible in criminal cases; the weight and value of such testimony always being a question for the jury.

The historical facts and the more recent legal decisions upon the subject are collated in a very able opinion handed down by Wadhams, J., in the case of *People v. Sallow*, reported in 100 Misc. Rep. 447, 165 N. Y. Supp. 915-925, which we here reproduce in part:

"* * * Scientific authority declares that finger prints are reliable as a means of identification. 10 Ency. Brit. (11th Ed.) 376. The first recorded finger prints were used as a manual seal, to give a personal mark of authenticity to documents. Such prints are found in the Assyrian clay tablets in the British Museum. Finger prints were first used to record the identity of individuals officially by Sir William Herschel, in Bengal, to check forgeries by natives in India in 1858. C. Ainsworth Mitchell, in 'Science and the Criminal,' 1911, p. 51. Finger print records have been constantly used as a basis of information for the courts since Sir Francis Galton proved that the papillary ridges which cover the inner surface of the hands and the soles of the feet form patterns, the main details of which remain the same from the sixth month of the embryonic period until decomposition sets in after death, and Sir Edward Henry, the head of the Metropolitan Police Force of London, formulated a practical system of classification, subsequently simplified by an Argentine named Vucetich. The system has been in general use in the criminal courts in England since 1891. It is claimed that by means of finger prints the metropolitan police force of London during the 13 years from 1901 to 1914 have made over 103,000 identifications, and the Magistrates' Court of New York City during the 4 years from 1911 to 1915 have made 31,000 identifications, without error. Report of Alfred H. Hart, Supervisor, Fingerprint Bureau, Ann. Rep. N. Y. City Magistrates' Courts, 1915. Their value has been recognized by banks and other corporations, passport bureaus of foreign governments, and civil service commissions as a certain protection against impersonation.

"It was held in 1909 by the Lord Chief Jus-

tice of England that the court may accept the evidence of finger prints, though it be the sole ground of identification. *Castleton's Case*, 3 Crim. App. C. 74. In *People v. Jennings*, 252 Ill. 534, 549, 96 N. E. 1077, 1082 (43 L. R. A. [N. S.] 1206), Mr. Chief Justice Carter, in holding such evidence admissible, states that: "There is a scientific basis for the system of finger print identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it."

"And in *People v. Roach*, 215 N. Y. 592, at page 604, 109 N. E. 618, page 623 (Ann. Cas. 1917A, 410), Mr. Justice Seabury said: 'In view of the progress that has been made by scientific students and those charged with the detection of crime in the police departments of the larger cities of the world, in effecting identification by means of finger print impressions, we cannot rule as a matter of law that such evidence is incompetent. Nor does the fact that it presents to the court novel questions preclude its admission upon common-law principles. The same thing was true of typewriting, photography, and X-ray photographs, and yet the reception of such evidence is a common occurrence in our courts.'"

See, also, the recent case of *State v. Kuhl*, 42 Nev. 185, 175 Pac. 190, 3 A. L. R. 1694. See further *State v. Cercello*, 86 N. J. Law, 309, 90 Atl. 1112, 52 L. R. A. (N. S.) 1010; *State v. Connors*, 87 N. J. Law, 419, 94 Atl. 812; *Parker v. Rex*, 14 C. L. R. (Austr.) 681, 3 B. R. C. 68; *Rex v. Morris* St. R. Qd. 274.

We are cited to the case of *McGarry v. State*, 82 Tex. Cr. R. 597, 200 S. W. 527, where it is held that finger print impressions were insufficient to support the conviction. The case, however, is clearly distinguishable from the present case. It was a burglary case in which entry was made by breaking window glass from the outside and unfastening the door from the inside. The defendant's finger prints were found upon the window glass and identified with substantial certainty, and he was convicted upon that evidence alone. The evidence showed that this window was in a public place and that there were other finger prints upon the window glass. The court, in reviewing the case, held that it was possible for the defendant to have innocently placed his hand upon the window glass, and that consequently his presence at the window was a fact that was not inconsistent with the hypothesis of his innocence. But it cannot be said of this defendant that his presence at the cash register, as necessarily found by the jury, was consistent with any hypothesis of his innocence. The cash register was not in a public place. It had been removed and placed on the floor in an effort to rifle it. There were no finger prints other than the alleged finger prints of the defendant upon the porcelain slab. The facts of the two cases are entirely different.

[3] Complaint is made of alleged errors of the trial judge in the admission of evidence.

The expert witness Sanders was permitted to make the test of pairing the finger prints of the 12 jurymen which consisted of taking two prints in duplicate on separate cardboards of the finger prints of the 12 jurymen in the absence of the expert, who upon returning to the room, in the presence of the court and jury, developed the finger prints of the jurymen by means of finger print powder and correctly paired the cards off by comparing the finger prints as developed. It is not claimed that the test was made under conditions different from the conditions actually existing in the case, or that there was any trick or device about the test or anything which smacked of a sleight of hand performance. It seems to have been a fair proposition, fairly conducted, and tended, as we think, to illustrate the methods of the system of finger print identification and the truth of the claim that invisible finger prints can be developed and identity of the maker revealed by simple process to positive certainty. In the present instance the evidentiary value of the abstract explanation of the methods of the system of developing finger print impressions given by the expert witnesses was probably difficult for the jury to grasp. To most of us it is very hard to conceive that there cannot be two fingers that are exactly alike. But as the methods of the system were susceptible of actual demonstration by means of a test, we can see no reason why such test should not be made. Upon the point we reproduce the reasoning of counsel for the state:

"To a layman, unsophisticated and incredulous, the idea that a finger laid on a clean sheet of paper, leaving no visible trace, thereby leaves a signature upon that paper, absolutely and positively is a fact startling enough, but to see that finger print developed under the finger print powder is a demonstration impressive and convincing. It might well be that until a jurymen witnessed this demonstration he would never believe that a plain porcelain slab would reveal the incriminating finger print, but having seen their own finger prints developed from invisible impressions on sheets of paper, it was no longer a question of speculation; it was to the jurymen a fact as commonplace as radium or wireless or flying in the air."

For obvious reasons the admission of experimental testimony must largely rest in the discretion of the trial judge, and the exercise of this discretion will not be controlled unless it is manifestly abused.

[4] The expert witness Evans, over the objection of the defendant, was permitted, on redirect examination, to detail the circumstances and facts in certain other cases, in which he was engaged and in which finger print evidence was used. This procedure is assigned as error. The record discloses that the defendant on searching cross-examination sought to impeach the qualification of the

witness as an expert upon the subject of comparing finger print impressions, and thus throw doubt upon his testimony. Throughout the trial it seems to have been insisted that there was no such science as that of finger print identification. Under such circumstances, the value and weight of the testimony of the expert witness became a question of prime importance before the jury, and we therefore think it was proper procedure to allow the witness on redirect examination to relate his experience in other cases in which he had been employed as a foundation for his opinion as an expert that the finger print impressions on the porcelain slab corresponded with the finger print impressions of the defendant. We do not think that the order in which the testimony was elicited is of great importance. The real question is: Was it admissible at all? Mr. Wigmore, in his work on Evidence (volume 1, par. 555), under the convenient heading of "General Theory of Experiential Capacity," says:

"In experience, then, are included all the processes—the continual use of the faculties, the habit and practice of an occupation, special study, professional training, and the rest—which contribute to produce a fitness to acquire accurate knowledge upon a given subject."

Again at paragraph 562 of the same volume, the learned author says:

"The experiential qualifications of a witness are usually established by his own testimony reciting the facts of his career and special experience."

[5] The facts and circumstances of the other cases were too minutely recited and should have been omitted. In this sense the procedure was probably violative of the rule that an expert may not be questioned about the particulars of other cases which have happened to come within his observation because it tends to introduce collateral issues (Rogers on Expert Testimony, par. 35), but the error was of a technical nature under the peculiar facts of the case, and does not, in our opinion, call for a reversal of the judgment of conviction.

[6] The introduction of the finger print photographs for comparison or identification is assigned as error. The question of using finger print photographs was raised in the case of *People v. Jennings*, supra, where the court said:

"When photography was first introduced it was seriously questioned whether pictures thus created could properly be introduced in evidence, but this method of proof, as well as by means of X-rays and the microscope, is now admitted without question. Wharton on Criminal Evidence (8th Ed.) § 544; 1 Wigmore on Evidence, § 795; Rogers on Expert Testimony (2d Ed.) § 140; Jones on Evidence (2d Ed.) § 581."

It is objected that it was error to admit in evidence the photograph of the finger

prints of the defendant for the reason that a defendant under the Constitution cannot be compelled to give evidence against himself. But the uncontradicted evidence shows that the defendant voluntarily suffered his finger print impressions to be taken which were photographed. There is no claim that any force or improper duress was used in taking the finger prints. It is clear that there was no violation of the constitutional rights of the defendant in suffering the photograph to be introduced in evidence. *People v. Sallow*, supra.

[7] An assignment of error is based upon the introduction in evidence of the state's Exhibits PP and QQ. Exhibit QQ is a photograph of the defendant. While the photograph was immaterial and its introduction superfluous and useless, yet we cannot perceive how its introduction could possibly be harmful to the defendant. PP is a photograph of the finger print impressions of the defendant taken in the San Francisco Bureau of Identification in March, 1918. On the opposite page of the card upon which the finger print impressions appear, and also under the finger print impressions on the same side of the card, appears the criminal record of the defendant, showing that he had been arrested for an assault and attempt to murder, etc. The contention here is that this exhibit tended to show the commission of a different offense than that charged in the information and had no connection with the case being tried and was prejudicial to the defendant. Upon a critical examination of the record, we find that when the exhibit was offered in evidence the court said:

"The ruling is the finger prints will be admitted and the card on which they are will be admitted only upon the written part being covered in such manner as to render the printing thereon invisible."

What was actually done in respect to concealing the printed matter on the card is not disclosed by the record. We must presume, however, that the ruling of the court was obeyed; there being nothing to the contrary. Hence we conclude that the jury never saw the printed matter on the card, and had no knowledge thereof.

The other questions argued by counsel have not been overlooked, but are not of controlling importance. We find no fault with the instructions. They fairly state the law and cover every phase of the case. The record, which, together with the able argument of counsel for the defendant, is quite voluminous, has had careful and thorough consideration, and we are not convinced that the defendant was denied a fair trial in the court below.

Finding no error, its judgment is therefore affirmed.

ROSS, C. J., and McALISTER, J., concur.

(82 Okl. 123)

PRINCE v. KING COAL CO. (No. 10010.)(Supreme Court of Oklahoma. Feb. 8, 1921.
Rehearing Denied May 31, 1921.)*(Syllabus by the Court.)*

1. Master and servant \Rightarrow 118(2)—Mine operator held not exempt from liability for destruction of employee's wearing apparel by fire.

Section 2, c. 125, Sess. Laws 1913, does not relieve a company operating a coal mine from civil liability to employees for the value of wearing apparel destroyed by a fire caused by the failure of such company, its agents and employees, to exercise ordinary care in preventing the fire which consumed its bathhouse and the clothing of its employees deposited therein, under the rules of the company while the employees were working in the mines, provided such employees were free from contributory negligence proximately causing their damage.

2. Statutory provisions.

Section 4766, Rev. Laws 1910, provides that, "in the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

3. Sufficiency of petition.

Record examined, and held that, in view of the foregoing rule, it was error for the trial court to sustain a demurrer to the petition of the plaintiff.

Kane and Miller, JJ., dissenting.

Appeal from Superior Court, Okmulgee County; R. E. Simpson, Judge.

Action by W. A. Prince against the King Coal Company. Judgment for defendant on demurrer, and plaintiff appeals. Reversed and remanded, with directions.

Morgan, Pinkston & Hepburn, of Henryetta, for plaintiff in error.

Jones & Foster, of Muskogee, for defendant in error.

JOHNSON, J. On the 23rd day of April, 1918, the court sustained a general demurrer of the defendant to plaintiff's bill of particulars filed herein. To reverse the judgment of the trial court sustaining said demurrer this proceeding in error was regularly commenced by the plaintiff in this court.

The defendant in error has filed no brief in this court as required by rule 7, nor has he given any reason why briefs have not been filed as required by said rule, and the court feels justified in dismissing, reversing, or affirming the judgment in its discretion, but in view of a peculiarity disclosed by the record we have considered the appeal upon its merits.

The record discloses that during the month of January, 1918, there were filed in the justice of the peace courts of Hon. R. B. Camp-

bell and Hon. W. Thomas, justices of the peace in and for Henryetta district of Okmulgee county at Henryetta, 64 cases wherein the plaintiffs prayed judgment against the King Coal Company, in various sums running from \$1.35 to \$42.50 each, aggregating a total sum of \$1,246.42.

The bills of particulars are in each case the same except as to the name and the amount prayed for. By stipulation of the parties and orders of the court regularly made, these cases were transferred to the superior court of Okmulgee county as aforesaid, in which court the following stipulations were filed:

"That the case of one of the defendants herein, to wit, W. A. Prince, may be tried in this court upon the bill of particulars filed by the said W. A. Prince * * * upon which said trial the said W. A. Prince may be treated as plaintiff, and the said King Coal Company as defendant."

It was further stipulated and agreed in said stipulation:

"That the claims of all the other defendants hereto shall abide the ultimate and final decision of W. A. Prince in said cause against said King Coal Company, as to all questions of fact and of law involved in said several suits or claims."

The bill of particulars was as follows:

"Comes now the plaintiff, and for cause of action against the defendant alleges and states: That the plaintiff is a resident of the county of Okmulgee, Okl.; that the defendant is a corporation organized and existing under the laws of the state of Oklahoma, and at all times hereinafter mentioned was operating a coal mine known as the King Coal Company at Dewar, Okmulgee county, Okl., and has property in said county and state, and that at all times hereinafter mentioned plaintiff was in the employ of the defendant as a coal miner, and worked in said mine; that in the operation of its said mine, and as a part thereof, defendant maintained a building as a washhouse or dressing room, wherein the employees of the defendant, and particularly this plaintiff, undressed before going down into said mine, and, after dressing in suitable clothing for the work in said mine, left their clothing for safe-keeping until they had finished their shift in said mine, and this plaintiff was compelled, during the course of his said employment, to leave his clothing in said washhouse or dressing room while working in said mine. Plaintiff alleges that it was the duty of this defendant to furnish a safe house or place to keep his said clothing while he was at work in said mine; that on the 3d day of December, 1917, this plaintiff, while working in the employ of this defendant, undressed in said washhouse or dressing room, and, after dressing in suitable clothing for his work as aforesaid, left his clothing, underclothing, shoes, and hat, all of the value of \$42.50, and entered upon his shift in said mine; that during said day, and while plaintiff was absent in said mine as aforesaid,

the washhouse or dressing room, without any fault of this plaintiff and through the carelessness and negligence of this defendant in failing to employ suitable means to prevent such fire, and by permitting a waste dump which had been burning for a long period of time to remain close to and attached to said washhouse, after this defendant had been notified of the danger of said washhouse from said burning dump, was burned, and the said clothing, underclothing, shoes, and hat of this plaintiff were burned and totally destroyed, all to his great damages in the sum of \$42.50.

"Wherefore plaintiff prays judgment against said defendant for \$42.50 and costs of this action."

Counsel for plaintiff say in their brief:

"The only questions presented to this court are: Does the bill of particulars state a cause of action, and did the court err in sustaining the demurrer thereto?"

"This necessitates a construction of section 2, c. 125, Session Laws 1913, p. 238, which reads as follows: 'No person, corporation or company, its agents, officers or representatives, maintaining such a bathhouse at * * * its mines as required in section 1 hereof, shall be legally liable for the loss or destruction of any property left at or in said bathhouse.'"

[1, 2] Prior to the passage of the act supra, the general laws regulating the operation of coal mines was chapter 54 of the Session Laws of 1907-08, and were carried forward in the Revised Laws 1910 as chapter 47, and section 4011 of the Statutes provided in substance that it should be the duty of the operator or the superintendent of any coal mine in this state at the request in writing of the mine inspector, who shall make such request upon petition of any five miners or other persons working therein, to provide a suitable building convenient to the entrance of such mine for the use of persons employed therein for the purpose of washing themselves and changing their clothing when entering and returning therefrom, the building to be maintained in good order and to be provided with proper light and heat and facilities for persons to wash and change their clothing, and proper facilities shall mean properly constructed lockers to protect clothing, a supply of hot and cold water and bathtubs, providing the workmen supply their own soap and towels. And section 4012 provided that any violation or failure to comply with any provision of the preceding section, or any person destroying any of the property provided for in said section, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in the sum of not less than \$10 nor more than \$100, or imprisonment in the county jail not less than 60 days, or both said fine and imprisonment.

Section 1 of chapter 125, Session Laws 1913, supra, amended section 4011 of the statute supra by making it mandatory upon any corporation or company owning and

operating or operating as lessee any mine wherein 10 or more miners are employed in digging coal to provide a washhouse as provided for in the original act, and section 2 of said chapter, quoted supra, follows, and section 2 provided penalty for failing, neglecting, or refusing to comply with the provisions of section 1, making such failure a misdemeanor, and upon conviction be fined in any sum not less than \$50 nor more than \$200 or imprisoned in the county jail for a period of not less than 10 and not more than 90 days, or both such fine and imprisonment, for each violation, and that each week such person fails and neglects to comply with the provisions shall constitute a separate offense, and section 4 of said act specifically repealed sections 4011 and 4012 of the statute supra.

At the time of the passage of chapter 125, Session Laws 1913, maintaining the provisions hereinbefore referred to, section 4014, c. 47, Rev. Laws 1910, supra, provided that for neglect, failure, or refusal to perform any of the duties required by any section of this chapter by any firm, association, corporation, person or parties required to perform them shall be a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$500 or imprisonment in the county jail for a period not exceeding 6 months or both, "and in addition thereto, such corporation or other mine operator violating any of the provisions of this chapter shall be civilly liable to any person injured thereby to the extent of such injury." Following this section, and as an annotation thereto, there appears the following: "History L. 1907-08, page 552, revision, provides that civil as well as criminal liability made definite."

The latter provision of the statute was in full force at the time of the enactment of chapter 125, Session Laws 1913, and said act did not by its terms repeal or purport to repeal the same, nor do we think that the Legislature intended to repeal the same for the reason that it specifically repealed two sections of the statutes upon the general subject which seemed to have manifested the intention to permit the remaining sections of the law to remain intact, and it was not the intention of the Legislature to relieve the class of persons enumerated in section 4014 of any civil liability, but criminal liability only, for the neglect, failure, or refusal to perform any of the duties required by any section of this chapter, and that section 2 of chapter 125, supra, construed together with section 4014, shows it was only intended to grant relief from liability for the loss or destruction of any property left at or in such bathhouse not occasioned through the act or omission of such firm, association, corporation, person, or parties required to perform the duties of maintaining such bathhouse. This is in conformity with other provisions of the statute

with which the provisions should likewise be construed. Section 998 provides:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

Also section 2845 provides:

"Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

Both of these provisions were taken from the Dakota statutes, being section 3603 and 4574 thereof, respectively, and have both been upheld by the Supreme Court of that state and this court in a long list of decisions entirely too numerous to cite in this opinion.

It seems clear to us that the bill of particulars in the instant case stated a cause of action against the defendant for negligently permitting fire to be communicated to the washhouse from the waste dump, an action in tort for negligently permitting a fire that destroyed the plaintiff's property situated where it had a right to be under any phase of the case, and it may be that the section of the act *supra* may have no application. This question has not been briefed.

[3] The trial court erred in sustaining the demurrer of the defendant. The judgment is therefore reversed, and the cause remanded, with directions to proceed further in accordance with the views herein expressed.

All Justices concur except KANE and MILLER, JJ.

(82 Okl. 26)

HARRISON v. M. KOEHLER CO.
(No. 9964.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

Appeal and error §773(5) — Judgment may be reversed where no brief filed by defendant in error.

In an action appealed to this court, where the plaintiff in error filed brief showing service upon the defendant in error, and no brief is filed by the defendant in error, and no reason given showing why the defendant in error has not filed brief, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed by the plaintiff in error reasonably sustains the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition in error.

Appeal from District Court, Commanche County; Cham Jones, Judge.

Action by C. W. Harrison against the M. Koehler Company on a promissory note. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions to grant a new trial.

A. J. Welch, of Clinton, for plaintiff in error.

W. C. Stevens, of Lawton, for defendant in error.

KENNAMER, J. This was an action upon a promissory note tried in the district court of Commanche county on the 7th day of November, 1917. At the close of the testimony introduced on behalf of the plaintiff and defendant both parties moved the court for an instructed verdict. The court sustained the motion of the defendant and instructed a verdict in its favor. Judgment was entered in accordance with the verdict of the jury. To reverse the judgment the plaintiff prosecutes this appeal and urges four assignments of error.

(1) The court erred in overruling plaintiff's motion for a directed verdict for plaintiff at the close of the evidence.

(2) The court erred in directing a verdict for the defendant.

(3) The verdict and judgment were contrary to the admissions in the pleadings and contrary to the evidence in the case, and was not supported by any competent evidence.

(4) The court erred in overruling plaintiff's motion for a new trial.

The record discloses that the brief of the plaintiff in error was served upon counsel for the defendant in error on July 1, 1918. No brief has been filed by the defendant in error, nor any reason presented for failure to file brief. The brief of the plaintiff in error appears reasonably to sustain the assignments of error, and under numerous decisions of this court we are not required to search the record to find some theory upon which the judgment below may be sustained. *Security Insurance Co. v. Droke*, 40 Okl. 116, 136 Pac. 340; *J. Rosenbaum Grain Co. v. Higgins*, 40 Okl. 181, 136 Pac. 1073; *Purcell Bridge & Transfer Co. v. Hine*, 40 Okl. 200, 137 Pac. 668; *First National Bank of Sallisaw v. Ballard*, 41 Okl. 553, 139 Pac. 293; *De Hart Oil Co. v. Smith*, 42 Okl. 201, 140 Pac. 1154; *Frost v. Haley*, 63 Okl. 19, 161 Pac. 1174.

The judgment of the trial court is reversed, and cause remanded, with directions to grant a new trial.

HARRISON, C. J., and KANE, MILLER, and NICHOLSON, JJ., concur.

(82 Okl. 9)

OLENTINE et al. v. ALBERTY et al.
(No. 9996.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Judgment \S 143(2) — To vacate default judgment defendant must show that he was prevented from making a timely meritorious defense upon statutory grounds.

A judgment upon default will not be vacated upon a showing that the party had a meritorious defense; it must be made to further appear that he was prevented from making a timely presentation of it upon some of the grounds named by the statute for granting such relief.

2. Appeal and error \S 957(1)—Judgment \S 139—Application to vacate default judgment addressed to discretion of court.

An application to vacate a default judgment and to be allowed to defend is addressed to the sound discretion of the court, and will not be disturbed on appeal, unless it clearly appears that the court has abused its discretion.

3. Judgment \S 143(3)—One seeking to vacate default for unavoidable casualty or misfortune must show himself free from laches.

When "unavoidable casualty or misfortune" is alleged, the facts must be so stated as to make it appear that no reasonable or proper diligence or care could have prevented the trial or judgment; that is, that the party complaining is not himself guilty of any laches.

Appeal from District Court, Craig County; Preston S. Davis, Judge.

Action by Lucy Alberty and another against Charles Olentine and others to cancel deeds. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. W. Noffsinger and A. L. Harris, both of Muskogee, for plaintiffs in error.

R. C. Armstrong, Jr., of Ft. Worth, Tex., for defendants in error.

PER CURIAM. This action involves the title to certain lands in Craig county, Okl., and is brought to cancel certain deeds, and for rents and profits during the time it is alleged defendants were in possession thereof. For convenience, the parties will be referred to as they appeared in the trial court.

The petition alleges that one Malinda Alberty was duly enrolled on the rolls of the Five Civilized Tribes as a Cherokee freedman, and that on July 4, 1909, she died intestate, leaving as her only surviving heirs at law her husband, Lee Ross, and her mother, Lucy Alberty, and further alleges that during her lifetime she gave certain deeds to her homestead allotment and surplus allotment, which deeds were void on account of her minority.

Answer was filed by the defendants setting

up a general denial and denying specifically that the deeds given were during the minority of the allottee. The case was regularly set down for trial, and trial was had in the absence of the defendants or of their counsel, and on December 11, 1917, judgment was rendered for the plaintiffs by default, decreeing them to be entitled to the lands and the possession thereof, and judgment was rendered for the plaintiffs against the defendants Charles Olentine, James M. Anthis, and J. H. Childers in the sum of \$900 damages for the wrongful withholding of the lands and rents thereof.

Defendants in due time filed a motion for a new trial and for the setting aside of the judgment by default, alleging, among other things, that J. H. Childers, one of the defendants who was the attorney of record for the defendants, and who had filed the answer for the defendants, had not for some time acted as attorney in the case, but that the defendants had, with the knowledge of the plaintiffs and their attorney, employed Messrs. Noffsinger and Harris as attorneys, and that these attorneys had an understanding with counsel for the plaintiffs that plaintiffs' counsel would advise them when the case was set down for trial. Counsel for plaintiffs filed an affidavit in the trial court, denying that he had any understanding with counsel for the defendants that he would advise them when the case was set for trial, and alleging that no advantage was taken of the defendants in any way in procuring the judgment by default. The motion for new trial and to set aside default judgment was regularly heard by the trial judge and overruled.

The propositions relied on by defendants for reversal of the judgment are that the trial court erred in refusing and overruling the defendant's motion to vacate and set aside the default judgment, and that said judgment is not sustained by the evidence. It is urged that there was an abuse of discretion by the trial court in refusing to set aside the judgment rendered in the absence of counsel for the defendants, and that the answer presented a good and valid defense.

Defendants cite certain Oklahoma cases which hold that it is an abuse of discretion for the trial court to refuse to open a judgment by default, where the answer presents a good defense and the showing made by the defendants is a reasonable excuse for the absence of the defendant and his attorney at the time of the trial, with no negligence on his part, and where no substantial prejudice would result from the sustaining of such motion. But these cases cited by them do not sustain the position urged by the defendants. In the case of *Cohen v. Cochran Grocery Co.*, 173 Pac. 642, judgment had been rendered against the defendant on a void process, and when the defendant and his attorney were ab-

sent on account of unexpected and unavoidable delay of the arrival of the railway train upon which they were traveling. The court therefore held that it was an abuse of discretion under these facts not to set aside the default judgment. In *Hodges v. Alexander*, 44 Okl. 598, 145 Pac. 809, counsel for the defendant had been called out of the state on account of the illness of his mother, and had been told by the trial judge that his cases would be continued because of his absence. On counsel's return to the state he was told by the trial judge that the cases had been continued, and understood the judge to say that they had been continued for the term. He thereupon left town and judgment was rendered against the defendant in his absence. The court here held that it was an abuse of discretion on the part of the trial judge not to set aside the default judgment. In *McLaughlin v. Nettleton*, 25 Okl. 319, 105 Pac. 862, counsel for the defendant had telegraphed the clerk of the court on the 18th day of May, asking to be advised when the case was set for trial, and received a telegram in reply that it was set for the 1st. There was a mistake in transmitting the message, and the telegram should have read the 21st instead of the 1st. Thinking that the case would not be tried until June 1st, neither counsel nor his client made any attempt to be present on the date the case was actually set for trial. The court held that under the statute the trial judge should have set aside the default judgment. The case of *Thomas Douglas v. Badger State Mine*, 41 Wash. 266, 83 Pac. 178, 4 L. R. A. (N. S.) 196, construes a different statute of a different jurisdiction, and does not state the law of Oklahoma.

[1] A judgment upon default will not be vacated upon a showing that the party had a meritorious defense; it must be made to further appear that he was prevented from making a timely presentation of it upon some of the grounds named by the statute for granting such relief. *Western Coal & Mining Co. v. Green*, 64 Okl. 53, 166 Pac. 154; *M., K. & T. Ry. Co. v. Ellis*, 53 Okl. 264, 156 Pac. 226, L. R. A. 1916E, 100.

It appears that no notices were mailed out by the clerk of the court of Craig county, advising counsel of the setting of the cases for trial, and that it was not the custom to do so in this court. Counsel for the defendants were not notified by the court clerk of the setting of their case for trial, nor do they appear to have relied upon any right to any notice by the clerk, but they seem to have depended upon receiving information of the date of the trial from counsel for plaintiffs. This they had no right to do. While it would have been a matter of courtesy for counsel for plaintiffs to have notified them of the date of the trial had he known the date the case was set for trial, he was not bound to do so, and

it was therefore not an abuse of discretion on the part of the trial court not to set aside the default judgment after hearing, on this ground.

Counsel for the defendants, knowing that the case was docketed and that the issues had been made up, were in duty bound to inquire of the clerk of court of Craig county when the case was set. In *Western Coal & Mining Co. v. Green*, supra, it was held that, in the absence of some statute or rule of court requiring it, parties who rely upon the custom of the clerk to notify when orders are entered on motions pending in their cases do so at their peril.

[2] By section 5063, R. L. 1910, subd. 3, it is provided that a former decision shall be vacated and a new trial granted on the application of the party aggrieved on account of "accident or surprise, which ordinary prudence could not have guarded against," and by section 5267, subds. 3, 4, 7, a district court may vacate its own judgments or orders "for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order"; "for fraud practiced by the successful party, in obtaining the judgment or order"; "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." In construing these statutes this court has held that an application to vacate a default judgment and to be allowed to defend is addressed to the sound discretion of the court, and will not be disturbed on appeal, unless it clearly appears that the court has abused its discretion. *Western Coal & Mining Co. v. Green*, supra; *M., K. & T. Ry. Co. v. Ellis*, supra; *Ratcliff v. Sharrock*, 44 Okl. 592, 145 Pac. 803; *Lindsey v. Goodman*, 57 Okl. 408, 157 Pac. 344.

[3] In *Lindsey v. Goodman*, supra, it was held that when "unavoidable casualty or misfortune" is alleged the facts must be so stated as to make it appear that no reasonable or proper diligence or care could have prevented the trial or judgment; that is, that the party complaining is not himself guilty of any laches.

Defendants further contend that the judgment is not sustained by the evidence for the reason of its incompetency or insufficiency in establishing the minority of the allottee in the deeds, or of the rental value of the lands. While the testimony of the witnesses as to the age of the allottee is not the most satisfactory, in the absence of any contradictory testimony, it cannot be said that the court abused his discretion in granting a judgment based upon it. Defendants also contend that the enrollment records of the commissioner of the Five Civilized Tribes was not admissible in evidence as to transactions relating to sale of allotted lands concluded prior to the date when they were made so by Congress, to wit; act of Congress of May 27 1908 (35 Stat. 312, c. 199). It appears that the last

deeds given by the allottee herein to Charles Olentine were subsequent to the date of May, 27, 1908. The enrollment records were competent for the purpose of showing the age of the allottee at such time. Nor are we prepared to say that the evidence introduced to show the rental value of the lands is insufficient to sustain the judgment of the trial court.

For the reasons stated, the judgment of the trial court is affirmed.

(82 Okl. 6)

ST. LOUIS-SAN FRANCISCO RY. CO. v. FREEMAN. (No. 10192.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Carriers \S 405(4)—Limitation of liability for loss of baggage held not to affect other damages sustained by passenger.

Where a railway company, by printed statements on its baggage checks and posted and published tariff, rates, schedules, and classifications, seeks to limit its liability to \$100 for the value of baggage belonging to or checked for an adult passenger, it does not thereby relieve itself from liability for damages sustained by such passenger other than the value of the baggage.

2. Carriers \S 408(5)—Loss of time and traveling expenses recoverable for loss of traveling salesman's sample trunk.

Where a carrier accepts as baggage the sample trunk of a traveling salesman with knowledge of its character, loss of time and inability to make sales because of delay in receiving trunks containing samples, and necessary and reasonable traveling expenses incurred in looking for the trunks or procuring other samples, will be regarded as within the contemplation of the carrier when it receives and checks traveling salesman's sample trunks as baggage, so as to entitle such salesman to recover damages therefor, in case of such delay.

3. Carriers \S 408(5)—Damages which proximately flow from breach of contract to carry baggage stated.

Such damages as proximately flow from the breach of the contract to carry baggage, or which in the language of the statute, in the ordinary course of things, would be likely to result therefrom, may be recovered, and this includes loss of time, necessary and reasonable traveling expenses incurred in looking for the baggage, procuring other samples, and inability to make sales directly occasioned by the breach of duty promptly to carry and deliver.

Appeal from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by W. S. Freeman against the St. Louis-San Francisco Railway Company to recover damages for loss of personal property. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, of St. Louis, Mo., and Kleinschmidt & Grant and W. T. Stratton, all of Oklahoma City, for plaintiff in error.

Edward Spiers, of Oklahoma City (Bernstein & Spiers, of Oklahoma City, of counsel), for defendant in error.

MILLER, J. This action was commenced in the district court of Oklahoma county by W. S. Freeman as plaintiff in the court below, defendant in error here, to recover \$429.08 as damages sustained by reason of the loss of a trunk, against the St. Louis-San Francisco Railway Company. A jury was waived, and the case tried to the court. Special findings of fact were made, and the court rendered judgment in favor of the plaintiff and against the defendant for \$225. Defendant appeals, and appears here as plaintiff in error.

The facts are as follows: W. S. Freeman was a traveling salesman, selling a line of raincoats and other goods of like nature. On the 12th day of September, 1917, he purchased a ticket from the agent of said railway company at Okmulgee, Okl., to Oklahoma City, and upon this ticket he checked a trunk containing his merchandise and samples. The trunk did not reach Oklahoma City, and, after waiting a day, Freeman made complaint to the railway company's division passenger agent. He afterwards made a trip to Sapulpa, Tulsa, and Okmulgee in an effort to locate the trunk. Being unable to find it, he made a trip to St. Louis, Mo., to get another trunk and a new supply of samples. His items of damage are the loss of commissions he would have made, amounting to \$165, \$50 expense money, and \$204.08 is the value of the articles in the trunk. The railway company admitted selling the ticket, checking the trunk at Okmulgee, and its failure to deliver the trunk at Oklahoma City. It admitted a liability of \$100, but insists that its liability is limited to that amount, because at the time of the acts complained of it had on file with the Corporation Commission of the state of Oklahoma, and had published, and kept open for inspection and filed in its various offices in the state, as by law required, schedules giving the rates, fares, and charges for the transportation of baggage between different points in the state, including Okmulgee and Oklahoma City. That under the provisions of said schedules the value of baggage up to and including 150 pounds, so checked as aforesaid, and without extra charge, is deemed and agreed to be not in excess of \$100, unless a greater sum or value is declared by the passenger and charges paid for increased valuation at the time of delivery of said baggage to the company.

At the conclusion of the evidence the railway company moved the court to render judgment in favor of the plaintiff, and against the defendant in the sum of \$100 and costs.

This motion was overruled, and defendant excepted. The court then made the following findings of fact and conclusions of law:

"The court finds that the defendant railway company had notice of the nature of the equipment of the baggage, and that the same were samples intended by the plaintiff for use by him. The court further finds as a matter of law that the schedules were in force at the time specified, and so far as the value of the property is concerned it is limited by the contract, to wit, the schedule in defendant's Exhibit A, and the plaintiff will therefore recover the sum of \$100 for the loss of property, also the sum of \$50 expense incident to the recovery of and in seeking to recover the property, and approximately caused by the negligence of the defendant in failing to deliver the baggage at Oklahoma City, and plaintiff will also recover the sum of \$75 for his time lost as a result of the negligence of the defendant; in other words, the plaintiff will recover the total sum of \$225. I might say that the time lost is based at the rate of \$50 per week, the evidence showing a loss of about a week and a half time.

"By Mr. Stratton: To which findings of fact and conclusions of law the defendant excepts, and gives notice in open court of its intention to appeal to the Supreme Court of Oklahoma from such judgment, and asks the court to direct the clerk to enter and make the proper entries upon the appearance docket and trial docket of the court.

"By the Court: Probably better make the further findings that the value is in excess of \$100, but the plaintiff is limited under the contract of \$100. You may draw up your journal entries, and the clerk will make the proper entries on the docket in accordance therewith. The judgment will be for the plaintiff in the sum of \$225 as per journal entry in the findings of this case."

The plaintiff in error made several assignments of error, but they may all be summed up and be resolved into this one question.

In view of the limitation on the liability of the railway company to \$100 for the value of the goods, was Freeman entitled to recover, in addition to said \$100, loss of time and expenses incurred in trying to locate the trunk and necessary traveling expenses in procuring additional samples?

The baggage check issued by the railway company to W. S. Freeman contained the following notice printed thereon:

"Notice to Passengers.

"Unless a greater sum is declared by the passenger and charges paid for increased valuation at time of delivery to carrier, the value of baggage belonging to or checked for an adult passenger shall be deemed and agreed to be not in excess of one hundred dollars (\$100.00) and the value of the baggage belonging to or checked for a child traveling on a half ticket shall be deemed and agreed to be not in excess of fifty dollars (\$50.00).

"To avoid storage charges, claim your baggage

immediately upon arrival at destination. Passengers should take memorandum of this check number, to avoid confusion in delivery of baggage, in case duplicate check is lost.

"H. T. Mason, General Baggage Agent,
"Springfield, Mo."

The defendant in error does not question but what he had notice of the ruling; neither does the plaintiff in error question the sufficiency of the evidence to support the items set forth in the findings of fact made by the court, but objects to the court allowing the items of expense and loss of time.

Plaintiff in error cites a large number of cases to support its contention, and these cases hold that certain limitations as a carrier's liability for loss, if reasonable, will be upheld by the court, but they do not get at the exact question presented here. The case of *Kansas City, Mo. & O. Ry. Co. v. Fugatt*, 47 Okl. 727, 150 Pac. 689, L. R. A. 1916A, 545, gets closer to the question than any case cited. The syllabus reads as follows:

"A carrier, with respect to baggage accompanying a passenger, intrusted to its custody, incurs the responsibility of a common carrier of goods, and is liable as an insurer of the baggage, except where the loss or damage is caused by the act of God, the act of the owner, or by the public enemy.

"It is the duty of the carrier to deliver a passenger's baggage, whether within the weight prescribed by statute or not, immediately upon the arrival of the passenger at his destination.

"It is a matter of general knowledge, of which courts will take judicial notice, that common carriers by rail make a practice of carrying as baggage the sample trunks of traveling salesmen.

"Where a carrier accepts as baggage the sample trunks of a traveling salesman, with knowledge of their character, it thereby waives any objection on the ground that such trunks and contents are not properly baggage, and its liability therefor is the same as that with reference to baggage as defined in section 806, Rev. Laws 1910.

"The measure of damages for a carrier's delay in forwarding the sample trunks of a traveling salesman is the value of the use of the property during the delay, together with the loss of time occasioned thereby; the carrier's agent receiving the trunks for transportation with knowledge of their contents and intended use.

"Loss of time and inability to make sales because of delay in receiving trunks containing samples will be regarded as within the contemplation of the carrier when it receives and checks a salesman's sample trunks as baggage, so as to entitle him to recover damages therefor in case of such delay.

"Such damages as proximately flow from the breach of the contract of carriage of baggage, or which, in the language of the statute, 'in the ordinary course of things would be likely to result therefrom,' may be recovered, and this includes loss of time and inability to make sales

directly occasioned by the breach of duty promptly to carry and deliver."

This being an action to recover damages for breach of a contract, to wit, the failure to deliver the trunk and samples at Oklahoma City, the following sections of Revised Laws of 1910 may be considered:

"2845. Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

"2846. Detriment is a loss or harm suffered in person or property."

"2852. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

We think the court was correct in limiting the amount of the railway company's liability for the value of the goods in the trunk to \$100.

[2, 3] When the railway company accepted the trunk for transportation under its duty as a common carrier of passengers for hire, knowing that Freeman was a traveling salesman and that this was a trunk containing samples, it knew that, if it did not make immediate delivery of the trunk at its destination at Oklahoma City, W. S. Freeman, as such traveling salesman, would suffer other detriment and loss by reason of its failure to deliver the trunk. The detriment caused by the loss of time because of its failure to deliver the trunk and his inability to exhibit his samples to the trade, his loss of time looking for the trunk and his expenses incurred, were all such losses as would naturally flow from or follow its failure to deliver the trunk. It was such losses as it might anticipate and reasonably expect as a result of its failure to make the delivery.

[1] The liability of the railway company for this loss was not limited by the \$100 clause for the value of the goods in the trunk. The court by allowing these items of damage against the railway company did not infringe upon or violate the terms of the contract or the notice on the trunk check or its tariff rates as posted and published, as aforesaid.

Under the findings of the court the judgment rendered is correct, and is hereby affirmed.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(31 Ok1. 256)

HAMILTON TP. OF OKMULGEE COUNTY v. UNDERWOOD. (No. 9602.)

(Supreme Court of Oklahoma. May 10, 1921.)

(Syllabus by the Court.)

1. Evidence §83(2) — Public officers issuing warrants for claims against municipalities presumed to perform duty.

It is a presumption of law that all public officers perform their duty, and in the absence of clear proof to the contrary, this court will refuse to hold that they did not do so in issuing warrants for claims against municipalities.

2. Municipal corporations §905 — Municipal warrant prima facie evidence of validity of debt.

A municipal warrant is prima facie evidence of the validity of the claim for which it was issued, and if in an action instituted by the owner and holder thereof the municipality asserts as a defense a violation of some constitutional or statutory provision, the burden of proof is upon the municipality to clearly establish by competent evidence that at the time the debt was created, for which said warrants were issued, the governing body of the municipality violated the provision of the Constitution or section of the statute relied upon.

3. Appeal and error §1010(1) — Court's finding of fact will be given same weight as verdict.

Where a case is tried to the court without the aid of a jury, the court's finding of fact will be given the same weight as the verdict of a jury, and will not be set aside if there is any evidence reasonably tending to support it.

4. Disposition of cause.

Record examined, and held, that the judgment of the trial court should be affirmed.

Appeal from District Court, Okmulgee County; Ernest B. Hughes, Judge.

Action by Elmer Underwood against Hamilton Township of Okmulgee County. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Wallace, Co. Atty., Joe S. Eaton, and L. L. Cowley, all of Okmulgee, for plaintiff in error.

Edward Spiers, of Oklahoma City, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Okmulgee county; Hon. Earnest B. Hughes, Judge.

This action was commenced in the lower court by the plaintiff, Elmer Underwood, against the defendants, Hamilton township of Okmulgee county, Okl., Okmulgee county, Okl., and the Wylie Manufacturing Company, a corporation. No summons was asked to be issued for Wylie Manufacturing Company, and the demurrer of Okmulgee county was sustained, so that the controversy in this

court is between Elmer Underwood and Hamilton township of Okmulgee county of the state of Oklahoma.

The plaintiff in his petition, which contains seven separate causes of action, alleges in substance that on or about November, 29, 1911, "and of date of November 29, 1911, for a valuable consideration, to wit, the sale and delivery of certain machinery that said defendant township was authorized to purchase and buy, and that it did purchase and buy, for the use of said township of and from the defendant Wylie Manufacturing Company, a corporation, the said defendant, Hamilton township, by and through its duly elected, qualified, authorized, and acting township officers, made and executed and delivered to said defendant, Wylie Manufacturing Company, a corporation of Oklahoma City, Oklahoma, their certain township warrants, in writing of that date. * * * That said warrants were duly presented, as provided by law, to the township treasurer of said township on or about the 29th day of November, 1911, and were not paid for want of funds, which was indorsed thereon. * * * That said warrants were sold and delivered to the plaintiff, who was the holder and owner thereof."

To the petition were attached copies of the seven warrants sued upon.

The defendant's answer alleged the invalidity of the warrants issued, charging that the same were issued without the authority of law, in that they exceeded the legal estimate of the township made for the fiscal year, and that the same were issued upon an illegal contract and in lieu of certain other warrants issued by virtue of said contract which had been adjudicated to be void in a suit brought for that purpose, and the warrants issued on being issued in pursuance to a void contract and in lieu of warrants that had been adjudicated void were likewise void.

As a reply to the defendant's answer, the plaintiff filed a general denial, and upon the issues thus joined, by the pleading, the cause was tried to the court without the intervention of a jury, and at the conclusion of the trial the court made the following findings of fact and conclusions of law:

"(1) That at the time of making and executing the warrants, to wit, 51A, 52A, 53A, and 54A for \$500 each, and 55A for \$830, 12B for \$320, and 13B for \$250, a binding and valid contract had been entered into between the duly authorized officers of Hamilton township and the Wylie Manufacturing Company; that said warrants were issued properly and in due form; that the contract, in payment of which said warrants were issued, was in all manner and things a valid and binding contract; that said contract was a new and distinct contract.

"(2) That when the contract of November 29, 1911, was entered into between Hamilton township and the Wylie Manufacturing Company,

there were sufficient funds not yet expended with which to pay for said contract."

"(4) I further find that the approved estimate for Hamilton township for the fiscal year commencing July 1, 1911, and ending June 30, 1912, was \$5,603.82. The court further finds, however, that there was no item in the amount of \$3,400 in the estimate made and approved for purchasing tools.

"(5) I further find that on November 29, 1911, at the time of the execution of the contract upon which the warrants heretofore referred to are based, there were funds expended by said township, in excess of the aggregate amount of the warrants.

"(6) I further find that the warrants sued on in this cause have been presented for payment, but not paid for want of funds.

"(7) I further find that said warrants are at this time unpaid, and that said warrants draw interest at the rate of 6 per cent. per annum from November 29, 1911, the date of their presentation and registration.

"(8) I further find that there is due and unpaid on warrant 51A the sum of \$500, principal, and \$151.25 interest, interest being computed to December 14, 1916. I find the same amount to be due on warrants 52A, 53A, and 54A. I find that there is due and unpaid on warrant No. 55A the sum of \$830 principal, and \$251.07 interest, interest being computed to December 14, 1916. I find that there is due and unpaid on warrant No. 12B the sum of \$320 principal, and \$90.75 interest, interest being computed to December 14, 1916. I find that there is due and unpaid on warrant No. 13B the sum of \$250 principal, and \$75.62 interest, interest being computed to December 14, 1916.

"Finding all the issues for the plaintiff, I therefore conclude that as a matter of law the plaintiff, Elmer Underwood, is entitled to recover against Hamilton township, a subdivision of Okmulgee county, the aggregate sum of \$4,428.44, with interest from December 14, 1916, on \$3,400 at the rate of 6 per cent. per annum.

"It is further ordered, adjudged, and decreed by the court that the plaintiff, Elmer Underwood, have and recover of and from the defendant, Hamilton township, a subdivision of Okmulgee county, Okl., for the sum of \$4,428.44, with interest from December 14, 1916, or \$3,400 at the rate of 6 per cent. per annum, which shall be enforced, collected, and payable according to law; to all of which findings of fact and each of them, and to the conclusion of law and judgment, the defendant excepts and exceptions are allowed."

The defendant makes 17 specifications of error in its petition in error, concerning which counsel say in their brief:

"We will not attempt to argue each of the assignments in error separately, but will address ourselves to the three defenses that were made by the township to these causes of action in the court below, which we believe include all of the assignments of error, except possibly one or two, which will be discussed separately.

"The three defenses to this action may be briefly stated as follows:

"(1) The contract of purchase on the 16th day of June, 1911, was void because it was an attempt to place upon the people of Hamilton

township a debt payable in 1912, 1913, and 1914, without the authority of law.

"(2) The contract of June 16, 1911, being void, the attempted repurchase of the machine on November 29, 1911, was an attempt to ratify a void contract, and therefore the warrants issued November 29, 1911, were void; these warrants are the ones sued upon in the court below.

"(3) Should the court hold that the proceedings had by the board of Hamilton township, November 29, 1911, either ratified the acts of the said board on June 16, 1911, or that a new contract was entered into by said board for the purchase of said roller on November 29, 1911, the plaintiff cannot recover, because, when the warrants were issued on that day, the township funds were exhausted and the warrants therefore void."

These propositions are so related that we can and will consider them together.

We find that, under the state of the record, the sole question for our determination is whether or not there is competent evidence reasonably tending to support the findings of fact made by the trial court. If so, the judgment should be affirmed; if not, it should be reversed.

The record discloses that the plaintiff, Elmer Underwood, commenced this action to recover upon seven warrants issued by the official board of Hamilton township in Okmulgee county, four of which were in the sum of \$500 each, and one in the sum of \$830, each of which showed upon its face it was issued against the income and revenue provided for purchasing tools fund for the fiscal year ending June 30, 1912, one for \$320 against the income and revenue provided for the fiscal year ending June 30, 1912, and one in the sum of \$250 against the income and revenue provided for road and bridge fund for the fiscal year ending June 30, 1912, and that there was an amount in each of said funds sufficient to cover the amount of the face of said warrants, each of which was dated and attested as of November 29, 1911. The records of the township board of said date sustained these recitals upon the face of the warrants, and that a claim for the aggregate amount thereof was on said date presented to the board by the payee, which was allowed, and the board ordered that said warrants issue, as is fully shown by the proceedings of the board, which were as follows:

"It was moved by Fred McCullough and seconded by A. T. Cowherd that the said claim of \$3,400.00 be allowed and that \$570.00 of said sum be charged against the road repairing and building fund, and that \$2,830.00 of said sum be charged against the sum for purchasing tools and that warrants be ordered drawn against the respective acts and four warrants of \$500.00 each and one warrant for \$830.00 be drawn and issued to the Wylie Manufacturing Company, against the tool fund, and that one warrant of \$320.00 and that one warrant

of \$250.00 be drawn and issued to the Wylie Manufacturing Company, against the road repairing and building fund, which motion was upon being put to a vote duly carried."

Mr. Wesley Smith, who was township trustee at the time the warrants were issued, testified on cross-examination concerning the transactions of the board in substance that these warrants were issued upon a new and separate contract made for the purchase of the road roller and for the use of the same by the township before its purchase, and that the township had the funds at the time it issued these warrants to pay for the same, and that the township had kept the road roller and used the same upon its roads, and the plaintiff testified that he purchased the warrants for a valuable consideration and in due course, from the payee, and the warrants were duly indorsed to him by the payee, and, as hereinbefore stated, the trial court made specific findings of fact in favor of the plaintiff.

[3] We find from the record that there is competent testimony reasonably tending to support these findings of the trial court, and this court has frequently and universally held that, where a case is tried to the court without the aid of a jury, the court's findings of fact will be given the same weight as the verdict of a jury and will not be set aside if there is any evidence reasonably tending to support it. *Sango v. Parks*, 44 Okl. 223, 143 Pac. 1158; *Postoak v. Lee*, 46 Okl. 477, 149 Pac. 155; *Huff v. Lee*, 46 Okl. 485, 149 Pac. 158; *Thompson v. Wilkinson*, 46 Okl. 115, 148 Pac. 177; *Washington County Abstract Co. v. Harris*, 48 Okl. 577, 149 Pac. 1075; *Dunn v. Modern Foundry & Machinery Co.*, 51 Okl. 465, 151 Pac. 893.

Section 26, art. 10, of the Constitution, provides that—

"No county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose."

Other similar limitations on the power of counties or subdivisions to bind the county or subdivision may be found in sections 6, 7, 8, 9, and 10 of chapter 80, Session Laws 1910-11, which in substance provide that the county or other municipality may be bound only for the amount approved by the excise board, and, if the county officials incur indebtedness over such amount, they and their bondsmen, and not the county or subdivision, shall be liable for such indebtedness.

As we have seen, the trial court found in the instant case that none of these provisions had been violated in a contract made by the township board, or in the issuance and regis-

tration of the warrants sued upon, and we have found from the record that there is competent evidence reasonably tending to support the findings of the trial court.

[1, 2] In the case of *City of Sulphur v. State ex rel. Lankford, Bank Com.*, 62 Okl. 312, 162 Pac. 744, in Sylls. 3 and 6, this court said:

"(3) It is a presumption of law that all public officers perform their duty, and in the absence of clear proof to the contrary this court will refuse to hold that they did not do so in issuing warrants for claims against municipalities."

"(6) A municipal warrant is prima facie evidence of the validity of the claim for which it was issued, and if in an action instituted by the owner and holder thereof the municipality asserts as a defense a violation of some constitutional or statutory provision, the burden of proof is upon the municipality to clearly establish by competent evidence that at the time the debt was created, for which said warrants were issued, the governing body of the municipality violated the provision of the Constitution or section of the statute relied upon."

[4] For the reasons stated, and in view of the authorities cited, we are of the opinion that the judgment of the trial court should be affirmed, and it is so ordered.

HARRISON, C. J., and PITCHFORD, MILLER, and ELTING, JJ., concur.

(81 Okl. 281)

McKEE v. THORNTON. (No. 9650.)

(Supreme Court of Oklahoma. May 10, 1921.)

(Syllabus by the Court.)

Appeal and error \S 1184, 1218—Where defendant in error dies after sending mandate to trial court, mandate will be recalled and judgment *nunc pro tunc* issued.

Where defendant in error dies after the submission of a cause in the Supreme Court, and the cause is decided after his death, though the mandate may have been sent down to the trial court, the Supreme Court will order the mandate recalled, withdraw its opinion, and render an opinion and judgment *nunc pro tunc* as of the date of submission, and direct the clerk to issue mandate accordingly.

Appeal from District Court, Okmulgee County; Chas. G. Watts, Judge.

On recall of mandate. Order issued.

For former opinion, see 79 Okl. 138, 192 Pac. 212.

West, Sherman, Davidson & Moore, of Tulsa, for plaintiff in error.

Merwine & Newhouse, of Okmulgee, for defendant in error.

HARRISON, C. J. It appears that this cause was submitted on oral argument and briefs February 10, 1920; that on August

31, 1920, an opinion was rendered by this court reversing the judgment of the trial court and rendering judgment in said cause. It further appears that between the date of submission and the date of rendering opinion G. W. Thornton, defendant in error, died, but that such fact was not called to the attention of the court until after the opinion had been rendered. Subsequent thereto motion was filed suggesting death of defendant in error, and asking that mandate be recalled and judgment in said cause rendered *nunc pro tunc* as of the date of submission.

In *Goldsborough et al. v. Hewitt*, 26 Okl. 859, 110 Pac. 906, under a condition exactly similar to the case at bar, this court held:

"Where defendant in error dies after the submission of a cause in the Supreme Court, and the cause is decided after his death, and the mandate is sent down to the trial court, the Supreme Court will order the mandate recalled, set aside its decision, and render the decision and opinion as of the date of the submission of the cause, and direct the clerk to so enter it."

Upon the authority of the above case, and the authorities therein followed, and upon *Boyes et al. v. Masters et al.*, 28 Okl. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576, the motion of plaintiff in error is sustained.

The mandate in this case is hereby recalled, and the opinion rendered August 31, 1920, withdrawn, and the judgment rendered in said opinion is now rendered *nunc pro tunc* as of the date of submission of said cause, to wit, February 10, 1920.

The clerk of this court is therefore directed to refile said opinion and enter same *nunc pro tunc* as of said 10th day of February, 1920, and to issue mandate accordingly.

PITCHFORD, McNEILL, NICHOLSON, and ELTING, JJ., concur.

(82 Okl. 78)

McCARTER et al. v. STATE ex rel. PITMAN, Co. Atty. (No. 11760.)

(Supreme Court of Oklahoma. April 26, 1921. Rehearing Denied May 24, 1921.)

(Syllabus by the Court.)

1. Statutory provisions.

Section 1, c. 258, Sess. Laws 1917, provides: "Provided further, that two or more or parts of school districts having less than twenty-five square miles shall be permitted to consolidate if they have a total valuation equal to or exceeding five hundred thousand dollars."

2. Statutes \S 181(1)—General rule is that intent, when ascertained, must govern.

In construing statutes, the general rule is that the intent of the Legislature, when ascertained, must govern.

3. Statutes \S 214—Presumed that Legislature has expressed its intent, and no more.

The legal presumption is that the Legislature has expressed its intent in the statute and that it intended what it expressed, and nothing more.

4. Schools and school districts \S 33—Consolidation not invalidated by State Auditor's failure to certify assessed valuation of property in consolidated district; and validity thereof not determined by assessed valuation of previous year.

In a quo warranto proceeding on behalf of the state on relation of the county attorney to declare the organization of a consolidated school district invalid, the record disclosed that the county superintendent made an order consolidating three school districts into said consolidated school district on July 28, 1919, and the proceedings, prior to the order consolidating said school district, were regular, and the districts had an area of less than 25 square miles, and the assessed valuation for the year 1919 was in excess of \$540,000, although the State Auditor had not certified to the county clerk of said county the assessed valuation of the public service corporation within said district until the 2d of September, 1919. *Held*, this fact would not make the organization of the district illegal, and further *held* it was error for the trial court to hold the assessed valuation for the year 1918 was controlling, and the only competent evidence to prove the value of the property of the district.

Appeal from District Court, Pottawatomie County; John L. Coffman, Judge.

Quo warranto by the State, on the relation of Clyde G. Pitman, County Attorney, against N. G. McCarter and others. Judgment for relator, new trial denied, and defendants appeal. Reversed and remanded, with instructions.

Joe M. Adams, W. L. Chapman, and Abernathy & Howell, all of Shawnee, for plaintiffs in error.

Goode & Dierker, of Shawnee, S. P. Freeling, Atty. Gen., and R. E. Wood, Asst. Atty. Gen., for defendant in error.

McNEILL, J. This was a quo warranto proceeding commenced in the superior court of Pottawatomie county on the 18th day of June, 1920, in the name of the state, on relation of Clyde G. Pitman, county attorney of Pottawatomie county, against N. G. McCarter, R. L. Chancellor, and J. V. Howell, as defendants. The petition alleged school districts Nos. 22, 25, and 113 of said county had been consolidated into consolidated school district No. 3, by virtue of an order of the county superintendent of said county, made on the 28th day of July, 1919, that said district had an area of less than 25 square miles, and an assessed valuation of less than \$500,000, and by reason of said fact the consolidation of said district was illegal;

and defendants were claiming to be the duly elected officers thereof.

The defendants filed their answer, and attached thereto the order of the county superintendent dated the 28th day of July, 1919, consolidating said districts, and copies of the necessary petitions for the calling of an election to consolidate, and notice of the election and the return of the officers of said election showing that 145 votes were cast for the consolidation and 45 against the consolidation. The plaintiff replied, alleging there were certain irregularities in the proceeding, and the order creating said district was illegal. The case was transferred to the district court, and a jury was impaneled to try the cause; and after the plaintiff introduced its evidence, the defendants demurred thereto, which was overruled by the court; and defendants introduced their evidence, and the court instructed the jury to return a verdict in favor of the plaintiffs, and against the defendants, for the reason the assessed valuation of the district did not equal the total value of \$500,000 at the time the county superintendent made the order of consolidation; and the court entered judgment disorganizing consolidated school district No. 3. Motion for new trial was filed and overruled, and the case is here on appeal.

This is the second time the validity of the organization of this consolidated district has been before this court, the former case being reported as *Fowler v. Park*, 190 Pac. 668.

While there are several questions presented in the briefs, the question of whether the district contained the required valuation, we think, is the only one necessary to consider and determine the merits of the case. It is admitted the district had an area of less than 25 square miles, and the assessed valuation of the three school districts for 1918 was less than \$500,000, and for the year 1919 was over \$540,000.

[1] The statute relating to the consolidation of school districts is section 1, c. 258, Sess. Laws 1917, the portion applicable to this case reads as follows:

"Provided, further, that two or more or parts of school districts having less than twenty-five square miles shall be permitted to consolidate if they have a total valuation equal to or exceeding five hundred thousand dollars."

It is contended by the plaintiff in error that the districts for the year 1919 had a valuation of over \$500,000, and therefore the organization of the district was legal. It is contended by the defendant in error, although the assessed valuation of the three districts amounted to over \$540,000 for the year 1919, this fact was unknown on the 28th day of July, 1919, at the date the county superintendent made his order consolidating

the district, for the reason the State Auditor had not certified the assessed valuation of the property of certain public service corporations located in these districts to the clerk of Pottawatomie county, and therefore the assessed valuation was unknown, and not ascertainable from the county assessor's books on said date, and by reason of that fact the assessment for 1918 must control. The correctness of these contentions involves the construction to be placed upon this particular section of the statute.

We will first direct our attention to the statute relating to assessment of property within this state. The statute provides that all real and personal property within the state shall be assessed at its actual cash value upon the 1st of January of each year. Section 7337, Revised Laws 1910, provides that the property of public service corporations shall be assessed by the State Board of Equalization. Section 7338 provides said corporation shall make a return of their property to the State Board of Equalization on or before the last day of February of each year, itemizing the property, and the value thereof on the 1st day of February of that year. Section 7348 provides that the return of the public service corporation shall not be conclusive. Section 7349 provides that the Auditor shall certify to the clerks of the different counties the valuation of the property of the public service corporation within their respective counties and subdivisions thereof on or before the first Monday of May each year. Section 7337 provides that the State Board of Equalization shall meet on the third Monday in June of each year, and equalize assessments of various counties. The record disclosed that the State Auditor did not certify the return of the public service corporations property in these districts to the clerk of Pottawatomie county until September 2, 1919. Exactly what date the State Board of Equalization made the assessment against the public service corporation is not shown, nor does the record disclose whether they increased the valuation as returned by the different public service corporations, nor whether the assessment was made upon the valuation returned by the different corporations. We have been unable to find any decisions construing a statute similar to ours.

[2, 3] The general rule in construing statutes is that the intent of the Legislature must govern. Board of County Commissioners of Creek County v. Alexander, 58 Okl. 128, 159 Pac. 311; Hudson v. County Treasurer, Osage County, 75 Okl. 260, 183 Pac. 507. In the case of Soliss v. General Electric Co., 213 Fed. 205, 129 C. C. A. 548, it was stated:

"The legal presumption is that the legislative body expressed its intention in the statute, that it intended what it expressed, and * * * nothing more."

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[4] What did the Legislature mean when it, in unambiguous language, provided that certain districts with an area of less than 25 square miles might consolidate if they had a total valuation equal to or exceeding \$500,000? If we indulge in the legal presumption that the body expressed its intent in the statute, and that it intended what it expressed, and nothing more, then the only question for determination would be, Did the district have a valuation of \$500,000 at the time the county superintendent made the order creating the consolidated district? It is admitted they had a total valuation in excess of that amount; therefore the requirements of the statute has been met. We see no reason to read into the statute something that the Legislature did not place therein, in order to defeat the desire of the great majority of the people of these districts as expressed at their meeting called for the purpose of consolidating the school districts.

We have been cited several cases, to wit: Parker v. Clatsop County, 69 Or. 62, 138 Pac. 239; Chicago, B. & Q. Ry. Co. v. Village of Wilber, 63 Neb. 624, 88 N. W. 660; and the courts in those cases were construing statutes relating to the issuing of bonds; and the statutes under consideration in those cases provided that the bonded indebtedness should not exceed a certain per cent. of the taxable property within the district "as shown by the last preceding assessment for state and county purposes previous to the incurring of said indebtedness." The statutes under consideration in those cases were almost identical with section 7835, Revised Laws 1910, which provides that bonds may not be issued by any school district in any amount exceeding five per cent. of the valuation of the taxable property, within said school district "as shown by the last preceding assessment for the state and county purposes." Those cases have no application. If the Legislature intended to make the same requirement for school districts when consolidating, it could have very easily inserted that phrase into the section of the statute relating to organization of school districts. But the Legislature did not see fit to do so, and we know of no reason why this court should read the same into the statute when that particular phrase was not inserted by the framers of the act.

There can be no doubt but what the assessed valuation of the county, or subdivision thereof, means the amount assessed by the constituted act of all the agencies employed in determining the amount and the value of the property available for taxation.

The consolidation of schools and organization of school districts, if they are permitted to function, must necessarily be organized between the school terms of each year, in order that schools may be conducted and operated with as little disturbance and inconvenience to the teachers and pupils as

possible and that the officers may make the proper estimates to run the schools. The Legislature anticipated that all property of the different counties and subdivisions thereof should be assessed before the 1st day of May, while, as a matter of fact, this is not always accomplished, or at least the total is not always known at that time; and that may have been why the Legislature did not attempt to provide that the last preceding assessment should control in the consolidation of school districts, but provided, if the districts had a certain valuation, the districts might be consolidated. The language used is clear and unambiguous, and it is not within the province of courts to read into the statute words not used by the Legislature, in order to defeat an act which complies with all the requirements demanded by the Legislature.

This was not a jury case, but was purely an equitable case, triable to the court; and upon the undisputed evidence it was error for the court to instruct the jury to return a verdict for the plaintiff, and to disorganize the school district; but the court should have sustained the demurrer of the plaintiff in error to the evidence of defendant in error.

The cause is therefore reversed and remanded, with instructions to take such further proceedings in accordance with the views herein expressed.

HARRISON, C. J., and PITCHFORD, NICHOLSON, and ELTING, JJ., concur.

(32 Okl. 27)

BURTSCHI et al. v. WOLFE et al.
(No. 9672.)

(Supreme Court of Oklahoma. Jan. 8, 1921.
Rehearing Denied May 17, 1921.)

(Syllabus by the Court.)

Indians — Court's holding that sale by guardian of minor heirs was invalid as to both homestead and surplus allotments held error as to homestead allotment.

In an action for the recovery of land commenced by W. and S. against B. and B., the evidence disclosed substantially the following facts: The land in controversy consisted of both the homestead and surplus allotments of S., a duly enrolled Chickasaw Indian of less than full blood, who died on or about the 28th day of September, 1905, after receiving her allotment, leaving surviving her H. S., her husband, and W. and S., her infant son and daughter, respectively. After the death of the allottee and the passage of Act Cong. April 26, 1906, H. S. made a separate conveyance of his curtesy right to H. and thereafter died before the commencement of the action. Some time after the execution of the conveyance by H. S.,

a guardian was appointed for W. and S. in the United States Court for the Southern District of Indian Territory sitting at Purcell, and thereafter a petition was filed, praying for permission to sell at guardian's sale the interest of S. and W. in said inherited land. Thereafter an order was made, directing the guardian to sell said land at guardian's sale, which was done. Whereupon a guardian's deed was duly executed, conveying the land to H. It was through this guardian's sale to H. that B. and B. deraigned their title, and it is conceded that if the interest of the minors in the land passed to H. by virtue of this sale the cause should be reversed; otherwise it should be affirmed. The trial court held that section 22 of the act of Congress of April 26, 1906 (34 Stat. at Large 137), provides the only means whereby a minor of any degree of Indian blood may be divested of the title to his inherited lands, and that, inasmuch as the minor heirs did not join in the sale by H. S., the separate sale of the minor heirs was invalid as to both the homestead and surplus allotments. *Held* error in so far as the ruling effected the sale of the homestead allotment.

Collier, J., dissenting.

Appeal from District Court, McClain County; F. B. Swank, Judge.

Action by Mary F. Wolfe and others against Julius Burtshi and another. Judgment for plaintiffs and defendants appeal. Reversed and remanded with directions.

Geo. E. Swisher, of Oklahoma City, for plaintiffs in error.

Robt. Wimbish and W. C. Duncan, both of Ada, for defendants in error Wolfe and Hybarger.

C. T. Rice, of Purcell, for defendant in error Ennett Shields.

KANE, J. This was an action commenced by Mary Wolfe, a three-fourths blood Chickasaw Indian, against the plaintiffs in error, for the recovery of certain specific tracts of land. Subsequent to the commencement of this action Ennett Shields, a brother of Mary Wolfe and J. C. Hybarger, were made parties, and when the cause came on for trial upon the issues joined by the pleadings judgment for the recovery of the land was rendered in favor of Mary Wolfe and Ennett Shields, to reverse which this proceeding in error was commenced.

The land in controversy constituted both the homestead and surplus allotments of Melissa Brown Shields, a duly enrolled Indian of less than full blood, who died on or about the 28th day of September, 1905, after receiving her allotment, leaving surviving her her husband, Henry Shields, and her minor children, Ennett Shields, and Mary Wolfe. After the death of the allottee and the passage of the act of April 26, 1906 (34 Stat. 137), Henry Shields, the husband, made a separate conveyance of his curtesy right to

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J. C. Hybarger, and thereafter died before the institution of this action. Some time after the execution of the conveyance by Henry Shields, one J. W. Gillett was appointed guardian of Ennett Shields and Mary Wolfe in the United States Court for the Southern District of Indian Territory sitting at Purcell, and after this appointment was made a petition was filed, praying for permission to sell the interest of Ennett Shields and Mary Wolfe in said land. Thereafter an order was made, directing the guardian to sell said land at guardian's sale, which was done, and thereafter said sale was confirmed by the court, whereupon the guardian executed a deed to said land to J. C. Hybarger. It was through this guardian's sale to Hybarger that the Burtschies deaigned their title, and it is conceded that if the interest of the minors in the land passed to Hybarger by virtue of this sale, then the cause should be reversed; otherwise it should be affirmed.

The trial court held that section 22 of the act of Congress of April 26, 1906 (34 Stat. at Large 137), provides the only means whereby a minor of any degree of Indian blood may be divested of title to inherited lands, and inasmuch as the minor heirs did not join in the sale by the adult heir the separate sale by the minor heirs was invalid as to both the homestead and surplus allotment.

The part of section 22, supra, necessary to notice reads as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory."

We are unable to agree with the construction placed upon this act by the trial court. It is settled beyond controversy that, while Indian heirs, both adult and minors, prior to the passage of this act, inherited the surplus allotment burdened with certain restrictions, they took the homestead portion of such allotment entirely free from restrictions. *Gannon v. Johnston*, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522, affirmed in *Gannon v. Johnston*, 243 U. S. 108, 37 Sup. Ct. 330, 61 L. Ed. 622; *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834. Starting from this as an established premise, it seems quite clear to us that it was not the purpose of the part of section 22 applicable to the case at bar to impose or reimpose any additional restrictions upon the person or the inherited lands of the class of Indians herein involved, to wit, minors of less than full blood. Obviously the primary purpose

of the act was to remove restrictions from inherited lands. The act was probably passed under the erroneous view, quite prevalent at the time, that the restrictions imposed upon allotted lands in the hands of the allottee followed the land into the hands of the heirs, and hence the general terms of the first part of the act removing restrictions from all adult heirs. The second part of the act, that relating to minor heirs, was undoubtedly passed for the purpose of facilitating the sale of inherited lands by adult heirs, where there were both adult and minor heirs. In that case both adult and minor heirs were empowered to sell their inherited land, both surplus and homestead, the latter by joining in the sale by guardian duly appointed by a proper United States court of the Indian Territory. Clearly the act down to this point was an act removing, not imposing, restrictions. Before its passage, both adult and minor heirs were authorized to sell and convey the homestead part of the allotment. The former because they were adult citizens of the state and of the United States, and there were no restrictions upon the inherited homestead. While a minor Indian was still under the usual disabilities imposed upon infants by the laws of Arkansas extended over the Indian Territory by the act of Congress, his unrestricted inherited land was subject to sale in the same manner as the lands of white minors; that is, for his care, education, and maintenance as provided by the extended statute.

In this situation the applicable part of section 22 herein quoted had the effect of removing all restrictions upon the sale of inherited lands by adult heirs of less than full blood, and of removing certain restrictions from minor heirs by permitting them to sell both their inherited homestead and surplus lands merely by joining in the sale "where there are both adult and minor heirs."

The act of Congress of April 28, 1904 (33 Stat. at L. 573), provides:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise." Section 2.

In *Taylor v. Parker et al.*, 33 Okl. 199, 126 Pac. 573, affirmed in *Taylor v. Parker*, 235 U. S. 42, 35 Sup. Ct. 22, 59 L. Ed. 121, it was held:

"The effect of the act of April 28, 1904 (33 Stat. at L. 573, c. 1824) was to make the laws of Arkansas, theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to wit, Indians and their property, in so far as it was alienable under

the acts of Congress then bearing upon it. The extension of the law of wills enabled the Indian to devise all his alienable property by will made in accordance with the laws of the state of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by act of Congress."

We may paraphrase this excerpt from the opinion and apply it to the case at bar with the following result: The extension of the laws of Arkansas pertaining to guardian and ward over the Indian Territory enabled the Indian to dispose of his alienable lands at guardian's sale held in accordance with the laws of the state of Arkansas. This was the situation when section 22, *supra*, was enacted. Without reading restrictions into this section which it does not in terms contain, we are unable to perceive that the latter act interferes in any manner with the right previously possessed by the minor of selling his unrestricted lands pursuant to the applicable law of the state extended and put in force in the Indian Territory by the previous act of Congress.

It seems inconceivable that Congress intended to make the right of an Indian minor to sell his unrestricted land turn exclusively upon the circumstance, unimportant to the minor, that there were adult heirs with whom he might join in the sale, and to abrogate the more important right, already possessed, of selling and disposing of his unrestricted lands for the ordinary purposes of education, care, and maintenance. There is some contention that this ruling is in conflict with the ruling of the Supreme Court of the United States in *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591, and other cases of this class. We perceive no such conflict. In the cases referred to the parties plaintiff were full-blood adult Indian heirs, and the question was whether conveyances of inherited lands made by such Indians were valid without the approval of the Secretary of the Interior, as provided by the latter part of section 22, *supra*. It was held:

"The approval by the Secretary of the Interior which by the act of April 26, 1906 (34 St. at L. 137, c. 1876) § 22, is made a condition of a valid conveyance by the heirs of a deceased allottee of either of the Five Civilized Tribes, must be obtained in the case of land as to which the original restriction upon alienation by the allottee or his heirs had expired before its enactment."

The part of the act particularly applicable to Indian heirs in that situation reads as follows:

"All conveyances made under this provision [section 22] by heirs who were full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

As the act, although declaratory of the law as it already existed in regard to inherited homesteads, provides in general terms for the removal of restrictions from both the inherited homestead and surplus lands of all adult heirs, it may very well be said that all sales of inherited lands made by adult heirs after the passage of the act are made under the provision of the act. It is, as we have seen, "all conveyances made under this provision by heirs who were full-blood Indians" that are subject to approval by the Secretary of the Interior. But the same reasoning does not apply to minor heirs of less than full blood. The part of the act applicable to minor heirs provides for the sale of inherited lands by minors in only one circumstance; that is, where there are both adult and minor heirs, and in one manner that is by joining in the sale. But this part of the act, as we have seen, does not in terms interfere with the usual rights of minors in ordinary circumstances. It is only conveyances made under the act that are affected thereby, to wit: (a) Conveyances made by all adult heirs; and (b) conveyances made by minor heirs by joining in the sale where there are both adult and minor heirs.

As was said by the Supreme Court in the recent case of *Harris v. Bell*, 254 U. S. 103, 41 Sup. Ct. 49, 65 L. Ed. —, not yet officially reported:

"A guardianship carries with it exclusive power to direct the guardian and to supervise the management and dispose of the ward's property. It is so in Oklahoma. This is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision."

We have more difficulty in harmonizing the reasoning in *Talley v. Burgess*, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600, with the reasoning whereby we practically reach the same conclusion. In that case it does not appear whether there were both adult and minor heirs, but it does appear that the instrument involved, to wit, a contract involving the title to land inherited by a minor Indian of less than full blood, made by the guardian with a firm of lawyers, was not joined in by any other heirs. While the applicability of section 22 to the situation thus presented is not entirely clear to us, we have no difficulty in agreeing with the conclusion reached. The land involved in that case, as in this, was free from all restrictions except those incident to the ordinary disabilities of minority, and therefore, the court held, were subject to sale or conveyance for the benefit of the minor under the applicable law governing guardian and ward.

"It is not denied," says the learned Justice who delivered the opinion for the court, "that the United States court for the territory would have had jurisdiction of a proceeding by a

guardian for an order to sell the ward's interests in the lands."

In reaching this conclusion we reject the premise assumed by counsel for the defendant in error that before an Indian is entitled to sell his lands, either inherited or allotted, we must be able to point our finger to some act of Congress specifically authorizing such sale. In our judgment the opposite presumption is true. Indians, unless they are restricted, either in their person or their property, by some specific act of Congress or applicable state law, have the same right to dispose of their property as white citizens of the state and of the United States. It is true that where either specific personal or property restrictions have been imposed by law, acts removing such restrictions must be liberally construed in favor of the Indians. But where there are no restrictions imposed by law the court is not justified in assuming their existence. *Welch v. Ellis*, 63 Okl. 158, 163 Pac. 321. Although the precise question we have now decided has not heretofore been passed upon by this court, there is reasoning in some of the cases which might possibly lead to an opposite conclusion. We particularly refer to *Wilson v. Morton et al.*, 29 Okl. 746, 119 Pac. 213, and *Lula, Seminole, v. Powell*, 64 Okl. 200, 166 Pac. 1050. In the first of these cases there were both adult and minor heirs, and we think the court correctly held that section 22 was applicable, and that the sale was made in substantial compliance with the section. We are unable to agree, however, with that part of the opinion, which was purely dictum, that holds that section 22 prescribes the sole procedure to be followed in making sales of inherited lands by Indian minors of less than full blood.

The facts in the *Lula, Seminole, Case* seem to make it more directly in point. In that case the heirs appear to be less than full blood, and there were no adult heirs. Clearly that was not a conveyance made by minors under the provision of section 22, *supra*, by joining in the sale, and the court would have been right in holding the sale invalid if, as it erroneously assumed, the case was controlled by *Brader v. James, supra*.

We agree with that part of the opinion wherein it is held that:

"Where the allottee died prior to the passage of the act of April 26, 1906, title passed to the heirs free of such restrictions without regard to the degree of Indian blood of the heirs or whether they were adults or minors; and prior to the passage of the act of April 26, 1906, the probate courts had jurisdiction to authorize and confirm a separate sale by guardian of such inherited interest of a minor in the homestead independent of a sale by the adult heirs, under procedure applicable to minors generally."

We think this excerpt correctly states the law of that case, and that it also correctly

states the law of this case, and that this situation was in no wise changed by the passage of section 22, *supra*, or of anything that has been decided in *Brader v. James*, or the other cases of this class.

For the reasons stated the judgment of the court below is reversed, and the cause remanded, with directions to proceed in accordance with the views herein expressed.

HARRISON, C. J., and JOHNSON, McNEILL, HIGGINS, and BAILEY, JJ., concur.

PITCHFORD, J., concurs in the result, but is of the opinion that the ruling of the trial court was erroneous as to both the homestead and surplus allotment.

COLLIER, J., dissents.

(81 Okl. 180)

IN RE PIGEON'S ESTATE.

PIGEON v. STEVENS et al

(No. 11235.)

(Supreme Court of Oklahoma. April 5, 1921.
Petition for Rehearing Stricken from
Files May 17, 1921.)

(Syllabus by the Court.)

1. Indians \Leftrightarrow 18—Lands from which restrictions have been removed descend according to state laws.

All Indian lands from which restrictions have been removed, upon the death of the allottee, descend according to the laws of descent and distribution of the state of Oklahoma.

2. Indians \Leftrightarrow 18—By repeal of statutory provisions noncitizen heirs held entitled to inherit estate of deceased Creek allottees.

Sections 13 and 21 of the Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), admitting Oklahoma as a state into the Union, provided: "That the laws in force of the territory of Oklahoma as far as applicable shall extend over and apply to said state until changed by the Legislature," and "shall be in force throughout said state except as modified or changed by this act or the Constitution of Oklahoma;" and section 2 of the Schedule to the Constitution provides: "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to the Constitution and which are not locally inapplicable shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

Held, under said provisions of the Enabling Act and the Constitution (chapter 49 of Mansfield's Digest of the Laws of Arkansas) and the provisos of section 6 of the Supplemental Creek Agreement of June 30, 1902, qualifying said chapter 49, were repealed, and the devolution of an estate of a deceased Creek allottee having died since the admission of Oklahoma into the Union is governed by the laws of descent

and distribution of the state of Oklahoma, and noncitizen heirs may inherit.

3. Statutes \S 167(1), 232 — Substitution of statutes repeals old statute although no repealing clause; proviso falls with repeal of statute.

A new statute revising the whole subject-matter of an old one, and intended as a substitute therefor, although there is no repealing clause, will operate to repeal the old law, and upon the repeal of a statute containing a proviso the proviso falls with the statute.

Kane, Pitchford, and Johnson, JJ., dissenting.

Appeal from District Court, Muskogee County; Chas. G. Watts, Judge.

Action to determine heirship of the matter of the estate of Robert Pigeon, deceased. From a judgment of the district court affirming an order of the county court, decreeing heirship and making distribution in favor of Idella M. Stevens and others, Josie Pigeon, administratrix, appeals. Reversed and rendered.

Irwin Donovan, Crump, De Graffenried & White, and Geo. S. Ramsey, all of Muskogee, for plaintiff in error.

W. W. Noffsinger and A. L. Harris, both of Muskogee, for defendants in error.

KENNAMER, J. The plaintiff in error, Josie Pigeon, in her individual capacity and as administratrix of the estate of Robert Pigeon, deceased, has appealed to this court from a judgment rendered by the district court of Muskogee county, affirming an order of the county court of Muskogee county decreeing heirship and making an order of distribution in the matter of the administration of the estate of Robert Pigeon, deceased; the cause being submitted in the county and district courts of Muskogee county upon the following agreed statement of facts:

"That said Robert Pigeon, deceased, was a citizen of the half blood of the Creek Nation or Tribe of Indians, and was duly enrolled as such opposite number 125 of the final roll of the Creeks by blood. That said Robert Pigeon died intestate on or about the 8th day of October, 1918, in the city of Muskogee, Muskogee county, Oklahoma. That said Robert Pigeon, at the time of his death, was the owner of the southwest quarter of section 18, township 14, range 13 east, in Okmulgee county, Okl. That said land was the allotment of said Robert Pigeon, deceased, the same having been allotted and patented to him as a citizen of the Creek Nation as his distributive share of the land of said Creek Nation. That 40 acres of said allotment was the homestead of said Robert Pigeon, the remaining 120 acres being his surplus allotment. That the appellant, Josie Pigeon, is the lawful widow of the said Robert Pigeon, deceased, having been married to him after the admission of Oklahoma as a state into the Union. That at the time of the death

of said Robert Pigeon he had no living father, mother, brother, or sister, nor any descendants thereof, that said Robert Pigeon died without issue, no children having been born to him since March 4, 1906, or at any other time. That at the time of the death of the said Robert Pigeon, deceased, he left surviving him the following relatives in addition to his widow: Josie Pigeon, the appellant herein; Idella M. Stevens, who was an aunt on his mother's side; Thomas J. Berrynill, a half-brother of the mother of the said Robert Pigeon, Jakeman Pigeon, and Cammaline Pigeon, children of John Pigeon, deceased, who was a brother of the deceased's father, and own cousins of the said Robert Pigeon, deceased, also Tiger Pigeon, Peggy Harjoe, née Pigeon, now the wife of John Harjoe, children of Dave Pigeon, who was also a brother of the deceased's father, and own cousins of the said Robert Pigeon, deceased. That the widow, Josie Pigeon, appellant herein, is a white woman, and not a citizen of the Creek Nation. That all other relatives mentioned herein were and are citizens of the Creek Nation, enrolled as such."

On this appeal but one proposition of law is presented to the court for decision, and that is, What is the law governing the devolution of the estate of Robert Pigeon, deceased, who died about the 8th day of October, 1918?

The agreed statement of facts show that Robert Pigeon, deceased, was enrolled opposite roll No. 125 as a member of the Creek Tribe of Indians of the half blood. The surplus allotment of the deceased allottee under section 16 of the Supplemental Creek Agreement, approved by the act of Congress of June 30, 1902 (32 Stat. 500) Thomas' Five Civilized Tribes and Osage Nation, page 129, and under the act of May 27, 1908 (35 Stat. 312) was unrestricted land; and, the record not disclosing that any of the parties to this controversy are full-blood Indians, the homestead of the deceased allottee became unrestricted upon the death of said allottee under section 9 of the act of Congress May 27, 1908 (35 Stat. 312).

There is no doubt but what section 8418 of the Revised Laws of 1910, paragraph 5, which provides:

"If the decedent leave a surviving husband or wife, and no issue, and no father, nor mother, nor brother, nor sister, the whole estate goes to the surviving husband or wife"

—would govern the devolution of the estate in controversy if the deceased had not been a member of the Creek Tribe of Indians, but it is contended by the defendants in error that the proviso of section 6 of the Creek Supplemental Treaty approved July 30, 1902, which provides:

"That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And provided further, that if there be no person of

Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49"

—govern the devolution of the estate in controversy, and counsel for the defendants in error rely upon the cases of *Scott v. Ryal*, 78 Okl. 12, 186 Pac. 206, *Jefferson v. Cook*, 53 Okl. 272, 155 Pac. 852, *Hughes et al. v. Bell et al.*, 55 Okl. 555, 155 Pac. 604, *Thompson v. Cornelius*, 53 Okl. 85, 155 Pac. 602, and *Privett v. Rentie*, 75 Okl. 191, 182 Pac. 898; and it must be conceded that the decision of this court, especially *Thompson v. Cornelius*, if followed in the case at bar, that the judgment of the trial court, decreeing the defendants in error to be citizens of the Creek Nation and entitled to inherit the estate in controversy to the exclusion of Josie Pigeon, the noncitizen wife of the deceased, must be affirmed, but upon an exhaustive examination of the authorities and a careful consideration of the same we are of the opinion that the rule announced in the case of *Thompson v. Cornelius*, supra, is unsound, and should be overruled, and the subsequent cases following the same rule.

Upon an examination of the case of *Thompson v. Cornelius*, supra, we find that the court held that section 9 of the act of Congress of May 27, 1908, c. 199 (35 Stat. L. 312), had nothing to do with said cause, and the opinion in part is as follows:

"Defendant next contends that Rev. Laws Okl. 1910, § 8416 et seq., without said provisos, is the governing statute here, because, he says, the same was made applicable by Act Cong. May 27, 1908, c. 100, 35 Stat. 312, in force at the time descent was cast. He relies upon section 9, which reads: 'That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such lands shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931: but if no issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the state of Oklahoma, free from all restrictions: Provided further, that the provisions of section 23 of the act of April 26, 1906, as amended by this act, are hereby made applicable to all wills executed under this section.'

"He contends that the words 'the lands,' as

used in the second proviso, refer to the whole allotment, as did the same words in section 7 of the Original Creek Agreement, and cites in support of his contention *Woodward v. De Graffenried*, 238 U. S. 284, 35 Sup. Ct. 764, 59 L. Ed. 1810, approving our construction of said section in *De Graffenried v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624. Assuming, but not deciding, that such contention is correct, section 9 has nothing to do with this case. This for the reason that said section is dealing only with lands of any allottee whose death ipso facto removes restrictions on its alienation. This is patent from the language with which the section starts out: 'That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land.'

"This is immediately followed by a proviso, in effect: 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless,' etc.—and providing, further, in effect, that if any member of the tribes of a certain quantum of blood shall die leaving certain issue born since a certain time, the homestead of such deceased allottee (of course in such land) shall remain inalienable (unless, etc.) for the use of certain issue until a certain time, but if no such issue survive, then such allottee, if an adult, may dispose of his homestead (in such allotted land) by will, etc., and if this be not done or the issue referred to die before a certain time, the land shall then descend, etc. As the pleading demurred to fails to disclose that the restrictions on the allotment of Percilla were removed, ipso facto, upon her death, and hence the same fell within the class of allotments designated by this act, we repeat that this act had nothing to do with this case."

It is apparent from that part of the opinion above quoted that the court fell into the error of failing to observe that Congress, in section 9 of the act of May 27, 1908, supra, recognized that the law of Oklahoma of descent and distribution unqualifiedly governed the devolution of estates of unrestricted Indians, and in plain and unambiguous language expressly says that the lands of allottees of one-half or more Indian blood shall descend under the laws of descent and distribution of the state of Oklahoma. There is no escape from the language of the proviso of section 9 of said act putting in force the laws of Oklahoma and specifically applying the same to the descent and distribution of the estates of allottees of the half-blood, or more; and in said case, supra, the court based its decision upon the proposition that the lands in controversy were restricted lands, and that was the very class of lands that the proviso of section 9 of the act of May 27, 1908, supra, in plain and unmistakable language, provided that the laws of Oklahoma of descent and distribution shall govern the devolution of the same. It is very obvious that the Congress recognized that Indian lands located within the state of Oklahoma from which restrictions had been removed were subject to the operation

of the state laws, and by section 4 of said act provided that said lands should be subject to the laws of the state.

Upon the admission of the state of Oklahoma into the Union the same came into the Union with all the powers and sovereignty of any other state, and upon the removal of restrictions against alienation and the granting of full citizenship to Indians the federal government ceased to have any further power or control over the tribal citizens with respect to unrestricted lands, and all laws passed by Congress prior to statehood, either general or special, ceased with the admission of Oklahoma as a state to have force or effect in so far as unrestricted lands of tribal citizens are concerned, and the Supreme Court of the United States has forever settled the question that Indian lands within a state or territory that has a local form of government are subject to the laws of the state or territory.

The Supreme Court of the United States in the case of John Schrimpscher et al. v. John S. Stockton et al., 183 U. S. 290, 22 Sup. Ct. 107, 46 L. Ed. 203, was reviewing a judgment of the Supreme Court of Kansas. The Supreme Court of Kansas held that the state statute of limitation applied to the allotment of a Wyandotte Indian and commenced to run against the heirs of a deceased allottee from the date of the treaty which terminated the restrictions on said lands or the disability of the heirs to alienate the same, and the court, in affirming the judgment of the Supreme Court of Kansas, speaking through Mr. Justice Brown, said:

"Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law."

In the case of Goudy v. Meath, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. Ed. 130, the Supreme Court of the United States, in passing upon the authority of the state of Washington to collect taxes from lands having been allotted to members of the Puyallup Tribe of Indians, in an opinion by Mr. Justice Brewer, said:

"Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens—that is, that no exemption exists by implication, but must be clearly manifested. No exemption is clearly shown by the legislation in respect to these Indian lands. The original treaty provided that they

should be exempt from levy, sale, or forfeiture until the Legislature of the state should, with the consent of Congress, remove the restriction. This, of course, meant involuntary as well as voluntary alienation. When the state was admitted and its constitution formed, its Legislature granted the power of alienation 'in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed.' What restrictions? Evidently those upon alienation. The Indian may not only voluntarily convey his land (authority to do that is provided by the use of the word 'grant'), but he may also permit its alienation by any action or omission which in due course of law results in forced sale. Congress postponed the operation of this statute for 10 years. When the 10 years expired (and they had expired before this tax was attempted to be levied) all restrictions upon alienation ceased. It required a technical and narrow construction to hold that involuntary alienation continues to be forbidden while the power of voluntary alienation is granted; and it is disregarding the act of Congress to hold that the Indian, having property, is not subject to taxation when he is subject to all the laws, civil and criminal, of the state."

In the case of Johnson v. Johnson, 179 Pac. 595, this court approved the doctrine announced in the case of Goudy v. Meath, supra.

In the case of Dickson v. Luckland Co., 242 U. S. 371, 37 Sup. Ct. 167, 61 L. Ed. 371, the court had before it a case appealed from the Supreme Court of Minnesota, involving an allotment of land made on the White Earth Indian Reservation in the state of Minnesota. The lands were allotted by the allottee under a treaty which restricted the same, and providing that the United States would hold the land in trust for the period of 25 years, and at the expiration of that period would convey the same to the allottee, or his heirs, by patent in fee, discharged of such trust and free of all charges or incumbrances; and also that if any conveyance should be made of the land, or if any contract should be made touching the same, before the expiration of the trust period, such conveyance or contract shall be absolutely null and void. Afterwards upon the allottee's application a fee-simple patent was issued to him under the provision of a subsequent act, providing that all restrictions as to the sale, incumbrances, or taxation of allotments within the White Earth Reservation in the state of Minnesota, heretofore or hereafter held by an adult mixed Indian, are hereby removed. The grantee, immediately upon receiving his patent, executed two deeds, the grantee in the second deed filed an action against the grantee in the first deed to determine who had title to the land. The plaintiff contended that the deed given during his minority was disaffirmed and avoided by the one given after the minor be-

came of age. The defendant contended that the patent was conclusive of the minor having attained his majority, and the plaintiff, in the trial of the case, was permitted to show the allottee's age by other evidence than the patent, and in deciding the case Mr. Justice Van Devanter, speaking for the court, said:

"With those restrictions entirely removed and the fee-simple patent issued, it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the state. And that Congress so intended is shown by the Act of May 8, 1906 (34 Stat. 182, c. 2348 [Comp. St. 1913, § 4203]), which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to all the laws, both civil and criminal, of the state.' Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment, were those governing the transfer of real property, fixing the age of majority, and declaring the disability of minors."

The United States Supreme Court, again in the case of *United States v. Waller*, 243 U. S. 463, 37 Sup. Ct. 430, 61 L. Ed. 843, held that when all restrictions against alienation are removed and the allottee had fee-simple title, the federal government "has no further interest in or control of the land."

The Congress of the United States by the act of April 28, 1904 (33 Stat. L. 573, c. 1824) extended the laws of Arkansas heretofore put in force in the Indian Territory so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise, and said laws of Arkansas operated as the local laws in force in said territory applicable to all citizens, and the Supreme Court of the United States, in the case of *Taylor v. Parker*, 235 U. S. 42, 35 Sup. Ct. 22, 59 L. Ed. 121, held, that the extension of said laws enabled the Indian to devise all his alienable property by will made in accordance with the laws of the state of Arkansas, which shows that the Supreme Court of the United States has uniformly adhered to the doctrine that unrestricted Indian lands are subject to the local laws of a territory or state within which said lands are located.

The Supreme Court of Kansas, in the case of *Moore v. Nah-con-be et al.*, 72 Kan. 169, 83 Pac. 400, 4 L. R. A. (N. S.) 477, held:

"February 8, 1887, Congress enacted a statute (chapter 119, 24 Stat. 388) providing for the allotment of lands among Indian bands and tribes and to confer upon the allottees the rights of citizenship in the state where the lands were located. Section 6 of this act has special application here, and reads: 'That upon the completion of said allotments and the patenting of the lands of said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made

shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.' By this statute Congress evidently intended to elevate these allottees from irresponsible condition of 'wards of the nation' to the position of free and independent citizens of the United States, and of the state of Kansas. *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; *In re Now-ge-zhuck*, 69 Kan. 410, 67 Pac. 877. As soon as the allotment was completed these parties became subject to all the laws of the state of Kansas, * * * and were absolved from all their tribal relations."

This court, in the case of *Burtschi et al. v. Wolfe et al.*, 196 Pac. 306, decided January 8, 1921, and not yet [officially] reported, speaking through Mr. Justice Kane, said:

"In reaching this conclusion we reject the premise assumed by counsel for the defendant in error that before an Indian is entitled to sell his lands, either inherited or allotted, we must be able to point our finger to some act of Congress specifically authorizing such sale. In our judgment the opposite presumption is true. Indians, unless they are restricted, either in their person or their property by some specific act of Congress or applicable state law, have the same right to dispose of their property as white citizens of the state and of the United States."

Section 4 of the act of Congress of May 27, 1908 (35 Stat. L. 312), is as follows:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: Provided, that allotted lands shall not be subject or held liable to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

We, therefore, conclude there is no escape from the inevitable conclusion that lands from which restrictions have been removed are subject to all the laws of the state of Oklahoma, and that Congress provided the only exception in that said lands shall not be held liable to any form of personal claim or demand against the allottee arising or existing prior to the removal of restrictions, and the Supreme Court of the United States by its decision held that said lands are nontaxable according to the provisions of the treaty under which said lands were allotted, basing its decision upon the ground that the members of the Indian Tribes had relinquished their equitable interest in the lands in common and received allotments in severalty, and that the relinquishment of the allottee of all his claim in the common tribal property was sufficient consideration to have said

lands allotted to him in severalty, protected from taxation as stipulated in the treaty under which the lands were allotted. Therefore, it is clear that the allottee acquired a vested right to have his allotted lands protected from taxation according to the terms of the treaty. *Choate et al. v. Trapp*, Secretary State Board of Equalization, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941. But no authority can be found sustaining the proposition that any person has a vested right by virtue of a law of descent and distribution prior to the time descent was cast, but, on the contrary, the Supreme Court of the United States, in the case of *Jefferson et al. v. Fink et al.*, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117, held there is no vested right in such law. The opinion in part is as follows:

"The making of an Indian allotment and the issuance of tribal deeds under the Supplemental Creek Agreement of June 30, 1902 (32 Stat. at L. 500, c. 1323), which contained a provision that the descent of Creek allotments should be according to the Arkansas law, which had theretofore been put in force in the Indian Territory, did not invest those who would be heirs under that law with a right to inherit which could not be taken away or impaired by subsequent federal or state legislation substituting the Oklahoma laws of descent for that of Arkansas."

The Supreme Court of the United States in the case of *Sizemore v. Brady*, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308, in unmistakable language repudiated the doctrine that the law of descent conferred a vested right upon a Creek citizen to inherit the lands of a deceased allottee under the law of descent as found in the original Creek Agreement of March 1, 1901 (31 Stat. L. 861, c. 676), and held that said treaty in effect was nothing more than an act of Congress, and could have no greater force or effect, and Mr. Justice Van Devanter, speaking for the court, said:

"On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant in presenti, and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant in presenti. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the

agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired."

The following authorities support the proposition that such treaties as the Supplemental Creek Treaty of June 30, 1902 (32 Stat. L. 500, c. 1323) are regarded as nothing more in effect than acts of Congress and are subject to change by Congress at any time before the same are carried into effect. *Cherokee Intermarriage Cases*, 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96; *Stephens v. Cherokee Nation*, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; *Edye et al. v. Robertson et al.*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798-804; *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928; *Sizemore v. Brady*, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308-312.

It has been held that the right to allot land of the Creek Nation was not a vested right until it had been exercised and could be withdrawn before the right to allot was exercised. *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, supra. Unquestionably, if the right to allot land could be withdrawn, the right to inherit prior to the time descent is cast may be withdrawn. All that any person may have under a law of descent prior to the time descent is cast is the mere expectancy to inherit the property of the deceased, provided the law is not repealed prior to the death of the deceased, and, as was said by Mr. Justice Clark in the case of *Campbell v. Wadsworth*, 248 U. S. 169, 39 Sup. Ct. 63, 63 L. Ed. 192, "All statutes of descent and distribution are arbitrary expressions of the lawmaking power," and the lawmaking power may decree at any time who are to be the beneficiaries under the law of descent and distribution.

[1] Then it is clear that the lands of the Five Civilized Tribes from which restrictions have been removed are subject to the operation of the laws of the state, and the only exceptions to be recognized are the protection from taxation as provided in the Treaty and the exemption from liability on demands existing prior to removal of restrictions.

Under section 4 of the act of May 27, 1908, supra, the lands from which restrictions were or shall be removed shall be subject to all

civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes. Said act clearly shows an intention on the part of the Congress to treat unrestricted lands within the state of Oklahoma the same as the property of any other citizen, and in case an unrestricted Indian should execute a conveyance in which he was defrauded out of his unrestricted lands he would have to appeal to the courts of Oklahoma for protection, and could not maintain an action in any other court. If he desired to will or contract with regard to his unrestricted lands, the same would have to be executed according to the laws of Oklahoma. If he desired to eject a trespasser from his unrestricted lands, he would have to appeal to the courts of Oklahoma for relief, and in case of the death of such unrestricted Indian his lands must be distributed to the heirs according to the laws of Oklahoma.

In the case at bar, the deceased allottee being an Indian of the one-half blood, the surplus part of the allotment was unrestricted in the hands of the allottee and the homestead part of the allotment was restricted, but the record fails to disclose whether any of the parties to this controversy claiming to be heirs are restricted Indians, but under section 9 of the act of Congress of May 27, 1906, the laws of the state of Oklahoma, in unmistakable language, are made to apply to the devolution of the estates of restricted Indians, and under sections 13 and 21 of the Enabling Act of June 16, 1906 (34 Stat. L. 287, c. 3335), under which Oklahoma was admitted as a state into the Union, it is provided "that the laws in force of the territory of Oklahoma as far as applicable shall extend over and apply to said state until changed by the Legislature," and, that all such laws in force at the time of the admission of the state into the Union "shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state." Now, Congress was without authority to provide any local laws for the newly created state or its people, except the Indian tribes located within the state, so it is evident that Congress by said provisions substituted for the Arkansas law of descent and distribution which was then in force among the various tribes of Indians the laws of the territory of Oklahoma, and that Congress did substitute the general laws of the territory of Oklahoma governing the descent and distribution of the estates of deceased allottees, and thereby repealed the laws of the state of Arkansas, has been settled by a number of decisions by this court and the Supreme Court of the United States (Jefferson v. Fink, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117), and it is a well-settled rule of law that a proviso is a subsidiary and dependent part of a statute, and when a statute which contains a proviso is repealed the proviso will fall

with the statute, and will not continue in force as an independent enactment. Black on Interpt. of Laws, p. 271; Church v. Stadler, 16 Ind. 463; Nusser v. Commonwealth, 25 Pa. 126; McDermott v. Nassau Electric R. Co., 85 Hun, 422, 32 N. Y. Supp. 884; In re Day et al., 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519.

[2] The provisos of section 6 of the Supplemental Creek Agreement of June 30, 1902 (32 Stat. L. 500, c. 1323), confining the devolution of Creek lands to citizens of the Creek Nation and their descendants were adopted as a proviso to said treaty adopting chapter 49 of Mansfield's Digest of the Laws of Arkansas, which governs the descent and distribution of estates of deceased allottees, prior to admission of Oklahoma into the Union, and when the Congress substituted the laws of Oklahoma for the laws of Arkansas under the above rule of construction the provisos fell with the statute.

A rule of law universally recognized is that a new statute revising the whole subject-matter of an old one and intended as a substitute for it, although there is no clause to that effect, will operate as a repeal of the old law. Norris v. Crocker, 13 How. 429, 14 L. Ed. 210; U. S. v. Tynen, 11 Wall. 95, 20 L. Ed. 153; State v. Rogers, 10 Nev. 319; Steamboat Co. v. The Collector, 18 Wall. 478, 21 L. Ed. 769.

[3] In the case of Smock v. Farmers' Union State Bank, 22 Okl. 825, 98 Pac. 945, this court approved the rule announced by Sutherland on Statutory Construction as follows:

"If the new act is intended as a revision and substitute for the former act or acts, the general rule applies, and the former act or acts are repealed in toto, though they may contain parts or provisions which are not embraced in the new act and are not repugnant to its provisions."

In the case of Shannon v. People, 5 Mich. 85, the Supreme Court held:

"That where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals, by implication, the former statute, though there be no repugnance." Commonwealth v. Cooley, 10 Pick. (Mass.) 37; Goodenow v. Buttrick, 7 Mass. 140.

The Supreme Court of Maine, in the case of Towle v. Marrett, 3 Greenl. (Me.) 22, 14 Am. Dec. 206, held:

"An act of the Legislature of Maine, relating to the same subject as a statute of Massachusetts, continued in force by the act of separation, but expressing different sentiments, establishing different principles, and containing provisions better suited to the people of Maine, is a virtual repeal of the act of Massachusetts."

Undoubtedly the Congress, in extending the laws of the territory of Oklahoma in force throughout the new state and making the same applicable to the only class of citi-

zens (the Indian tribes) that Congress was vested with authority to legislate for within the new state, evidenced a purpose of abolishing the different tribal laws and provisions of the same which in their operation disinherited their own children, and certainly it cannot be contended that such a condition as existed under such laws were conducive to the best interest of the members of the tribes. Surely Congress did not intend to continue in force a system of laws that denies to the wife the right to inherit her husband's property, or the children to inherit from their parents. It is more in keeping with reason and justice that the Congress intended to substitute a new order of things and conform the law of descent to a natural and reasonable operation. And, upon an examination of the act of Congress of May 27, 1908, *supra*, it is plain that the Congress recognized the fact that the laws of Oklahoma were applicable to unrestricted Indian lands, and to remove all doubt that the laws of Oklahoma should control section 9 of said act specifically provided that restricted land shall descend according to the laws of the state of Oklahoma, and in sections 13 and 21 of the Enabling Act the Congress specifically made the laws of the territory of Oklahoma operative upon the only class of citizens that the Congress was vested with power to legislate for within said state. And as a rule of statutory construction uniformly adhered to by the courts is that every statute is to be construed with reference to its intended scope and the purpose of the Legislature in enacting it, and there is no reason to doubt that the Congress in extending the laws of the territory of Oklahoma in force in the state intended for the same to apply to that class of citizens that Congress was vested with power to legislate for within said state, in order that the citizens of the new state would be provided with a system, as nearly as possible, of uniform laws.

In the case of *Jefferson v. Fink*, *supra*, the Supreme Court of the United States said:

"In early times, when allotments in fee simple to individual Indians were made only occasionally, there was no congressional enactment prescribing who should inherit allotted land on the death of the allottee, and in such cases it was held that while the tribal relation continued the applicable rule of descent was to be found in the laws and usages of the tribe, and not in the laws of the state or territory in which the land lay. *Jones v. Meehan*, 175 U. S. 1, 29-32, 44 L. Ed. 49, 60-62, 20 Sup. Ct. Rep. 1. In actual practice this rule proved unsatisfactory, because the tribal laws and usages were generally crude and often difficult of ascertainment; and so in late allotment acts Congress provided that the descent should go to the state or territorial law. * * * Referring to the purpose with which the Arkansas statutes were put in force in that territory and to their status there this court said in *Shulthis v. McGougal*, 225 U. S. 561, 571, 56 L. Ed. 1205,

1211, 82 Sup. Ct. Rep. 704: 'Congress was then contemplating the early inclusion of that territory into a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local Legislature, Congress alone could act. Plainly, its action was intended to be merely provisional.'

"By the Enabling Act of June 16, 1906 (34 Stat. L. 267, c. 3335), provision was made for admitting into the Union both the territory of Oklahoma and the Indian Territory as the state of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act (section 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof;' and also (section 21) that 'all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state.' The people of the state, taking the same view, provided in their Constitution * * * that 'all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law.'

"The state was admitted into the Union November 16, 1907; and thereupon the laws of the territory of Oklahoma relating to descent and distribution (Oklahoma Revised Statute 1903, c. 86, art. 2, became laws of the state. Thereafter Congress, by the act of May 27, 1908 (35 Stat. at L. 312, c. 199, § 9), recognized and treated 'the laws of descent and distribution of the state of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes."

Now, it is plain that the Supreme Court of the United States held that the purpose of Congress in extending the laws of the territory of Oklahoma in force throughout the state was that the new state should have a system of laws applicable with practical uniformity, and that the tribal laws governing the descent and distribution of estates which were crude and often difficult of ascertainment should be abolished. For a number of years Congress had evidenced an intention of preparing the members of the different tribes for full citizenship and the benefits of a new order of things. So we conclude that the Congress intended by extending the laws of the territory of Oklahoma in force throughout the state that said laws were to be applicable to Indians and their estates, and that since the admission of Oklahoma as

a state into the Union that the devolution of the estates of deceased allottees of the different tribes of Indians are governed by the laws of the state of Oklahoma.

To hold that the Congress under the Enabling Act and the Act of May 27, 1906, did not intend for the laws of descent and distribution of the state of Oklahoma to apply to the devolution of estates of deceased Indians of the Five Civilized Tribes is to repudiate the very doctrine announced in the case of *Jefferson v. Fink*, supra, and place the people of the state of Oklahoma in the unreasonable position of having three distinct laws of descent and distribution: One for the Creek Tribe of Indians; one for the Seminole Tribe of Indians; and one for the people in general throughout the state. Such a contention is not founded upon reason or supported by the authorities, but it requires the court by an unreasonable rule of construction to detach from the dead corpse of the Arkansas law as contained in chapter 49, *Mansfield's Digest*, the provisos as contained in section 6 of the Supplemental Creek Treaty of June 30, 1902, and ingraft them onto the laws of Oklahoma without any authority whatever of any legislative act of the Congress or of the state, and by such an illogical rule of construction thereby disinherit the wives and children of the deceased allottees of the various tribes of Indians. It is more in keeping with the purpose of the Congress and sustained by every sound rule of statutory construction to hold that when the Arkansas law of descent and distribution was repealed the proviso contained therein fell with the statute, and such a construction is in harmony and consistent with every sound rule of statutory construction applicable to the construction of statutes.

Having arrived at this conclusion, the judgment in the case at bar must be reversed, and under the agreed statement of facts in the record the plaintiff in error, Josie Pigeon, is entitled to inherit the estate of Robert Pigeon, deceased, to the exclusion of the defendants in error.

The conclusion reached in this case is not in conflict with the doctrine announced by this court in the case of *Bruner v. Oswald et al.*, 178 Pac. 693, for in that case the deceased Creek allottee died March 23, 1902, and the allotment to which the deceased allottee was entitled was made in the name of her heirs on July 9, 1906. Therefore it was properly held that the descent and distribution of said estate was governed by the law as found in chapter 49 of *Mansfield's Digest* as qualified by the provisos of the Creek Treaty of June 30, 1902.

Judgment is therefore entered, reversing the judgment of the trial court, and Josie Pigeon is decreed to be the sole and only heir

at law of Robert Pigeon, deceased, and entitled to the distribution of the allotment in controversy.

HARRISON, C. J., and MILLER, BLTING, and NICHOLSON, JJ., concur.

KANE, PITCHFORD, and JOHNSON, JJ., dissent.

(34 Idaho, 62)

BITNER v. McINTOSH. (No. 3384.)

(Supreme Court of Idaho. June 27, 1921.)

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by George F. Bitner against Ewen McIntosh for contribution from cosurety on a bond. From an order denying a motion to vacate the judgment in favor of plaintiff, defendant appeals. Reversed and remanded, with instructions.

James F. Allshie, of Cœur d'Alene, for appellant.

James A. Wayne and H. E. Worstell, both of Wallace, for respondent.

McCARTHY, J. On the facts shown in the record, the order of the district court denying appellant's motion to vacate the judgment was an abuse of judicial discretion. Accordingly that order is reversed, and the cause remanded, with instructions to vacate the judgment and for such further proceedings as may be appropriate.

Costs awarded to appellant.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

(34 Idaho, 199)

CARLSON et al. v. HAMILTON. (No. 3332.)

(Supreme Court of Idaho. July 26, 1921.)

Appeal from District Court, Nez Perce County; Wallace N. Scales, Judge.

Action by A. K. Carlson and another against William Hamilton. Judgment for plaintiff, and defendant appeals. Affirmed.

Eugene A. Cox, of Lewiston, for appellant.

Fred E. Butler, of Lewiston, for respondents.

RICE, C. J. Respondents brought this action to recover upon a promissory note. The only defense involved here is the allegation that the note was and is the property of the Monarch Tractor Company, a foreign corporation, which has not complied with the Constitution and laws of this state authorizing it to do business therein.

We have examined the transcript, and find no evidence contradicting the finding of the court to the effect that the respondents were

the owners of the note at the time of its delivery and continued to be the owners thereof to the time of trial.

The judgment is affirmed, with costs to respondents.

BUDGE, MCCARTHY, DUNN, and LEE, JJ., concur.

(34 Idaho, 82)

In re HOFSTEDE. (No. 3208.)

(Supreme Court of Idaho. June 30, 1921.)

Proceeding for the disbarment of Edward Hofstede, an attorney at law. A judgment of disbarment was entered, and respondent petitions for reinstatement. Reinstatement ordered.

PER CURIAM. On June 25, 1918, a judgment of disbarment was entered in the matter of Edward Hofstede, an attorney at law. He has petitioned the court for reinstatement, setting forth that since his disbarment his conduct has been such as to justify the court in reinstating him. The showing made is satisfactory to the court, and is supported by many affidavits and testimonials, all certifying to the propriety of his conduct since the judgment of disbarment, and to the fact that he is now a law-abiding citizen, giving his hearty support to the laws of the land. His petition for reinstatement was referred to the State Bar Association. The members of the grievance committee, to whom it was referred, have expressed themselves as satisfied that an order of reinstatement should be made.

It is therefore ordered that the said Edward Hofstede be reinstated as an attorney at law, and that he be and is hereby authorized to practice as such attorney in all courts of this state.

Ex parte BILYEU. (No. A-2994.)

(Criminal Court of Appeals of Oklahoma. Aug. 16, 1921.)

In the matter of the petition of Ike Bilyeu for writ of habeas corpus. Writ denied, and rule to show cause discharged.

C. T. Huddleston, of Okemah, for petitioner.

T. S. Hurst, Co. Atty., of Pawnee, for respondent.

PER CURIAM. On behalf of Ike Bilyeu a petition for writ of habeas corpus was filed in this court April 30, 1917, alleging that petitioner is unlawfully imprisoned in the county jail of Okfuskee county, by the sher-

iff of said county. A rule to show cause was entered and issued, and the answer duly filed shows that petitioner, upon arraignment in the superior court of Okfuskee county on a charge of larceny of domestic fowls, entered a plea of guilty, and was by the court sentenced to be confined in the county jail for two months and to pay a fine of \$100 and the costs.

Thereupon the writ was denied, and the rule to show cause discharged.

Ex parte COUCH. (No. A-2922.)

(Criminal Court of Appeals of Oklahoma. Aug. 16, 1921.)

Application for writ of habeas corpus by John M. Couch. Writ denied.

Homer Hurst, of Oklahoma City, for petitioner.

Chas. B. Selby, Co. Atty., of Oklahoma City, for respondent.

PER CURIAM. This was an application to this court for writ of habeas corpus by John M. Couch, upon the ground that he was not guilty of the charge of murder made in the complaint filed before T. F. Donnell, a justice of the peace of Oklahoma county, upon which a preliminary examination was had and he was held without bail for the murder of one Rowland D. Williams, alleged to have been committed in Oklahoma county on the 18th day of January, 1917.

A demurrer was interposed on the ground that the facts stated in the petition, if established, will not warrant the discharge of the petitioner, which demurrer was sustained, and the writ denied.

Ex parte CURTWRIGHT. (No. A-3985.)

(Criminal Court of Appeals of Oklahoma. July 9, 1921.)

Application by Manuel Curtwright for habeas corpus to be let to bail. Writ denied, and bail refused.

Neal & Neal, of Poteau, for petitioner.

The Attorney General, W. C. Hall, Asst. Atty. Gen., D. C. McCurtain, Co. Atty., of Poteau, and James Babb, Asst. Co. Atty., of Poteau, for respondent.

PER CURIAM. This is an application by Manuel Curtwright for the writ of habeas corpus, by which he seeks to be let to bail pending the final hearing and determination of a charge of murder filed against him in Lesfore county, wherein upon his preliminary

(198 P.)

examination he was held to answer for the murder of one Jesse Yates, by shooting him with a shotgun in said county on or about the 13th day of February, 1921.

Petitioner avers that he is now unlawfully imprisoned and restrained in the common jail of LeFlore county, by John Hunt, sheriff; that he is not guilty of the crime of murder charged; that upon the evidence introduced at his preliminary examination, together with the affidavits of certain other persons which are presented herewith, it is shown that the proof of his guilt is not evident nor the presumption thereof great; that therefore petitioner is entitled to be let to bail pending the trial of said charge. It is also shown that petitioner applied to the judge of the district court of LeFlore county for the writ of habeas corpus to be admitted to bail, and on the 19th day of April, 1921, a hearing was had thereon and bail was denied.

The evidence for the state taken upon the preliminary examination and the affidavits for the state show that about 8 o'clock, Sunday morning, the 13th day of February, 1921, the petitioner did kill and murder one Jesse Yates, by shooting him in the back with a shotgun. The petitioner admits the shooting, but claims that it was done in self-defense. We have examined the record, and, without entering into a discussion of the facts as disclosed by the proof, we deem it only necessary to say that upon a careful consideration of all the testimony presented in support of the application we are of opinion that the petitioner is not entitled to be admitted to bail as a matter of legal right.

It is therefore considered and ordered that the writ be denied, and bail refused.

GARDNER et al. v. STATE. (No. A-3668.)

(Criminal Court of Appeals of Oklahoma. July 9, 1921.)

Appeal from Superior Court, Okmulgee County; R. E. Simpson, Judge.

George Gardner and Rose Gardner were convicted of violating the prohibitory liquor law, and they appeal. Affirmed.

See, also, 193 Pac. 56.

E. W. Smith, of Henryetta, for plaintiffs in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiffs in error, George Gardner and Rose Gardner, were jointly informed against and tried and con-

victed upon an information filed in the superior court of Okmulgee county, at Henryetta, charging that they did have possession of certain intoxicating liquors, to wit, 16 gallons of Choctaw beer, with the intention on the part of them of selling the same, and in accordance with the verdict of the jury they were each sentenced to be confined in the county jail for a period of 6 months and to pay a fine of \$500. From the judgment they appealed, by filing in this court on December 9, 1919, a petition in error, with transcript of the record.

No briefs have been filed and no appearance made on behalf of the plaintiffs in error in this court. When the case was called for final submission, the Attorney General moved to affirm the judgment for failure to prosecute the appeal. It appearing that the appeal herein has been abandoned, the judgment is affirmed, and the cause remanded to the superior court of Okmulgee county, at Henryetta, with direction to cause its judgment herein to be carried into execution.

Mandate forthwith.

(82 Okl. 107)

MAZ-HE v. JEFFERSON TRUST CO.

JEFFERSON TRUST CO. et al. v. MAZ-HE.

(Nos. 10056, 10198.)

(Supreme Court of Oklahoma. April 19, 1921.
Rehearing Denied May 31, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 300 — In absence of showing of unavoidable delay in moving for new trial, Supreme Court will not consider errors.

Sections 5035 and 5036, Rev. Laws 1910, requiring motion for a new trial to be filed within three days after the verdict or decision is rendered and to be made in writing, are mandatory; and, in the absence of the showing that the party filing said motion has been unavoidably prevented from doing so within the time fixed by the statute, this court will not consider errors occurring at the trial. Clark et al. v. Cawdell, 74 Okl. —, 181 Pac. 285.

2. Appeal and error \S 356 — Appeal will be dismissed where not filed within six months.

Where plaintiff in error fails to file his appeal in this court within six months from the date of the rendition of the judgment or order appealed from, as required by chapter 18, p. 35, Sess. Laws 1910-11 (section 5255, Bunn's Ann. Supp. to Rev. Laws Okl.), the same will be dismissed for want of jurisdiction.

3. Indians \S 18 — Action of Secretary of Interior in determining legal heirs of deceased allottee held conclusive.

By authority of the provisions of section 6 of the act of the Congress approved February

8, 1887, as amended by Act May 8, 1906 (34 Stat. 182, 183 [U. S. Comp. St. §§ 8951, 4203]), and the act of June 25, 1910 (36 Stat. 855), which was made applicable to Oklahoma by the act of the Congress of February 14, 1913 (U. S. Comp. St. § 4228), the Secretary of the Interior was vested with authority to ascertain the legal heirs of deceased Indians and caused to be issued to said heirs, in their name, a patent in fee simple for the lands being held in trust by the United States for the original allottee, and the action of the Secretary of the Interior in determining the legal heirs of such deceased Indians in accordance with the authority granted is conclusive and final.

4. Indians \S 15(1) — Indian's deed held subject to cancellation for inadequacy of price.

In an action to cancel a deed, where the evidence discloses that the same was obtained from a man nearly 100 years of age, who was a member of the Citizen Band of Pottawatomie Indians, uneducated, could speak but very little English, unable to write, that the interest in the lands conveyed was of the value of \$2,000, for a consideration of \$50, held, in such a case, the inadequacy of price is so gross as to shock the conscience of the court and establish a strong presumption of fraud and that such a conveyance should be canceled.

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Actions by Peter Maz-he against the Jefferson Trust Company. Judgment for plaintiff on his first cause of action in ejectment. Judgment for defendant on the second cause of action to cancel deed. From the judgment on the first cause of action defendant appeals, and from the judgment on the second cause of action plaintiff appeals; the appeals being consolidated in the Supreme Court. Appeal of defendant dismissed, and on plaintiff's appeal judgment reversed and cause remanded, with directions.

Arrington & Arrington, of Shawnee, and A. E. Crane, of Topeka, Kan., for Maz-he.

Mark Goode, of Shawnee, for Jefferson Trust Co.

KENNAMER, J. The two causes here on appeal were consolidated for the reason that Peter Maz-he, plaintiff in error in cause No. 10056, filed his second amended petition in the district court of Pottawatomie county pleading three different causes of action. The first cause of action pleaded was an ejectment action for the possession of the allotment of one Maz-he, a member of the Citizen Band of Pottawatomie Indians; the plaintiff, Peter Maz-he contending that one Wah-sah-to and himself were the nephews of the allottee and the sole and only heirs and entitled to possession of the allotment; that since the filing of the original petition in the action his coplaintiff, Wah-sah-to, had died, leaving him as the sole heir of the deceased allottee. The second cause of action pleaded

in the petition of the plaintiff prayed for the cancellation of a certain deed which the Jefferson Trust Company, plaintiff in error in cause No. 10198 and defendant in error in cause No. 10056, had obtained from Wah-sah-to, coplaintiff of Peter Maz-he, after the institution of this action, upon the ground that the consideration paid for the interest conveyed under said deed was so inadequate and unconscionable as to shock the conscience of the court, and that fraud was practiced in obtaining the deed. Upon a trial of the causes the court instructed the jury, on the 25th day of January, 1918, to return a verdict for the plaintiff upon his first cause of action, which verdict was duly rendered and filed. On the 30th day of January, 1918, the court entered judgment on the verdict in favor of the plaintiff and against the defendant. The judgment entered upon the verdict of the jury was for the possession of the lands, and sustained the first cause of action in ejectment. The court in rendering the judgment found for the defendant upon the second cause of action, and sustained the deed which the Jefferson Trust Company had obtained from the coplaintiff of Peter Maz-he for the sum of \$50, and decreed the Jefferson Trust Company to be the owner of an undivided half interest in the lands. The third cause of action was by the plaintiff dismissed. The Jefferson Trust Company, plaintiff in error in cause No. 10198, has attempted to appeal and reverse the judgment rendered by the trial court upon the verdict of the jury sustaining the plaintiff's first cause of action in ejectment.

[1] The case-made filed by the Jefferson Trust Company et al., as Plaintiff in Error, v. Peter Maz-he, as Defendant in Error, in cause No. 10198, discloses that the verdict of the jury was filed and returned into court on the 25th day of January, 1918; that the motion for a new trial by the Jefferson Trust Company was not filed until February 2, 1918, seven days after the verdict was rendered; that the judgment of the court was entered on the 30th day of January, 1918. It is not contended that the plaintiff in error was unavoidably prevented from filing the motion for a new trial within three days, the time prescribed by the statute, or that the motion was upon the ground of newly discovered evidence. Under section 5035, Revised Laws of 1910, the motion for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying which he could not, with reasonable diligence, have discovered and produced at the trial, or impossibility of making a case-made, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented. The statute prescribing the time within which to file a motion for a new trial

is mandatory. *Ronne v. Hirsh*, 71 Okl. —, 178 Pac. 88; *Clark et al. v. Cawdell*, 74 Okl. —, 181 Pac. 285; *J. R. Watkins Medical Co. v. Lizar*, 78 Okl. 302, 190 Pac. 552.

[2] Chapter 13, Session Laws of Oklahoma 1910-11, at page 35 (section 5255, Bunn's Ann. Supp. to the Revised Laws of Oklahoma) provides:

"All proceedings for reversing, vacating or modifying judgments or final orders shall be commenced within six months from the rendition of the judgment or final order complained of.
* * *

It is obvious that this court has no jurisdiction of the appeal in cause No. 10198, Jefferson Trust Company, Plaintiff in Error, v. Peter Maz-he, Defendant in Error, and the same must be dismissed for the reason the petition in error was not filed in this court within six months from date of judgment. *Thomason v. Champlin*, 43 Okl. 86, 141 Pac. 411.

It is so ordered.

In cause No. 10056 the only question presented to the court for decision is whether or not the plaintiff, Peter Maz-he, is entitled to a cancellation of the deed obtained from Wah-sah-to Maz-he, the coplaintiff with Peter Maz-he, and who died prior to the trial of the cause in the court below. The trial court having rendered judgment in favor of the defendant below, the Jefferson Trust Company, the plaintiff, Peter Maz-he, brings the judgment of the court denying a cancellation of the deed here for review. The undisputed testimony shows: That the lands in question were allotted to one Maz-he, a member of the Citizen Band of Pottawatomie Indians, pursuant to the act of Congress of February 8, 1887 (24 Stat. 388). Section 5 of the act (U. S. Comp. St. § 4201) reads as follows:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of such period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

[3] That the allottee, Maz-he, died in Jackson county, Kan., some time in the year of 198 P.—21

1895 or 1896. That on or about the 21st day of October, 1914, pursuant to an order of the Secretary of the Interior finding Peter Maz-he and Wah-sah-to to be the legal heirs at law of the deceased allottee, Maz-he, a fee-simple patent was issued to Peter Maz-he and Wah-sah-to and their heirs. It appears that on or about the 22d day of March, 1904, Marie F. Donovan attempted to purchase the allotment of Maz-he from Anton Burnett and James Burnett, who claimed to be the heirs of the deceased allottee, and presented affidavits of heirship and secured the approval of a deed by the Burnetts to Donovan by the Secretary of the Interior. The Jefferson Trust Company contends in this cause that the title to the lands prior to the issuance of final patent was in the United States, and, in approving the conveyance of the supposed or purported heirs, that until such conveyance is canceled and set aside the United States was without power to issue a patent conveying the lands to any other person. This contention cannot be sustained. The Burnetts, in securing the approval of the Secretary of the Interior to their conveyance to Donovan, conveyed no title, if they in fact were not the heirs of the allottee. It is not contended that there was any authority by reason of any act of Congress vesting the Secretary of the Interior with authority to decree heirship at the time of the purported approval of the Burnett conveyance, but all the authority the Secretary had was to approve the conveyance of the real heirs; but the patent issued to Peter Maz-he and his brother, Wah-sah-to, as the heirs of the deceased allottee was authorized by the act of the Congress of May 8, 1906 (34 Stat. 182, 183 [U. S. Comp. St. §§ 3951, 4203]), which granted authority to the Secretary of the Interior to ascertain the legal heirs of deceased Indians and caused to be issued to their heirs a final patent, and the patent issued to Peter Maz-he and Wah-sah-to under the authority of said act, until canceled and set aside in a court of competent jurisdiction, vested the title to the lands in controversy in Peter Maz-he and Wah-sah-to as the heirs of the deceased allottee.

Counsel for the Jefferson Trust Company contends that if in fact Peter Maz-he and Wah-sah-to were the heirs of the deceased allottee this action was barred by the statute of limitation. There is no merit in this contention, for the reason the government was holding the lands in trust and the statute of limitation would not operate as long as the lands were being held in trust by the government. Statutes of limitation are not available against a restricted Indian. *Wrigley v. McCoy*, 73 Okl. —, 175 Pac. 259; *McGannon v. Straightledge*, 32 Kan. 524, 4 Pac. 1042; *Gibson v. Obouteau*, 13 Wall. 92, 20 L. Ed. 534.

It appears from the record in this case

that the plaintiff, Peter Maz-he, together with his brother, Wah-sah-to, were in possession of the lands in controversy during the year 1913, by reason of one William Sharp having leased the lands from the plaintiff and his brother, Wah-sah-to, occupied and used the lands as their tenant, and paid the rent of \$100 to the plaintiff and his brother, Wah-sah-to. It further appears from the record that Sharp was in possession of the lands, claiming title through mesne conveyances from Marie Francis Donovan, the same party who claimed to have purchased from the Burnett heirs, but, being notified by the Secretary of the Interior of the determination of the heirship and issuance of patent to Peter Maz-he and Wah-sah-to, recognized the order of the Secretary of the Interior decreeing heirship, executed a quitclaim deed to Peter Maz-he and Wah-sah-to, and leased the lands from them. Clearly there is no foundation upon which the statute of limitation can apply to this cause. The question here, since we had held that the appeal of the Jefferson Trust Company must be dismissed, is the one presented by Peter Maz-he on his appeal as to whether or not the deed which the Jefferson Trust Company obtained from Wah-sah-to should be canceled. It is admitted by the parties to this controversy that the interest of Wah-sah-to in the lands, if he in fact was an heir, which was finally determined in the trial of the first cause of action stated in the petition, was of the value of \$2,000. The evidence is undisputed that he was an old Indian, near the age of 100 years, illiterate, and could speak but very little English. Prior to his death he testified by deposition that a Mr. Horn, whom the evidence shows was an agent of the Jefferson Trust Company, and an Indian interpreter by the name of Bosley, who the evidence shows was hired by the Jefferson Trust Company to interpret for this particular transaction, came to his place and represented to him that they wanted to pay him his lease money which was due him and wanted him to sign papers. The testimony shows for the year 1913 he had received \$50 as his pro rata share of the lease money due on the lands in controversy, and believing that he was signing a receipt for the lease money he made his thumbmark upon an instrument of some kind. The evidence by Mr. Horn, the agent of the Jefferson Trust Company, shows that Wah-sah-to was so old and decrepit that he had to steady his hand for him to make his mark. The evidence further discloses that they secured his mark to an instrument requesting the dismissal of his suit wherein it was being sought to recover his interest in the lands in controversy, and that he agreed to pay the cost of the suit, and, while the record is not clear, it is undisputed that the cost amounted, at that time, to more than the \$50 that was being paid for his interest in the lands valued at \$2,000. The trial

court, in rendering judgment for the defendant and refusing to cancel the conveyance, which the Jefferson Trust Company relies upon, assigned no reasons, made no findings of fact that would give the court any light upon what law or facts the deed should be sustained.

[4] When we consider all the facts and circumstances attending this transaction, we are unable to reach the conclusion that a deed obtained under the circumstances as disclosed by the record as this deed was should be sustained. We are fully warranted in concluding that the consideration of \$50 for lands of the value of \$2,000 is sufficient to constitute constructive fraud and in good conscience cannot be sustained in a court of equity. Gross inadequacy of consideration raises a strong presumption of fraud, but the evidence of the witness on behalf of the defendant, the Jefferson Trust Company, discloses that the deed was not fairly obtained, and the record is full of inequitable facts and circumstances that sustain the conclusion that the deed was obtained through fraud. The very fact that the parties obtaining the deed were not satisfied with having the old Indian of nearly a century's age sell his interest in an estate valued at \$2,000 for \$50, but proceeded to have him sign a written instrument requesting his suit to be dismissed, at his cost, with an accumulated cost of more than he was obtaining for his \$2,000 estate, shows conclusively that he was imposed upon or was incompetent to transact the business under consideration and that the judgment herein is clearly against the weight of the evidence. In the case of *Brunner v. Cobb*, 37 Okl. 228, 131 Pac. 165, L. R. A. 1916D, 377, this court said:

"We might content ourselves by saying, and the record would fully warrant such conclusion, that the inadequacy of the consideration, of itself, free from any other fact or circumstance, is sufficient to constitute constructive fraud of such magnitude as to require the cancellation of the conveyance; but in this case we are not required to base our judgment upon this lone conclusion, for the record is full of other inequitable facts and circumstances that, to our mind, are so cumulative in their character and corroborative of the above conclusion as to leave no room for doubt in the mind of any fair-minded man."

See 2 Pomeroy's Equity Jurisprudence, § 926; *Stephens v. Ozbourn*, 107 Tenn. 573, 574, 64 S. W. 902, 89 Am. St. Rep. 957.

The judgment rendered decreeing the Jefferson Trust Company to have an undivided one-half interest in the lands in controversy with Peter Maz-he is reversed, and this cause is remanded to the district court, with directions to enter judgment canceling the deed as prayed for in the second cause of action.

HARRISON, C. J., and KANE, JOHNSON, and MILLER, JJ., concur.

(81 Okl. 285)

DAILEY et al. v. BENN et al. (No. 9646.)

(Supreme Court of Oklahoma. May 10, 1921.)

(Syllabus by the Court.)

1. Indians \Rightarrow 18—Devolution of allotment of Seminole freedman held governed by statute; allotment of Seminole freedman held to come through blood of both parents.

William Bowlegs, a Seminole freedman, died intestate on the 30th day of June, 1902, without descendants, after having received his allotment. He left surviving him his widow. The father and mother of the deceased were dead at the time of the death of the intestate. They were Seminole freedmen. *Held*, that the devolution of the allotment of William Bowlegs is governed by the applicable provisions of chapter 49, Mansf. Dig. Laws of Ark. *Held*, further, that the said William Bowlegs acquired the right to his allotment by his membership in the Seminole Tribe of Indians; that, the father and mother being Seminole freedmen, his allotment came to him through the blood of both parents, and as much through the blood of one as the other; that by virtue of that part of section 2531 of said chapter 49 which provides, "In cases where the intestate shall die without descendants, if the estate came by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs," said allotment ascended equally to the father and mother of said decedent and to their heirs, who were citizens of the Seminole Tribe of Indians.

2. Dower \Rightarrow 57(1)—Not an estate subject to conveyance prior to assignment.

The law in this jurisdiction seems to be well settled that the widow's right of dower, prior to assignment, is not an estate in the lands of her deceased husband, but is rather in the nature of a mere chose in action, and cannot be assigned to a person not vested with the fee, and a conveyance of dower to a stranger to the title, prior to having the same assigned, confers no rights enforceable at law; but she may by deed release her dower interest after the death of her husband to the heirs or others in privity with them.

3. Statutory provisions.

Under and by virtue of section 2533, Mansf. Dig. of the Statutes of Ark., relations of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Appeal from District Court, Seminole County; O. Guy Cutlip, Judge.

Proceeding between Louisa Dailey and others and Margaret R. Benn and others. Judgment for the latter, and the former appeal. Affirmed.

J. A. Baker, of Wewoka, for plaintiffs in error.

Davis & Patterson, of Wewoka, and Mark Goode, of Shawnee, for defendants in error.

PITCHFORD, J. This is an appeal from the district court of Seminole county, Okl.; the subject-matter being the title to 40 acres of land in said county, being the allotment of one William Bowlegs, a Seminole freedman.

The brief filed by plaintiffs in error contains the following stipulations:

"To avoid making this case-made unnecessarily long and tedious by incorporating in the same the evidence produced on the trial of the same in the district court and the rulings thereon by the court, we, the undersigned attorneys in said case, agree that no substantial good is to be accomplished by so incorporating the evidence, and that the findings of fact as made by the trial judge, Hon. C. Guy Cutlip, are true and correct, and that the findings of fact made by him express the truth of the case."

The findings of fact by the trial court are substantially as follows: That William Bowlegs, the allottee, died intestate in the year of 1902, leaving surviving him his widow, Louisa Dailey, one of the plaintiffs in error; the deceased had no children or descendants of children; that the father of the deceased was John Bowlegs, and his mother was Bess Bowlegs, both of whom were Seminole freedmen, and were dead at the time of the death of William Bowlegs. John Bowlegs, the father, left surviving him certain of his brothers and sisters and their descendants.

Bess Bowlegs, the mother, died, leaving surviving her as her heirs at law her brother, Freeman, and Betsey Ann, her sister. Pompey, the father of Bess, after the death of her mother, intermarried with one Hester, and was the father, by Hester, of a number of children.

It was further found by the court that on the 9th day of October, 1905, certain of the heirs interested in the allotment of the deceased, William Bowlegs, conveyed said land by warranty deed to J. W. Bolon, and that by mesne conveyance the interest of the grantors passed to defendant in error J. W. Lydick; that Polly Cyrus, a sister of John Bowlegs, had conveyed all of her interest to N. B. Smith, and that Smith afterwards sold to Lydick; that Louisa Dailey, on the 28th day of June, 1916, executed to H. T. King and J. S. Barham her warranty deed to said land; and that King and Barham sold to Lydick, and J. D. Lydick conveyed a part of his interest in the land to Margaret R. Benn.

The court, after setting forth the interest of the various heirs in the estate, concluded that J. D. Lydick and Margaret R. Benn were the owners of the dower interest of

Louisa Dailey, the widow, and that in equity this interest should be assigned to them, and that by purchase of the interests of a number of the heirs they were also entitled to a $\frac{25}{48}$ interest in and to the remainder of the land; that, upon the death of William Bowlegs, his allotment descended one-half to the descendants of John Bowlegs, his father, and one-half to the descendants of Bess Bowlegs, his mother, and that, upon the death of Bess Bowlegs, her estate went to the heirs of her father, Pompey; that is, to her full brother and sister, Freeman and Betsey Ann, and her half brothers and sisters, the children of her father, Pompey, by Hester.

On appeal the plaintiffs in error argue three propositions, the first being that the dower interests of the widow, Louisa Dailey, in the allotment of her deceased husband, were not assignable, except to the heirs, the remaindermen, or the owner of the fee; that the defendants in error secured no rights by reason of the deed executed by Louisa Dailey; second, that, if it should be held that Louisa Dailey by her deed did convey her dower interest, this interest should not go to the purchasers alone, but that it would inure to the benefit of all the joint tenants by each paying his or her pro. rata part of the purchase money of such interest, on the theory that, one joint tenant purchasing an incumbrance upon the common property, this purchase inures to the benefit of all the joint tenants; and, third, that upon the death of William Bowlegs one-half of his estate descended to the heirs of his mother, Bess Bowlegs, and that the portion going to Bess Bowlegs would descend, one-half to the heirs of her mother, who would be Freeman and Betsey Ann, and the other one-half to the heirs of her father, Pompey, and further that, as Freeman and Betsey Ann were the children of Pompey, they would be entitled not only to the one-half of Bess' interest, but would also be entitled, in addition thereto, to share in the one-half interest going to the heirs of the father of Bess; that they were as much entitled to share in the distribution of their father's estate as were their half brothers and sisters, who were the children of Hester.

[2] The law in this jurisdiction appears to be well settled that the widow's right of dower, prior to assignment, is not an estate in the lands of her deceased husband, but is rather in the nature of a mere chose in action, and cannot be assigned to a person not vested with the fee, and that a conveyance of dower to a stranger to the title, prior to having the same assigned, confers no right enforceable at law.

By virtue of the stipulations supra we have no means of ascertaining from the evidence whether or not defendants in error were justified in claiming the entire interest of the heirs in the land at the time the deed was executed by the widow.

[1] We find in the pleadings, however, that the claim was made by the defendants in error to the entire interest. If the interest of all the heirs had been purchased, then the defendants in error would have owned the whole fee, and there would then be no question as to the power of the widow to transfer her dower interest to them prior to having the same assigned. The court found that there were other heirs whose interest had not been sold to the defendants. Therefore we are confronted with this proposition: If a portion of the heirs transfer their interests, does this constitute the purchaser of these various interests such a holder of the legal title as to make effective the conveyance of the dower interest of the widow to such purchaser? We are of the opinion that it does. At the time Louisa Dailey executed the deed, her grantee was not a stranger to the title.

In the case of *Beauchamp v. Bertig et al.*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659, the widow, entitled to an unassigned dower interest, joined with certain infants owning the balance of the fee, in executing a deed to the land, the infants thereafter disaffirming their act. It was there held that the deed was effective to pass the widow's dower interest.

The rule is stated in *Rodgers on Domestic Relations*, p. 360, § 410, as follows:

"And she may release her dower interest after death of her husband to the heirs or other in privity with them by deed so as to release same to them, though she could not, ordinarily, convey her dower interest before her assignment."

In the case of *Dobberstein v. Murphy et al.*, 44 Minn. 526, 47 N. W. 171, it is said:

"A quitclaim deed to the heirs by a widow, when, by the law of the state, she was entitled to dower in the lands of her deceased husband, if it could not operate as a conveyance, did operate as a release of the dower right."

In the case last quoted from it was held to be immaterial as to whether or not the deed of the widow to her dower passed title or merely extinguished the right, and the court refused to pass squarely on the question, but in the body of the opinion on page 529 of 44 Minn., and on page 172 of 47 N. W., says:

"Whether or not the widow's dower, not being set off, was at the time she executed the quitclaim deed to her daughters, assignable so that she could convey it, there is no question that she could release it. And her deed operated either as a conveyance or as a release. In which way it took effect is immaterial in this action, for it left in the widow no claim upon the land."

The next contention of plaintiffs in error is that, if the deed executed by Louisa Dailey had the effect of extinguishing her dower interest, the purchase of this interest would inure to the benefit of all the heirs inter-

ested in the estate. It is conceded, however, that each heir should pay his or her proportion of share of the amount expended in purchasing this interest. There is nothing contained in any of the pleadings indicating a contention of this nature on the part of any of the plaintiffs in error in the trial court. The point stressed particularly by plaintiffs' brief is in reference to the dower interest of Louisa Dailey.

In the conclusions of law by the trial court, holding that the defendants in error were the owners of the dower interest of Louisa Dailey, and that in equity this interest should be assigned to them, none excepted to this finding except Louisa Dailey. In fact, there was no specific exception to any of the conclusions of law by the trial court, except those made by Louisa Dailey, and she excepted specifically to each finding. There is, however, a general exception in the following language:

"To each and every foregoing conclusion of law Louisa Dailey and all the defendants and interveners represented by J. A. Baker except, and which exceptions are allowed by the court, and likewise the intervener J. D. Lydick excepts to each and every of the foregoing conclusions of law, and his exceptions are allowed by the court."

The plaintiffs in error have cited a long line of authorities to the effect, where a cotenant purchases an incumbrance, lien, or outstanding title, each purchase inures to the joint benefit of the cotenants. This is true in regard to liens and incumbrances, but the right of the nonpurchasing cotenants to share in the benefit of the purchase is dependent on their election, within a reasonable time, to bear their proportion of the expenses incurred in said purchase. 38 Cyc. 46.

We have seen in *Beauchamp v. Bertig*, supra, that the dower interest passes to the purchaser, notwithstanding the deed executed by the minor heirs was disaffirmed.

In *Eakins v. Eakins*, 112 Ky. 347, 65 S. W. 511, it was said:

"Where a widow united with a part of the heirs in selling land allotted to her as dower, the other heirs had no right to interfere with the purchaser during the widow's lifetime."

The third contention of plaintiffs in error is that one-half of the estate descended to his mother, Bess Bowlegs, and that the interest going to Bess should be divided, one half to the heirs of her mother, and the other half to the heirs of her father. The trial court held that this interest went to the heirs of the father of Bess. In support of this contention we are cited to the case of *Thorn v. Cone*, 47 Okl. 781, 150 Pac. 701. The question there before court was whether or not the father and mother of a Seminole allottee,

both of whom were Seminole citizens, would be entitled to inherit equally in the estate of their deceased child? The facts in that case were as follows: Sissie and Lona Jefferson, full-blood Seminole Indians, died intestate, without descendants, after having received their allotments, on the 12th day of February, 1903, and the 20th day of July, 1904, respectively. The court held that the devolution of their allotments was governed by the applicable provisions of chapter 49, Mansf. Dig. Laws of Ark., and held further that said decedents acquired the right to their allotments by their membership in the Seminole Tribe of Indians; that, their father and mother being full-blood Seminole Indians, their allotments came to them through the blood of their tribal parents, and as much through the blood of one as the other, and, upon their death without descendants, their allotments ascended equally to the father and his heirs and the mother and her heirs.

We are again confronted with the stipulations above referred to. We have no means of reviewing the evidence heard by the trial court. The court found that the father and mother of William Bowlegs were Seminole freedmen, and evidently there must have been some evidence to justify the court in awarding the interest of Bess Bowlegs to the heirs of her father; that he must have found that they were Seminole citizens and entitled to share in this interest. If the mother of Bess Bowlegs was not a Seminole, then no interest would go to her heirs.

In *McDougal v. McKay et al.*, 237 U. S. 372, 35 Sup. Ct. 605, 59 L. Ed. 1001, one of the parents of the deceased allottee whose estate was in controversy was a noncitizen of the Creek Tribe of Indians, and the court held that, since no right in the Creek tribal estate came from the noncitizen parent, none would go back to the noncitizen parent by inheritance. The same rule would apply in this case.

[3] Section 2533, Mansf. Dig. Laws of Ark., provides that:

"Relations of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise, or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance."

We conclude that the judgment of the trial court should be affirmed; and it is so ordered.

HARRISON, C. J., and McNEILL, NICHOLSON, and ELTING, JJ., concur.

(81 Okl. 247)

KOKOMO OIL CO. v. BELL. (No. 9874.)

(Supreme Court of Oklahoma. May 10, 1921.)

*(Syllabus by the Court.)***1. Contracts — 164 — When writings should be construed together stated.**

When two or more writings are executed at the same time and between the same parties, and concern the same subject-matter, or when the contracts are not executed at the same time, but refer to the same subject-matter, and on their face show that they are each executed as a means of carrying out the intention of the other, they should be construed together.

2. Contracts — 147(2, 3)—Intent as gathered from entire agreement must be made effectual in construing contracts.

In construing contracts, it is the duty of this court to ascertain the intention of the parties from the language contained therein, and give to said contracts the effect contemplated by the parties at the time of the execution of such contract, and the intention of the parties must be deduced from the entire agreement, not from any part or parts of it standing alone, and, if possible, every part should be made effectual.

3. Money received — 6(4)—Action lies to recover money paid for consideration which has wholly failed.

An action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed, unless the failure of the consideration is due to some fault on the part of the plaintiff himself.

Appeal from District Court, Washington County; R. B. Boone, Judge.

Action by John A. Bell, Jr., against the Kokomo Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Zevely, J. M. Givens, and R. W. Stoutz, all of Muskogee, for plaintiff in error.

James A. Veasey and J. P. O'Meara, both of Tulsa, for defendant in error.

NICHOLSON, J. This action was brought in the district court of Washington county by the defendant in error as plaintiff below against the plaintiff in error as defendant below to recover the sum of \$1,600 paid for the assignment of a departmental oil and gas mining lease. The parties will be referred to as they appeared in the trial court.

On the 31st day of May, 1912, the plaintiff purchased of the defendant a departmental oil and gas mining lease and paid therefor the sum of \$1,600, and on said day the defendant executed to the plaintiff an assignment of said lease in words and figures as follows:

"Assignment of Oil and Gas Lease.

"Whereas, the Secretary of the Interior has heretofore approved an oil and gas mining lease,

dated May 12, 1912, entered into by and between J. F. Overfield, lessee, the Kokomo Oil Company, assignee from J. F. Overfield, and Ollie Bunch, lessor, conveying the following described lands in the Cherokee Nation, Okl.: Southeast quarter of the northwest quarter, north half of northeast quarter of southwest quarter, southeast quarter of northwest quarter of northeast quarter of section 1, township 25 north, range 13 east:

"Now, therefore, for and in consideration of \$1,600.00, the receipt of which is hereby acknowledged, the said Kokomo Oil Company, assignee of the lessee in the above-described lease, hereby bargains, sells, transfers, assigns, and conveys all its right, title and interest of the lessee in and to said lease, subject to the approval of the Secretary of the Interior, to John A. Bell, Jr., said assignment to be effective from date of approval hereof by the Secretary of the Interior.

"In witness whereof the said lessee has hereunto set its hand and seal this 31st day of May, 1912. Kokomo Oil Company,

"By John F. Overfield, President.

"Acknowledgment of Corporation.

"State of Kansas, Montgomery County—ss:.

"Before me, a notary public in and for said county and state, on this 31st day of May, 1912, personally appeared John F. Overfield, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its president and acknowledged to me that he executed the same as his free and voluntary act and deed for such corporation, for the uses and purposes therein set forth.

"[Seal.] Claud Miller, Notary Public.
"My commission expires November 12, 1913."

And on the same date the defendant entered into a contract which, omitting the acknowledgment and description of the land, is as follows:

"This agreement made and entered into this 31st day of May, 1912, by and between Kokomo Oil Company, a corporation, of Tahlequah, Okl., first party, and John A. Bell, Jr., of Bartlesville, Okl., second party, witnesseth that:

"Whereas, first party is the owner by assignment of a lease for oil and gas mining purposes executed by one Ollie Bunch on the 12th day of May, 1912, to J. F. Overfield and assigned to first party covering the following described land situate in Washington county, Okl., to wit:
* * *

"Whereas, first party has this day executed and delivered to second party an assignment in quadruplicate of the above-described oil and gas mining lease on the form and according to the regulations prescribed by the Secretary of the Interior, for which the second party has paid the first party the sum of sixteen hundred dollars (\$1,600.00):

"Now, therefore, in consideration of the premises and the payment of said sum of sixteen hundred dollars (\$1,600.00) first party further agrees to execute such further assignments, instruments, affidavits and papers as are necessary to secure the approval of the Secre-

tary of the Interior to the assignment of the above-described oil and gas mining lease to the second party.

"In witness whereof the first party has caused its corporate name to be hereunto subscribed by its president, and its corporate seal to be hereunto affixed and duly attested by its secretary; and the second party has hereunto subscribed his name the day and year first above written.

The Kokomo Oil Company,
By J. F. Overfield, President.

"Seal.]
"Attest: E. B. Huston, Secretary."

It developed later that at the time this assignment was delivered to the plaintiff and said contract made there was pending in the office of the Indian agent at Muskogee a lease bearing date April 12, 1912, executed by Ollie Bunch, enrolled as a full-blood citizen of the Cherokee Nation to J. F. Overfield, and an assignment of said lease from said Overfield to the defendant; that on September 24, 1913, said lease was by the Indian agent forwarded to the Commissioner of Indian Affairs, with the recommendation that it be disapproved, and said lease was by the Commissioner of Indian Affairs on November 28, 1913, submitted to the Secretary of the Interior with the recommendation that it be disapproved, and on November 28, 1913, said lease was by the Secretary of the Interior disapproved. The petition in this action was filed on January 5, 1914, and on October 15, 1917, said cause was tried to the court, without the intervention of a jury, and judgment rendered for the plaintiff for the sum of \$1,600, with interest thereon at the rate of 6 per cent. per annum from the 31st day of May, 1912, from which judgment this proceeding in error is prosecuted.

The trial was had without producing any witnesses to testify, and but one deposition, that of Mr. Hay, a clerk in the Indian office, was read in which he testified as to the disapproval of the lease. It is admitted by the plaintiff that Overfield made diligent effort to secure the approval of said lease by the Secretary of the Interior, likewise the approval of the assignment of said lease from John F. Overfield to the Kokomo Oil Company, and that his efforts embraced an appeal from the adverse decision of the United States Indian agent to the Commissioner of Indian Affairs and to the Secretary of the Interior, but with ultimate failure.

[1] The case hinges upon the aforesaid assignment and contract, both dated May 31, 1912, and these two instruments executed at the same time and relating to the same subject-matter should be construed together. *Carter v. Prairie Oil & Gas Co. et al.*, 58 Okl. 365, 160 Pac. 319; *Canadian Coal Co. v. Lynch*, 28 Okl. 585, 115 Pac. 466.

The plaintiff in error insists that, inasmuch as the assignment contains no warranty as to the validity of said lease and merely conveyed its right, title, and interest therein, and as the contract provided that the de-

fendant should execute such further assignments, instruments, affidavits, and papers as were necessary to secure the approval of the Secretary of the Interior to said assignment, and, as there is no denial that the defendant was always ready and willing to execute all necessary documents that might be effective for that purpose, and that the defendant, through its president, Overfield, made diligent efforts to secure the approval, that it is not liable to the plaintiff for the money paid to it by him. On the other hand, the plaintiff contends that he purchased an approved departmental lease, but that the lease assigned to him by the defendant had not been approved, and in fact, was afterwards disapproved by the Secretary of the Interior, and therefore the consideration failed and he is entitled to recover the money paid.

[2] In construing the instruments in question, it is the duty of this court to ascertain the intention of the parties by the language contained therein, and give to said instruments the effect contemplated by the parties at the time of the execution of said instruments, and the intention of the parties must be deduced from the entire agreement, not from any part or parts of it standing alone, and, if possible, every part should be made effectual. Therefore let us analyze the assignment and ascertain what the plaintiff purchased, and what the defendant sold. The first paragraph thereof recites:

"Whereas, the Secretary of the Interior has heretofore approved an oil and gas mining lease dated May 12, 1912, entered into by and between J. F. Overfield, lessee, the Kokomo Oil & Gas Company assignees from J. F. Overfield, and Ollie Bunch, lessor, covering the following described land in the Cherokee Nation. * * *

And it is further recited that:

"For and in consideration of \$1,600.00, the receipt of which is hereby acknowledged, the said Kokomo Oil Company, assignee of the lessee in the above-described lease, hereby bargains, sells, transfers, assigns, and conveys all its right, title, and interest of the lessee in and to said lease, subject to the approval of the Secretary of the Interior, to John A. Bell, Jr., said assignment to be effective from the date of approval hereof by the Secretary of the Interior."

What did the defendant sell and assign to the plaintiff? Clearly the answer is it sold a lease dated May 12, 1912, which had been theretofore approved by the Secretary of the Interior. Did the plaintiff obtain what he bought and paid for? It is conceded that the lease was not at that time approved, and that afterwards it was disapproved; therefore he did not obtain what he purchased and paid for, and, as the lease was of no validity without the approval of the Secretary of the Interior, the plaintiff received no consideration for his money. But

the defendant contends that, as the assignment and contract only purported to convey the right, title, and interest of the defendant, and neither contains a covenant of warranty as to validity, that the plaintiff received what he paid for, and that if the lease was not valid it was his loss. There might be merit in this contention if the defendant had not represented in the face of the assignment that the lease had been approved, but it cannot be said that the defendant can sell its right, title, and interest in an approved lease, and deliver a lease that is not approved, and is subsequently disapproved, and retain the consideration received by it.

Let us now consider the contract of even date with said assignment, and ascertain, if possible, the intention of the parties as expressed therein. This contract recites that the defendant is the owner of the lease mentioned in said assignment that it has executed and delivered to the plaintiff an assignment of said lease in quadruplicate, and that said plaintiff has paid the sum of \$1,600 therefor, and in consideration of the premises and the payment of said sum of \$1,600 the defendant "agreed to execute such further assignments, instruments, affidavits, and papers as are necessary to secure the approval of the Secretary of the Interior to the assignment of the above-described oil and gas mining lease to the second party."

This contract makes no reference to any act to be done seeking the approval of the lease, but the defendant agreed to execute any additional instruments necessary to procure the approval of the assignment thereof from it to the plaintiff. We are forced to the conclusion that the plaintiff paid his money relying upon the recitation or representation that the lease sold and assigned to him, as stated in the assignment, had been theretofore approved by the Secretary of the Interior; that he was willing to assume the risk of procuring the approval of the assignment to him provided the defendant would execute any further assignments or other instruments made necessary by the demands of the Interior Department, and in order to satisfy himself that this would be done he obtained this contract in addition to said assignment. We cannot believe that the plaintiff paid \$1,600 for this lease knowing that it had not been approved, but the transaction, as gathered from the assignment and contract set forth, convinces us that the plaintiff believed that the lease had been approved and contracted with reference to a lease duly approved by the Secretary of the Interior, and as the lease assigned to him had not been so approved, but was subsequently disapproved, the consideration for which he paid has wholly failed, and he is entitled to recover the money paid with interest.

[3] "The rule is well settled that an action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed, unless the failure of the consideration, is due to some fault on the part of plaintiff himself." 27 Cyc. 865, and cases there cited. See, also, Lawson on Contracts, § 50, and cases cited.

There is no intimation that the plaintiff was in any way responsible for the disapproval of this lease, or that the failure of consideration is in any other manner due to any fault on his part; therefore the judgment of the trial court is in all things affirmed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

(82 Okl. 5)

STONER et al. v. HYDE. (No. 10159.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Injunction \S 16—Remedy not available, where plain, sufficient, and adequate remedy at law exists.

Where a person has a plain, sufficient, and adequate remedy at law, they are not entitled to invoke the extraordinary remedy of injunction.

2. Executors and administrators \S 338, 357—That land is homestead is a defense to petition for order to sell; claim of homestead an adequate remedy at law against petition by administrator to sell, and injunction will not lie.

Where the county court is administering on an estate by its duly appointed administrator and such administrator files a petition to sell lands belonging to the estate which certain of the heirs contend is the homestead of the deceased and not subject to sale, this constitutes a defense that may be set up in resisting an order of sale in the county court on such petition. Under this state of facts, the county (probate) court has jurisdiction, and such heirs have a plain, sufficient, and adequate remedy at law, by setting up their claim of homestead and by contesting such sale in the county court. Such heirs are not entitled to an injunction to prevent the contemplated sale before a hearing has been had in the county court on such petition.

Appeal from District Court, Garfield County; James B. Cullison, Judge.

Action by Emma Hyde Stoner and others against George L. Hyde, individually and as administrator of the estate of Rolandis H. Hyde, deceased, for an injunction. From a judgment denying the injunction and dismissing the action, plaintiffs appeal. Affirmed.

H. Z. Wedgwood, of Enid, for plaintiffs in error.

J. C. Moore, of Enid, for defendant in error.

MILLER, J. This was an action brought in the district court of Garfield county by Emma Hyde Stoner et al. against George L. Hyde, individually, and against George L. Hyde, administrator of the estate of Rolandis H. Hyde, deceased, to enjoin the said George L. Hyde, as administrator, from procuring orders in the county court of Garfield county to sell certain lands belonging to the estate of Rolandis H. Hyde, deceased, and from making such sales.

The defendant filed a motion to dismiss the action, for the reason that the court had no jurisdiction to hear and determine the same; that the jurisdiction of said property was in the county court. A hearing was had on said motion, and the motion was by the court sustained, the action dismissed, and judgment rendered against the plaintiffs Emma Hyde Stoner and Zella Pearl Meek for the costs; the other plaintiffs being minors. From this judgment the plaintiffs appeal. The parties will be referred to as they appeared in the court below.

It is contended by the plaintiffs in their petition that the land in controversy was the homestead of Rolandis H. Hyde and his wife, Emma Hyde, and their minor children, and that it does not pass into the hands of the administrator. Emma Hyde Stoner was the widow of Rolandis H. Hyde, deceased, and she was occupying the said property, together with her minor children, at the times herein complained of.

This particular land was not the homestead of the deceased, Rolandis H. Hyde, but the administrator exchanged two lots in the city of Enid, being the original homestead, for the land in controversy in this action, subject to a mortgage of \$300. The adult plaintiffs, Emma Hyde Stoner and Zella Pearl Meek, appear in the petition in this action to have ratified said exchange, accepted it in lieu of the original homestead, and Emma Hyde Stoner, with her children, is occupying the same as such. They say the \$300 mortgage was given on the same day the exchange of property was made, and that George L. Hyde, as administrator, received the proceeds from said mortgage; that the property in controversy is of equal value with the property that constituted the original homestead, and they are not making any complaint about the exchange of property. They insist on having the \$300 mortgage canceled because it was not a debt created by Rolandis H. Hyde and Emma Hyde, or made a lien by any act of Rolandis H. Hyde and Emma Hyde during his lifetime, and the homestead is not subject to the payment of his debts.

[1, 2] On these allegations in the petition, it is clear that the plaintiffs should have made their objection in the county court of Garfield county. They could have made their showing in that court that the property was the homestead and could not be alienated for the payment of debts. We cannot assume that the county court would have acted in violation of the statute. Even if the county court had disregarded the statute relating to homesteads, the plaintiffs had a plain, adequate remedy at law, and were not entitled to invoke the extraordinary remedy of injunction. A void sale of the homestead would not pass any title to the purchaser, and nothing that the administrator of the estate might do in violation of expressed statutes would deprive the minors of any interest they had in the homestead property.

For these reasons, the judgment of the trial court is affirmed.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(82 Okl. 11)

TAYLOR v. SHRIVER et al. (No. 9755.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Waters and water courses §119(1) — At common law, proprietor might protect himself against surface water without liability.

At common law surface water was regarded as a common enemy against which each proprietor might protect himself. He might send it back or pass it on to the next adjoining proprietor without liability.

2. Waters and water courses §119(1)—Proprietor may divert surface water to adjoining proprietor if he can do so without injury.

The common law governing the diversion of surface water as adopted and applied in this state has been modified and restricted to this extent, namely, that each proprietor may divert the same, cast it back, or pass it along to the next proprietor, provided he can do so without injury to such adjoining proprietor. Under this rule of law no one is permitted to sacrifice his neighbor's property in order to protect his own.

3. Disposition of cause.

The judgment of the trial court is reversed, and cause remanded, with directions to the trial court to proceed in accordance with this opinion.

Appeal from District Court, Kay County; W. M. Boles, Judge.

Action by Clay Shriver and another against Oswald B. Taylor to abate a private nuisance. Judgment for plaintiffs, and defendant

appeals. Reversed and remanded, with directions.

William S. Oline, of Newkirk, for plaintiff in error.

K. M. Geddes and B. R. Leydig, both of El Dorado, Kan., and G. A. Chappell, of Newkirk, for defendants in error.

JOHNSON, J. This is an appeal from the district court of Kay county; Hon. W. E. Bowles, Judge.

Clay Shriver and J. D. Bush, as plaintiffs, commenced this action in the district court against Oswald B. Taylor, defendant, to abate a private nuisance. For convenience the parties will be referred to as plaintiffs and defendant as they respectively appeared in the trial court.

The record discloses that the plaintiffs owned the N. W. $\frac{1}{4}$, and the defendant owned the N. E. $\frac{1}{4}$, of section 5, township 25 north, range 2 west, in Kay county, and the said land was situated in drainage district No. 1 of Carlyle township in said county, and that said land and other lands in said district are low and level and form somewhat of a basin where water collects, and the said district constructed a large ditch which crosses the south part of plaintiffs' land, and said ditch enters into Salt creek about three-quarters of a mile to the south of defendant's land. For the construction of said ditch, the defendant's land was assessed and taxed in the sum of \$1,760. The defendant, to protect his land from the overflow of surface water from the plaintiffs' land and other lands to the north of the defendant, and for the purpose of draining his own land, constructed a ditch from his northwest to his southwest corner, from about $2\frac{1}{2}$ to 3 feet wide, and the dirt taken from the ditch was thrown on the defendant's land on the west side of the ditch, making an embankment from 6 inches to $1\frac{1}{2}$ feet high, and said ditch constructed by the defendant on his land emptied into and drained the water off of his land into the large ditch constructed by said drainage district, but does not cross or touch any part of the land of the plaintiff.

The plaintiffs prayed for an order of the court compelling and requiring the defendant to remove the said embankment that he had constructed along the highway which runs east and west to the north side of the plaintiffs' and defendant's land, which embankment is immediately north of the plaintiffs' northeast corner, as well as the first-mentioned embankment along the west side of the defendant's land, and that the defendant be permanently enjoined from maintaining such embankments, which embankments prevented the surface water from flowing in its natural manner and course, and for such other and further relief as equity and good conscience might dictate.

The case was tried to the court, and resulted in a judgment in favor of the plaintiffs, to

reverse which this proceeding in error was commenced.

The plaintiff John D. Bush having died pending this appeal, pursuant to a stipulation of the parties, the cause has been revived in the name of Fannie E. Bush, executrix, and John F. Bush, grantee of the said John D. Bush.

At the conclusion of the trial upon request of the defendant, the court made the following separate findings of fact and conclusions of law:

"(1) The court finds as a fact that the plaintiffs in this case are the owners of the land described in their petition, and that the defendant is the owner of the land described in his answer.

"(2) That at the time complained of in the plaintiffs' petition, the defendant constructed a ditch or opened up a ditch on the line between his land and the plaintiffs' land in this case, running from the north side to the south side of the defendant's land along the west line of the defendant's farm.

"(3) That the ditch is from $2\frac{1}{2}$ to 3 feet wide. That the dirt taken from the ditch was thrown to the west side of this ditch. That the embankment so constructed along the west side of said ditch was from 6 inches to $1\frac{1}{2}$ feet high.

"(4) The court further finds that the surface water running over and across the land of the plaintiffs in this case comes from the north and northwest and runs across the land of the defendant in this case; that the dam obstructs the natural flow of the surface water across the land of the defendant and holds it back upon the land of the plaintiffs, forming ponds and swales which destroy the crops on the plaintiffs' land to their irreparable damage.

"The court renders judgment in favor of the plaintiffs and against the defendant, and the defendant is enjoined and restrained from maintaining the dam, and he is ordered, within 30 days, to remove the dam sufficiently to permit the surface water, running across plaintiffs' land, that naturally heretofore runs from plaintiffs' land across the defendant's land, to continue to do so."

From an examination of the record, we find that the testimony sustained these findings of fact.

Concerning these findings, counsel for plaintiff in error say in their brief:

"The evidence in this case is undisputed and the 'findings of fact' are in substantial accord with the evidence, and we do not therefore deem it necessary to incumber this brief with the quotation of any of the evidence. The question involved in this case is a legal proposition as to the right of the defendant to dam his own land against the surface water of the plaintiff, whereby the surface water is prevented from flowing on the defendant's land from the land of the plaintiffs."

The plaintiffs in error's contention is that the judgment of the court is erroneous in that the court failed to render judgment upon the facts found by the court in favor of

(193 P.)

the defendant. It is conceded by counsel for both parties that the rule of law governing superior and servient landowners in obstructing and diverting the flow of surface water into and upon their respective premises is the law of this case, and the rule was correctly announced by this court in the cases of *R. I. & P. Ry. Co. v. Groves*, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802; *G., C. & S. F. Ry. Co. v. Richardson*, 42 Okl. 457, 141 Pac. 1107; *Miller v. Marriott*, 48 Okl. 179, 149 Pac. 1164; *McLeod v. Spencer*, 60 Okl. 89, 159 Pac. 326; *Town of Jefferson v. Hicks*, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214.

[1,2] We think the rules announced by this court in the case of *G., C. & S. F. Ry. Co. v. Richardson*, and *McLeod v. Spencer*, *supra*, are particularly applicable to the case at bar, and the court announced the rule in syllabi 2 and 3 of the *Richardson* Case, which is as follows:

"(2) At common law surface water was regarded as a common enemy against which each proprietor might protect himself. He might send it back or pass it on to the next adjoining proprietor without liability.

"(3) The common law governing the diversion of surface water as adopted and applied in this state has been modified and restricted to this extent, namely, that each proprietor may divert the same, cast it back or pass it along to the next proprietor, provided he can do so without injury to such adjoining proprietor. Under this rule of law no one is permitted to sacrifice his neighbor's property in order to protect his own."

We think it is clear from the evidence in this case, and the facts found by the trial court, that the defendant, in cutting the ditch and erecting the embankment complained of upon his premises, did not infringe upon the rule of law announced in the cases *supra*, but, upon the other hand, was in the proper exercise of his rights under the rule, and in thus using his premises violated no law or rule of equity, but did that which a prudent and provident owner should have done to protect his property, and, if the plaintiffs had so acted in the preservation of their own property, they would either have constructed a similar ditch and embankment upon their own property, draining the same where needed, and discharging the water into the drainage ditch and upon their own property, which, from this record, could have easily been accomplished at an outlay perhaps not exceeding one-half the amount they have expended in the prosecution of this action against their neighbor.

[3] We are clearly of the opinion that the conclusions of law of the trial court were erroneous under the evidence and his findings of fact in this case, and that in equity and good conscience the judgment of the trial court should be reversed, and judgment should be rendered dismissing the plaintiffs'

suit at their cost and that they take nothing.

The cause is remanded, with directions to the trial court to proceed in accordance with the views herein expressed.

HARRISON, C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

(32 Okl. 110)

ÆTNA BUILDING & LOAN ASS'N v. HAHN
et al. (No. 10029.)

(Supreme Court of Oklahoma. March 22, 1921.
Rehearing Denied May 31, 1921.)

(Syllabus by the Court.)

Building and loan associations — 33(8)—Loan held not usurious.

The contract by which a party becomes the owner of shares of the stock of a building and loan association, to be paid for in monthly installments running through a long series of years, and borrows from the association on his stock, the interest on the loan being the legal rate, is not to be treated as a usurious loan; the payments supposed to constitute the usury, by the terms of the contract, being made on the stock debt, not the loan.

Appeal from District Court, Jefferson County; Cham. Jones, Judge.

Action by the Ætna Building & Loan Association against Virginia Elizabeth Hahn and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Jno. D. Rogers, of Topeka, Kan., for plaintiff in error.

Bridges & Vertrees, and E. B. Anderson, all of Waurika, for defendants in error.

JOHNSON, J. On the 21st day of February, 1917, the plaintiff commenced an action in the district court of Jefferson county, against the defendant in person and as administratrix of the estate of C. A. Hahn, deceased, to recover the sum of \$153.18, with interest thereon at the rate of 10 per cent. per annum to the 21st day of February, 1917, and for costs and \$25 attorney's fees, alleged to be the balance due on a promissory note executed by the defendant and her deceased husband on the 1st day of February, 1909, and to foreclose a mortgage on lots 25 and 26, block 18, in the Waurika Heights addition to Waurika, Okl.

The plaintiff alleged in substance that it was a building and loan association organized under the laws of the state of Kansas, and authorized to do business in the state of Oklahoma, and that at the time of the execution of the note in controversy C. A. Hahn, deceased, and defendant were the owners

of 2 shares of series stock in class A of said building and loan association, and that said note was for the sum of \$450, was due and payable on or before 10 years after date, with interest thereon at the rate of 6 per cent. per annum, payable in monthly installments of \$2.25 each, also monthly premium of \$1.50 being payable on the 5th day of each and every month, making copy of said note Exhibit A to the petition, and alleging that at the time of execution thereof said defendants executed a mortgage deed covering the said lots to secure said note, making a copy of the same Exhibit B to plaintiff's petition.

The plaintiff further alleged, in substance, that the defendant failed to make payments due on said note and stock on the 5th day of July, 1914, but made default, and failed to make any payments due since said date, by reason of which failure and default the conditions of said mortgage were broken, and the plaintiffs became entitled to foreclose the same, and that at the time of the execution of said note and mortgage the defendants assigned said shares of stock to the plaintiff as additional security for said note, interests, dues, premiums, and fees, and that the defendant had been given credit for the value of said shares of stock in the sum of \$416.40, leaving the sum of \$153.18 due, as hereinbefore stated.

On April 7, 1917, the defendant, Virginia Elizabeth Hahn, filed her answer, admitting the execution of the note and mortgage, and that nothing had been paid upon the note since the 5th day of June, 1914, but alleges, as a defense, that from the 1st day of February, 1909, to the 5th day of June, 1914, the defendant and her late husband had paid the sum of \$579.50, and prior to said 1st day of February, 1909, had paid the sum of \$15, making a total of \$592.50, paid in monthly installments of \$8.75 each, and that said contract was therefore unlawful, usurious, and constituted the plaintiff a lender and the defendant a borrower of said money without the protection of the building and loan law of the state of Oklahoma, and prayed that the plaintiff recover nothing, and that the defendant recover judgment for such sum as may be shown to be more than the plaintiff was entitled to receive.

On the 16th day of July, 1917, the plaintiff filed its reply, consisting of a general denial, and denied that the defendant had paid any amount in excess of the amount allowed by law.

A jury was waived, and the cause was tried to the court, and the defendant was awarded a judgment by the court in the sum of \$142.50, to reverse which judgment this proceeding in error was regularly commenced in this court.

The trial court made no separate findings of fact and conclusions of law, but the facts found by the trial court as recited in the journal entry of the judgment were that the

defendants executed their note to the plaintiff in the sum of \$450, and to secure the payment of said sum placed as collateral security with the plaintiff the stock subscribed for, and gave their real estate mortgage upon the lots described in plaintiff's petition, and that at the time the said Charles Hahn made application for the loan the plaintiff charged a premium of \$1.50 per month for the loan of said money, and the same was charged by plaintiff arbitrarily and without competitive bid, and in addition thereto charged interest at the rate of \$2.25 per month, payable monthly, and that, in addition to interest and premium, the plaintiff required the defendants to pay the sum of \$5 per month on the stock subscribed for, and that said transaction was usurious, and was entered into by plaintiff with the intention of avoiding and evading the laws of the state of Oklahoma, regulating the rate of interest to be charged, and that by reason thereof the plaintiff is not entitled to receive or recover any interest upon the amount loaned, and that the defendants had paid to plaintiff up to the 5th day of June, 1914, the sum of \$592.50, and by reason thereof the sum of \$142.50 was paid to the plaintiff that it was not entitled to receive, and then rendered judgment in favor of the defendants for the sum of \$142.50, being the difference between the sum so paid by the defendants and the sum of \$450 borrowed from the plaintiff. These findings and conclusions of the court are assigned as error by the plaintiff and argued in the brief of counsel.

The defendant offered no testimony upon the trial of the cause.

The controlling questions are: Was the interest in excess of 10 per cent. received or exacted by the lender, and, if so, was it knowingly done with a corrupt intent to evade the law against usury? If so, the lender is guilty whatever may have been the scheme or plan employed by the lender. The burden of proof, however, is upon the borrower to make his case; the necessary facts to such conclusions will not be presumed.

The plaintiff's testimony consisted of the stock certificate for the two shares of stock, and note and mortgage, and copy of constitution and by-laws of the plaintiff in force at the time the loan was made and in force at the time of the trial, the testimony of the agent of the plaintiff, who took the defendant's subscription for the stock and the application for the loan, and the agent of the plaintiff that inspected the loan, and the officers of the company at the home office, each of whom testified at considerable length and practically without objection.

The undisputed testimony is in effect: That the agent of the plaintiff informed Mr. Hahn at the inception of the negotiations that the plaintiff loaned money to its stockholders only; that if he became a stockholder the plaintiff would make him a loan at

straight 10 per cent. per annum, payable in monthly installments, to be secured by a mortgage on the premises and assignment of his shares of stock as collateral security; that the stock would participate in the profits of the company to be credited semiannually, and that if the interest and stock payments were kept up for the term of 112 months, the borrower in this instance would be entitled to have his note of \$450 and stock canceled, and would receive in cash \$550; that the stock transaction as to the purchase of the stock was closed, and 4 months thereafter the loan was made; that 69 monthly payments of \$5 each were made on the stock and 65 monthly payments of interest of \$3.75 each and one fractional payment of \$1.88 and no more, after which payments on both stock and interest ceased; that some time thereafter the directors of the plaintiff closed both accounts. The stock account stood as follows:

69 payments of \$5 each.....	\$345 00
Dividend earned	119 40
Book value	\$464 40
Less 10 per cent. of dues.....	\$34 50
Less fines	12 50
	48 00
	<hr/>
	\$416 40

—as authorized by R. L. 1910, § 1306, §§ 6, 10, art. 3, constitution and by-laws. That no premium was charged upon this loan, the testimony being that two separate accounts were kept in the home office, one an interest account, the other a stock account. That they were kept in different departments, and by different clerks or employees. The interest account was credited monthly on this loan with \$3.75 (except for the month of January, 1909, which was fractional, being in the sum of \$1.88) from February, 1909, to June 4, 1914, the amount of such credits aggregating \$245.63, and no more. The stock account was credited, beginning October, 1908, with \$5 each month up to June, 1914, aggregating \$345, also by semiannual dividends at the rate of 4 per cent., aggregating on the said date the sum of \$86.28, and from that day, which was the date payments on interest and stock ceased. The stock account was thereafter credited with dividends in the sum of \$33.12, and was charged with fines, \$13.50, 10 per cent. of dues, \$34.50, making \$48, leaving balance due borrower on account of stock, \$416.40, which was credited on the principal note at the time this action was commenced, as hereinbefore stated. That this stock participated in the dividends earned to the amount and in the same manner of all other stock issued by the company.

It is clear from the evidence that this loan was a straight loan of \$450, with interest thereon at the rate of 10 per cent. per annum, payable in monthly installments of \$3.75, and that no other or greater amount was exacted or reserved.

"Where a party is a stockholder in a building and loan association and afterwards becomes a borrower from the same association, the two transactions have no connection with each other, and cannot be commingled to support an action in usury."

"Interest at the lawful rate may be charged on the principal of the loan, without regard to the weekly or monthly reductions, and because the interest is payable monthly or weekly does not render it usurious."

"Where a loan is made by an association on a pledge of its own shares, the rule for computing interest on partial payments has no application to the monthly dues paid on the shares so pledged, and such payments do not bear interest, or reduce the amount on which interest is to be paid. In considering the question of usury in a loan from an association, payments made by the borrower as dues on his stock are not to be considered as interest, since such payments are not made for the use of the money borrowed, but in order to acquire an interest in the property of the association. *Equitable B. & L. Ass'n v. Vance*, 49 S. C. 402, 27 S. E. 274, 29 S. E. 204; *Thompson, B. & L. Ass'n*, § 266, pp. 544, 545; *Thompson, B. & L. Ass'n*, 528; *Richard v. Southern Building, etc., Ass'n*, 49 La. Ann. 481, 21 South. 643; *Thompson, B. & L. Ass'n*, 428, 429; *Reeve v. Ladies, etc., Ass'n*, 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129.

This being the testimony of the plaintiff, which was not disputed by the defendant, we find, and so hold, that the findings and conclusions of the trial court "that such transaction was usurious and was entered into by the plaintiff with the intention of avoiding and evading the laws of the state of Oklahoma regulating the rate of interest to be charged, and that by reason thereof the plaintiff is not entitled to receive or recover any interest upon the amount loaned," is without any evidence to support it, and is therefore usurious, and such findings and conclusions must be disapproved. Compiled Laws 1909, was the applicable law in force in this state (article 8, c. 15, Rev. Laws 1910) the date that the contracts involved were entered into.

The evidence in this case further discloses that there were 18,691 stockholders, representing 38,056 shares of stock of the value of \$5,635,438, and that C. A. Hahn, the defendant, held 2 shares of this stock; that the plaintiff had operated in Oklahoma for about 20 years, and had loaned over \$10,000,000 during that time, and at the time the testimony was given had \$3,000,000 invested for stockholders in first real estate mortgages in Oklahoma, which were earning the stockholders not less than 4 per cent. semiannually, and that Mr. Hahn had received his pro rata share of such earnings. The evidence also discloses that the association had been doing business in Waurika, Okl., for about 15 years, and at that time had about 37 loans in force in that city.

This evidence removes any question as to the shares of stock of the association being

held by other than small stockholders, there being 18,691 stockholders, and 38,056 shares, making a little more than 2 shares of stock to each stockholder, and conclusively shows that the plaintiff was created and is being operated and maintained for the purpose of accumulating a fund by the monthly subscription of savings of its members to assist them in building or purchasing for themselves dwellings or real estate by loaning to them the requisite money from the funds of the association upon good security, and for the purpose of enabling members and stockholders thereof to provide a fund, by means of small periodical payments, which can be loaned to members upon advantageous terms for the purpose of enabling them to become home owners, and thus encourage thrift and economy and thereby promote good citizenship, and to accommodate the poor and less fortunate members of society by permitting them to make payments of small sums out of their current wages, and thus obtain the means of owning modest homes; that the organization was mutual, and that the stockholders share and share alike in the benefit and profits, as well as the losses of the association. This was one of the requirements which this court held to be necessary in the case of *Midland Savings & Loan Co. v. Nicoll*, 76 Okl. 27, 183 Pac. 731, and the case of *Holt v. Aetna*, 78 Okl. 307, 190 Pac. 872; 9 C. J. 920, 921; *Thompson on B. & L. Ass'n* (2d Ed.) § 124; *Midland Savings & Loan Co. v. Deaton et al.*, 57 Okl. 622, 157 Pac. 285.

Having reached the conclusions announced above, we think the case comes clearly within the rule announced by this court in the case of *Holt v. Aetna Building & Loan Ass'n*, supra; *Aetna Building & Loan Ass'n v. Rouch*, 32 Okl. 735, 124 Pac. 24. Therefore proper credits must be given to the note, and interest should be allowed at the legal rate.

It follows that plaintiff is entitled to judgment for the principal of the note sued on, \$450, with 10 per cent. interest per annum from February 1, 1909, which amounted to \$362.50 on February 21, 1917, or principal and interest \$812.50, and that the defendant had paid on account of interest and stock with dividends thereon, \$662.03, which, being applied upon the amount due upon the note with accrued interest, leaves \$150.47 at that time due the plaintiff.

The judgment of the trial court is reversed, and the cause remanded, with directions that judgment be rendered in favor of the plaintiff for the sum of \$150.47, with interest thereon from date at the rate of 10 per cent. per annum from February 21, 1917, and \$25 attorney's fees, and for costs incurred in both courts.

HARRISON, C. J., and PITCHFORD, NICHOLSON, and KENNAMER, JJ., concur.

SOUTHWESTERN SURETY INS. CO. v. DOUGLAS et al. (No. 9884.)

(Supreme Court of Oklahoma. May 3, 1921.)

(Syllabus by the Court.)

1. Courts §65—District Court in session until adjournment sine die or until expiration by law.

A district court legally opened for all general purposes continues in session until it adjourns sine die, or expires by law, and when an adjournment is made subject to call, the term not having then expired by law, convenes, the court is legally constituted, and its acts are valid and binding.

2. Action §46—Causes of action arising out of same transaction may be joined whether legal or equitable.

Revised Laws of 1910, § 4738, authorizes the uniting of several causes of action in the same petition whether they be such as have heretofore been denominated legal or equitable or both, where they all arise out of the same transaction or transactions connected with the same subject of action.

3. Reformation of instruments §47 — Reformation and damages for breach of condition may be had in same action.

As courts of equity have always asserted the right to give complete relief on all matters properly brought before them, the party who seeks in a court of equity relief by reformation of a written instrument or bond may ask and obtain reformation thereof and damages for breach of a condition of indemnity therein contained when reformed.

4. Disposition of cause.

Record examined, and it appearing that substantial justice has been done, the judgment of the trial court is affirmed.

Miller, J., dissenting.

Appeal from District Court, Okfuskee County; J. W. Bolen, Judge.

Action by Duard C. Douglas, a minor, by E. Huser, his guardian, against the Southwestern Surety Insurance Company and others. Judgment for plaintiff, and defendant insurance company appeals. Affirmed.

J. C. Wright, of Okemah, and S. L. O'Bannon, of Okmulgee, for plaintiff in error.

Martin L. Frerichs and E. Huser, both of Okemah, for defendants in error.

MILLER, J. This was an action commenced in the district court of Okfuskee county on the 25th day of May, 1917, by Duard C. Douglas, a minor, by E. Huser, his guardian, as plaintiff, against Harry Douglas, W. H. Dill, and the Southwestern Surety Insurance Company, as defendants, to recover against Harry Douglas as principal and the other defendants as sureties under separate guardianship bonds executed by them. The said

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sureties were by the petition asked to respond for the default of Harry Douglas as guardian of the plaintiff. The case was tried to the court without a jury on the 23d day of October, 1917. The court rendered a judgment in favor of the plaintiff and against defendant Harry Douglas, as principal, and defendant Southwestern Surety Insurance Company as surety, in the sum of \$1,612.90 with interest and costs. Defendant the Southwestern Surety Company excepted to the judgment of the court, gave notice of appeal as required by law, and perfected this appeal.

The plaintiff in error sets out the following assignments of error:

"I. Said court erred in overruling the motion of plaintiff in error for a new trial.

"II. Said court erred in not rendering judgment for the plaintiff in error upon the evidence submitted at said trial.

"III. Said court erred in rendering any judgment in any sum whatsoever against this plaintiff in error and in favor of the defendant in error, Duard C. Douglas, for the reason that the same was not supported by the law or by the evidence.

"IV. Said court erred in overruling the plaintiff in error's motion in arrest of judgment designated as motion to vacate judgment."

The plaintiff in error then raises the question of the jurisdiction of the court to hear and determine this action at the time it attempted to do so, contending that the court was not legally in session.

The journal entry of judgment makes this recital:

"This cause coming on to be heard in its regular order, on this the 23d day of October, 1917, one of the regular judicial days of the August, 1917, term of the district court. * * *

Thereafter a motion was filed to vacate the judgment, which motion reads:

"Comes now said defendant, Southwestern Surety Insurance Company, and moves the court to vacate and set aside and hold for naught the purported judgment rendered herein on the 23d day of October, 1917, for the following reasons, to wit:

"I. For the reason that said judgment is void and has no binding force or effect against the defendant, Southwestern Surety Insurance Company.

"II. For the reason that the court was without jurisdiction to hear, try, and determine the same, or to render judgment therein at the time said purported judgment was rendered.

"III. For the reason that the court was not legally in session at the time the aforesaid purported judgment was rendered.

"Wherefore defendant prays the court to vacate, set aside, and hold for naught the aforesaid purported judgment rendered herein on the 23d day of October, 1917, as aforesaid."

The above motion was passed on by the court, and the following order made:

"Now on this the 7 day of January, A. D. 1918, the same being a regular judicial day of

the November term of said court, the above-entitled cause coming regularly on for hearing upon motion of defendant to vacate judgment, the court being fully advised and informed in the premises, motion is overruled; exceptions allowed."

The fourth assignment of error of the plaintiff in error is as follows:

"Said court erred in overruling the plaintiff in error's motion in arrest of judgment designated as motion to vacate judgment."

This raises a jurisdictional question which will be given first consideration.

Chapter 9, Session Laws of 1915, prescribes the time for convening the regular term of court in certain districts, among which is district No. 9, in which Okfuskee county is situated. It reads:

"The time of the convening the regular term of district court in each county in judicial districts numbers two, seven and number nine, of the state of Oklahoma, shall be on the first Monday in each of the respective months hereinafter set out in this section after each of the respective counties, to wit: * * *

"District number nine: In Hughes county March, July and December. In Okfuskee county February, August and November."

We find that the first Monday in August, 1917, occurred on the 6th day of that month. Plaintiffs in error say in their brief they admit that the court was regularly in session on August 6, 1917. The case made then contains a complete record of the adjournments and convening of the district court of Okfuskee county from August 6th, until the convening of the next term, which is on the 5th day of November, 1917. It will not be necessary to set each and every one out in full, but we will set out sufficient of them for the purpose of passing on the jurisdictional question.

"Now on this the 6th day of August, A. D. 1917, the same being the regular day of the August term of said court, the court orders that court be adjourned and the same is hereby adjourned but it is not the intention of the court to adjourn, sine die, but the same is adjourned subject to call."

Pursuant to the foregoing adjournment "subject to call," court did not convene until September 10th, when court was convened as follows:

"Now, on this the 10th day of September, A. D. 1917, court convened, pursuant to adjournment.

"Present: Hon. Geo. C. Crump, judge; M. C. Jones, court clerk; Berry Jones, sheriff; T. S. Hurst, county attorney; A. F. Hall, court reporter;

"Public proclamation of the opening of court having been announced, the following among other proceedings, were had, to wit."

It then appears that court was in session on September 10, 11, 12, 13, 14, and 15, when the following order was made:

"Now on this the 15 day of September, A. D. 1917, court is ordered to take recess subject to call, and the same is hereby done."

It again appears that the court was not in session from September 15, 1917, until October 22, 1917, when the following order convening court was made:

"Now on this the 22d day of October, A. D. 1917, the same being a regular judicial day of the August term of said court, court hereby convenes pursuant to adjournment."

"Present: Hon. Geo. C. Crump, judge; M. C. Jones, court clerk; T. S. Hurst, county attorney; Berry Jones, sheriff; A. F. Hall, court reporter."

"Public proclamation of the opening of court having been announced, the following, among other proceedings were had, to wit."

On the 22d day of October, 1917, the following adjourning order was made:

"Now on this the 22 day of October, A. D. 1917, court hereby takes recess, subject to call."

This order was made convening court on the 23d of October:

"Now on this the 23d day of October, A. D. 1917, court is hereby convened, pursuant to adjournment."

"Present: Hon. Geo. C. Crump, judge; M. C. Jones, court clerk; T. S. Hurst, county attorney; Berry Jones, sheriff; A. F. Hall, court reporter."

"Public proclamation of the opening of court having been announced, the following, among other proceedings were had, to wit."

It was on the 23d of October this case was tried and judgment rendered. The plaintiff in error contends that when the district court was adjourned on the 6th day of August, 1917, subject to call, and did not convene again until September 10, 1917, said term lapsed and the court was not legally in session subsequent to that time. We find that another order was made on the 15th day of September when the court took a recess, subject to call, and was not again convened until October 22, 1917.

We do not agree with this contention. In *re Nichols' Will*, *Phebus et al. v. Vinson et al.*, 64 Okl. 241, 166 Pac. 1087. We quote paragraph 5 of the syllabus:

"June 10, 1915, after a hearing upon motions to remand cause to the superior court, motions were denied, whereupon hearing on pending motions to suppress depositions was continued until July 19th following, and order made setting the case for trial on the same day. On July 7th, 8th, and 9th, further preliminary motions in the cause were heard before another judge, and on the latter day the court ordered the stenographer to make a transcript of the record and file the same with the clerk on July 19th, whereupon the records disclose court adjourned subject to call. On the day fixed for trial by the order of June 10th, and on which by order of July 9th, the stenographer was directed to file his transcript of the record, viz. July 19th, court was duly convened 'pursuant to adjournment,' and afterwards the cause went to trial and was proceeded with until July 30th, when the trial ended. The judges who presided at the hearings, both in the month of June and July, were assigned to hold court by the Chief Justice of this court pursuant to section 9, art. 7, Const., during the times occupied both in making up the issues and in the trial of the case. At no time during the trial, or while the cause was in the lower court, was objection made that because of the form of the order of adjournment of July 9th the court was not legally convened on July 19th. Held, that neither the parties nor the court having treated the order as an adjournment sine die, and the parties having appeared and without objection proceeded to trial, and no question being made that the term was not, in the first instance, legally convened, an objection that the court was not legally in session during the trial, made for the first time in the court, should be denied."

ment,' and afterwards the cause went to trial and was proceeded with until July 30th, when the trial ended. The judges who presided at the hearings, both in the month of June and July, were assigned to hold court by the Chief Justice of this court pursuant to section 9, art. 7, Const., during the times occupied both in making up the issues and in the trial of the case. At no time during the trial, or while the cause was in the lower court, was objection made that because of the form of the order of adjournment of July 9th the court was not legally convened on July 19th. Held, that neither the parties nor the court having treated the order as an adjournment sine die, and the parties having appeared and without objection proceeded to trial, and no question being made that the term was not, in the first instance, legally convened, an objection that the court was not legally in session during the trial, made for the first time in the court, should be denied."

The case of the *Union Pacific Railroad Co. v. Hand*, 7 Kan. 380, contains a very learned discussion on the question of adjournments of court by Kingman, C. J.:

"A question is raised in limine of controlling importance. The facts necessary to understand it are these: The verdict in the case was returned, and judgment entered thereon on Saturday the fifth of December, and at the close of the day the court adjourned to Monday, the 7th; but neither on Monday, the 7th, nor on Tuesday, the 8th, was any court held, the district judge being absent. On the 8th of December the motion for a new trial was filed with the clerk. On the 9th, the judge having reached Lawrence, the court was opened, and the motion for a new trial was heard and overruled, and time given to make a case; and that case so made raises all the questions but one made in this court. It is insisted by defendant in error that all the proceedings had on Wednesday the 9th, were coram non jure, and present no basis on which this court can act. The record shows that on Monday, the 7th, and on Tuesday, the 8th, the court was adjourned by the sheriff, the order reciting the absence of the judge, being detained by a severe storm. Section 719 of the Civil Code is referred to as sustaining the correctness of the action of the sheriff. This section seems clearly to refer to the beginning of a term, and therefore is not applicable to this case. It was inserted for the sole purpose of saving the term if the judge was detained from the place for any cause. *Thomas v. Forgarty*, 19 Cal. 644; *People v. Sanchez*, 24 Cal. 17. By the common law a failure to open the court on the first day of the term wrought a loss of the whole term. *People v. Bradwell*, 2 Cow. 445. The great inconvenience arising from this principle early led to its correction by legislation. Accordingly the English parliament in the 3 Geo. IV., 18, made provisions that the court might be opened at some day subsequent to the first day of the term, and that all records and proceedings should be made up as of the first day of the term (2 Bac. Abr. title Courts, p. 714); and our examination has shown that similar laws have been passed in many of the states. This section of our Code having only reference to the beginning of the term, the act of the sheriff

in adjourning the court, was simply a nullity. Yet we do not think that the term was lost by the adjournment of the court on Saturday till Monday, and its not convening till Wednesday. The term of the court is fixed by law. Having once opened, it so continues till the term expires, or an adjournment sine die is made. The adjournment from day to day does not suspend its functions. After the court has adjourned for the day, it is a common practice for grand juries to continue their sessions, swear witnesses, pursue their investigations, and find bills; and petit juries frequently remain out all night in deliberation, and make up their verdicts, while the journal shows that the court has adjourned. Each of these juries is part of the court, performing important functions; and the court is always in session in fact, so that it can protect the juries, and enforce proper conduct on their part. 'For all general purposes the court is considered as in session from the commencement till the close of its term.' *Barrett v. State*, 1 Wis. 175.

"In the case just cited, the court had adjourned till the next day, and some hours after the adjournment, and before the next day had begun, received a verdict in a criminal case, which was held good, on grounds that necessarily cover the case under consideration. At common law the whole period of a term was looked upon as a single day, and everything done at the term was regarded as done of that day. We need not point out what innovations our statutes have made on this doctrine, but we nowhere find it entirely abrogated. The statute still makes judgment liens revert to the first day of the term at which the judgment is rendered. There is an evident purpose on the part of the courts to so construe the law, if possible, as will uphold the sessions of courts actually doing business. See *Womack v. Womack*, 17 Tex. 1; *Cook v. Skelton*, 20 Ill. 107; *Jones v. State*, 11 Ind. 357. In this case we find there present the judge, the clerk, and other ministerial officers at a time and place where it is by law authorized to be held, properly organized at the beginning of the term, and performing the functions of a court. This must be held to be a court legally constituted, and fully authorized to transact business. 2 Bac. Abr. 6, 16, title 'Courts.' This conclusion makes it necessary to examine the various questions raised in the record."

This case had been followed in *State v. Hargis*, 84 Kan. 150, 113 Pac. 401, and other cases.

In considering the foregoing question, we have not made any distinction between the words "adjournment" and "recess." We are not holding that these words are synonymous, but for the purpose of this case it is not necessary to draw any fine lines of distinction.

"Where the record of the board of supervisors showed that the board adjourned to a specified time, an amendment of the record showing that it took a recess until that time was unimportant; the words 'recess' and 'adjourn' both meaning that the meeting was postponed until the time specified." *Beatie v. Roberts*, 156 Iowa, 575, 187 N. W. 1006, Ann. Cas. 1915B, 770.

[1] We hold that the court having regularly convened on the first day of the term as provided by law and being regularly in session on that day, and no other term of court in the same district having intervened during the time the court was either adjourned or taking a recess, subject to call, the term of the district court of Okfuskee county did not lapse.

[2, 3] We will now consider the merits of the case. The record in this case discloses this state of facts: That Harry Douglas was the guardian of his two minor sons, Duard C. Douglas and Raymond R. Douglas; that he was appointed as such guardian by the county court of Okfuskee county in guardianship proceeding No. 85. Thereafter the guardianship proceedings were divided, and Raymond R. Douglas' guardianship was conducted under case No. 631, and Duard C. Douglas' guardianship was conducted under case No. 609.

On January 10, 1911, in case No. 609, Duard C. Douglas, minor, a petition having been filed to sell real estate of said minor at a hearing had on the 12th day of January, 1911, the court made an order requiring the guardian, Harry Douglas, to give additional bond in the penal sum of \$2,000 before the sale of said real estate. Thereafter certain of the real estate belonging to Duard C. Douglas was sold by the guardian under the order of said county court. The sale of same was duly confirmed on February 11, 1911.

On February 10, 1911, an additional bond was executed by W. H. Dill pursuant to an order of January 12, 1911. This bond, however, recited the name of Raymond R. Douglas and was in the penal sum of \$1,000.

In the order confirming sale of real estate entered on the 11th day of March, 1911, in the Duard C. Douglas case, No. 609, this statement appears in the order of the court:

"The court further finds that said guardian has executed additional bond herein as required and the same has been approved."

In the Raymond R. Douglas case in the county court, being No. 631, an application having been filed to sell certain lands of the minor, Raymond R. Douglas, the court, on the 11th day of February, 1911, entered its decree of sale of real estate by guardian and required additional bond to be given in the penal sum of \$1,000.

Thereafter and on the 23d day of February, 1911, this bond was executed and is the bond in controversy in this action.

"Additional Bond on Sale of Real Estate, Adm'r, Ex'r, Guardian. In County Court. 'State of Oklahoma, Okfuskee County.

"In the Matter of the Estate of Raymond R. Douglas. Know all men by these presents, that we, Harry Douglas, as principal, and the Southwestern Surety Insurance Co. as sureties, are held and firmly bound unto the Raymond R. Douglas & county judge of Okfuskee Co., state

of Oklahoma, in the penal sum of two thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

"The condition of the above obligation is such, that whereas on the 11 day of Feb. 1911, an order was entered by the county court of Okfuskee county, state of Oklahoma, authorizing the above-named principal as guardian of the estate of Raymond R. Douglas to sell certain real estate belonging to said estate, and providing therein that said * * * should give an additional bond in the above-named sum, before making such sale.

"Now, therefore, if the said Harry Douglas as such guardian shall faithfully execute the duties of such trust according to law, then this obligation to be void otherwise to remain in full force and effect.

"In witness whereof, we have hereunto subscribed our names this 23 day of Feb. 1911. Harry Douglas. The Southwestern Surety Insurance Company, by C. B. Conner, Atty. in Fact. [Corporate Seal.]

"Subscribed and sworn to before me this ____ day of ____, 191__.

"I hereby approve the above bond this 25 day of Feb., 1911.

"[Seal.] W. A. Huser, County Judge."

Indorsed on back: -

"No. 631. In County Court. In the Matter of the Raymond R. Douglas. Additional Bond. Filed Feb. 23, 1911. M. E. Hicks, Clerk Co. Court.

"Recorded in Ad Bond Record Book 1, page 147."

Afterwards Harry Douglas was discharged as guardian of each of said minors, and E. Huser was appointed his successor in each case.

On April 7, 1916, E. Huser, as guardian of Raymond R. Douglas, instituted a suit in the district court of Okfuskee county, being case No. 2080, and sought to recover from defendant the Southwestern Surety Insurance Company on said bond above set out.

The defendant the Southwestern Surety Insurance Company answering admitted the execution of the bond in the guardianship estate of Raymond R. Douglas, and set up as its defense that no liability had accrued in favor of Raymond R. Douglas for which the surety company was liable under the bond.

On the trial of the case the court found the issues in favor of the defendant surety company and against the plaintiff. This judgment was rendered on the 20th day of July, 1916.

The defendant in error in this case, in order to charge plaintiff in error with liability, alleged in its petition that it was the intent of all the parties concerned and so understood by each and all of them that this bond should have been for the benefit of Duard C. Douglas instead of Raymond R. Douglas, and that

both guardianship proceedings were pending under the same style and number in the county court, and that it was a mere clerical error that the name of Raymond R. Douglas was inserted in the bond, whereas it was the intention of all the parties to insert the name of Duard C. Douglas. The action was to reform the bond and for judgment on it as reformed.

Counsel for defendant in error then cite the following authorities in support of the judgment rendered by the trial court to sustain the theory that a mistake in the name of the obligee will not invalidate the bond: Brandt, Suretyship & Guaranty (3d Ed.) § 32, p. 81; Rice v. Theimer, 45 Okl. 618, 146 Pac. 702; Thompson v. Grider Imp. Co., 36 Okl. 165, 128 Pac. 266; U. S. F. & G. v. Hansen, 36 Okl. 459, 129 Pac. 60, Ann. Cas. 1915A, 402; S. W. Surety Insurance v. Richard, 62 Okl. 122, 162 Pac. 468; McIntire v. Linehan, 178 Mass. 263, 59 N. E. 767; U. S. F. & G. Co. v. Commonwealth (Ky.) 104 S. W. 1029; State v. Wood, 51 Ark. 205, 10 S. W. 624; Riggs v. Miller, 34 Neb. 666, 52 N. W. 567; Turner v. Billigram, 2 Cal. 521; Morgan v. Thrift, 2 Cal. 562; People v. Samuel Love, 19 Cal. 676; Nicholay v. Kay, 6 Ark. 59, 42 Am. Dec. 680; Lafferty, Adm., v. Lafferty, 10 Ark. 268; Dolton v. Cain, 14 Wall. 472, 20 L. Ed. 830; Collins v. Chastain, (Tex. Civ. App.) 36 S. W. 503; Carnegie Phipps & Co. v. Hulburt, 70 Fed. 209, 16 C. C. A. 498.

In most of these cases the bond ran in the name of the state, where it should have run to some municipality or vice versa. However, the mere mistake in the name would not invalidate the bond; if it was a clerical error, the bond should be reformed to conform to the intention of the parties.

The Southwestern Surety Insurance Company, plaintiff in error here, set up in its answer in this action all of the proceeding had in said case No. 2080 in which Raymond R. Douglas was plaintiff and this plaintiff in error was defendant. This was not a plea in res judicata, but merely to show that the insurance company admitted and understood that it had executed and was liable under a bond to Raymond R. Douglas. There being only one bond issued by it, this was competent evidence to support its defense wherein it denied that it executed a bond or even intended to execute a bond in favor of Duard C. Douglas. It accepted its liability to Raymond R. Douglas under this bond.

Harry Douglas testified that he was the father of Duard C. Douglas and the guardian who had defaulted; that C. B. Conner was his attorney while he was acting as such guardian and conducted the land sale on Duard C. Douglas' allotment; that C. B. Conner was also the attorney in fact for the plaintiff in error, Southwestern Surety Insur-

ance Company, and executed the bond in controversy in this action as attorney in fact for said surety company; that at the time of the execution of this bond, witness "made a contract with the Southwestern Surety Insurance Company and the Citizens' State Bank that this money was to be deposited in the Citizens' State Bank subject to approval of the county judge or the Southwestern Surety Insurance Company."

W. H. Dill testified as follows:

"By Mr. Frerichs: Q. What is your name?
A. W. H. Dill.

"Q. Mr. Dill, what business were you in in 1911, in this town? A. I was in the Citizens' State Bank.

"Q. I hand you defendant's Exhibit 'A,' and ask you if you ever seen that before? A. Yes, sir.

"Q. Whose handwriting is that in? A. Mine.

"Q. The handwriting of the body of the bond is in your handwriting? A. Yes, sir.

"Q. What is that? Tell the court about the circumstances of that bond, Mr. Dill. A. That is a bond made for Harry Douglas, guardian of Raymond R. Douglas, for \$1,000.

"Q. How did you happen to draw up that bond, Mr. Dill? A. Well, Harry Douglas, guardian, was going to sell some land of his ward, Raymond R. Douglas, and he gave me the data from the county judge's office, and I prepared this bond, and he signed it, and I signed it and delivered it to the clerk up here, Mr. Hicks.

"Q. Do you remember the day that the bond was executed that was signed by C. B. Conner, attorney in fact, that was signed by the Southwestern Surety Insurance Company? A. Do I remember the date of the bond?

"Q. Yes. Now, do you remember anything that happened? A. Yes, sir; I do.

"Q. State to the court what happened that day between Conner and you and Harry Douglas. A. There was a joint control agreement made at the time.

"By the Court: Q. In writing, or not? A. They are usually in writing, and this one, perhaps, was in writing. The attorney usually drew the contract and delivered it to the bank. Conner had an agreement of that kind.

"By Mr. O'Bannon: We object. The instrument itself would be the best evidence.

"By the Court: Sustained. Were these funds put in your bank at the time of this sale? A. I think they were.

"Q. Do you know whether it was under the supervision of the Southwestern Surety Company or not? The checking out of it? A. I don't know; under my supervision, but in that agreement C. B. Conner, agent of the Southwestern Surety Insurance Company, supervised it.

"Q. Did he supervise it? Do you remember? A. I don't remember whether the checks were O. K'd or not.

"By Mr. Wright: Q. You are the same W. H. Dill who was defendant in this case until a few minutes ago? A. Yes, sir; I was defendant."

[4] We hold that under this evidence, and it not being disputed or contradicted, it is sufficient to sustain the findings of the court

changing the name in the bond from Raymond R. Douglas to that of Duard C. Douglas. Under the bond as reformed, there is a liability against the surety company in favor of Duard C. Douglas.

There is no prejudicial error in the record, and the judgment should be, and the same is hereby, affirmed.

All the Justices concur, except KENNAMER, J., not participating, and MILLER, J., who dissents.

MILLER, J. (dissenting). The writer of the opinion of the majority court does not agree with the conclusions reached therein.

It is the policy of our judicial system to have certain times for convening the various courts. Usually the time for convening the term of court is fixed by statute. When so fixed every person may take notice thereof; this is necessary for the orderly dispatch of the public business in the courts. Attorneys and litigants have notice of it, as well as the public generally. The holding of a term of court is public business and in which the public is interested. It is one of the important branches of our system of government. It is deemed so essential to give public notice of the time of convening a term of a court of record that where the specific date is not fixed, it is invariably provided that public proclamation be made thereof by advertisement in newspapers or posting of notices so that the public as well as litigants and attorneys may be fully apprised.

Chapter 102, Session Laws of 1910, after providing for the terms of the district court in most of the districts, then made the following provision for adjourning district courts and for calling special terms:

"The regular term of any district court may be adjourned from time to time, or sine die, by a resident judge of the district court or by any other district judge assigned and holding court in such district, but such adjournment shall be [to] a time prior to the convening of the next regular term.

"The regular judge, or any judge assigned, may make all orders with reference to the adjournment of the term.

"Special terms of the district court in any county in a district may be called by the resident judge of said district, by order entered of record in such court, notice of such special term to be given in at least two consecutive issues of a weekly newspaper published and of general circulation in such county, prior to the convening of such special term."

The question presented by the contention of plaintiff in error depends upon the construction of the first paragraph above quoted. The succeeding paragraphs have been quoted for the purpose of throwing what light they may upon the first paragraph. In order to get at the specific meaning of this legislative act authorizing a court to adjourn during

term time, we will quote the first paragraph leaving out the parts that may refer to other things, and it would read as follows:

"The regular term of any district court may be adjourned from time to time, * * * but such adjournment shall be to a time prior to the convening of the next regular term."

This makes it necessary to construe the meaning of the phrase "from time to time" as used in this section of the statute. Webster's International Dictionary defines the word "time" as follows:

"That in which events are distinguished with reference to before and after, beginning and end; relation with reference to concurrence or succession; the measurable aspect of duration; that within which change is determined."

As used here, the first word "time" indicates the beginning of the adjournment or suspension of the court. The second word "time" indicates the end of the duration of the adjournment or suspension of court. The Legislature in using the word "time" in the first instance knew that it meant a specific, definite, fixed period, hour or day, for its event or happening, to wit, the specific, definite hour or day the court adjourned or announced its adjournment which might be either to another time, another day, or sine die. The Legislature realized and comprehended that this time would specifically and definitely be fixed by the act of the court in doing it (adjourning). The same word "time" being again employed evidently was intended to mean another time which would be as definitely fixed, but left to the discretion of the court, which by its order would adjourn to a day certain.

If the phrase "from time to time" is to be construed so that the court may make an order adjourning the court subject to call, or take a recess, subject to call, and then all of the officials constituting the court leave the courthouse or the courtroom with no intention or expectation of transacting any further court business for an indefinite number of days, weeks, or even months, until some day the district judge happens in there and decides he will hold court, then the last part of the paragraph above quoted is absolutely meaningless. It says, "but such adjournment shall be to a time prior to the convening of the next regular term." If the adjournment or recess is subject to call, without any immediate expectation of the court resuming the transaction of business, then it could not be determined until the court was reconvened whether or not it was adjourned to a time prior to the convening of the next regular term. This would be left entirely to the wish, convenience, or caprice of the judge. The Legislature evidently did not have any intention of leaving a matter of so great importance to the public at large locked up in the bosom of the trial judge. The term hav-

ing been fixed by the Legislature to convene on the first Monday in August, 1917, and that Monday being the 6th day of August, 1917, the time was definitely fixed. Court having been regularly convened, it was within the power of the trial judge, under the statute above quoted, to have the court adjourned to September 10, 1917, or to any other specific date before the 5th day of November, 1917, which was the day fixed by statute for the convening of the November term; November 5th being the first Monday in November, 1917.

It is clear that the trial judge did not have any definite idea as to what day he would expect to reconvene the August term of the district court of Okfuskee county. Neither the judge, the attorneys, the officers of the court, the litigants, or the public had knowledge of any definite time when the court would convene for the further transaction of business; neither was there any record made from which this information could be obtained.

It is said by defendant in error that the court did not intend to adjourn the term sine die, and this is true, for the order expressly so states. But the court cannot either intentionally or unintentionally set at naught the statutes which were enacted for the expressed purpose of governing the action of the court. If it can, then we have disposed of and forever in the future dispensed with the legislative branch of our government.

We wish it strictly understood that there are of necessity many adjournments and recesses during the progress of the trial of cases, and especially in the trial of cases before a jury or when a grand jury may be in session, when it would be entirely proper to take a recess subject to call and not fix any definite time. It is not necessary that every time the court may take a recess or suspend the active business of the court that it must announce that it will take a recess to a certain hour or minute in the day. But when a court does adjourn or take a recess, subject to call, without any immediate intention of resuming the transaction of the public business of the court at any definite time in the immediate future, and does not reconvene for days or weeks, such adjournment or recess amounts to an adjournment of the term sine die.

"Adjournment of the regular term of a county court, without fixing in the order of adjournment any time at which the court shall reconvene, precludes the court from again convening until the time fixed by law for the next regular session of the court." *Irwin v. Irwin*, 2 Okl. 180, 37 Pac. 548; *Black on Judgments*, Vol. 1, Section 179; *Earls v. Earls*, 27 Kan. 538; *Balm v. Nunn*, 63 Iowa, 841, 19 N. W. 810; *Laughlin v. Peckham*, 66 Iowa, 121, 23 N. W. 294; *Kirtley v. Marshal S. M. Co.*, 4 Colo. 111; *Filley v. Cody*, 4 Colo. 106; *Wight v. Wallbaum*, 39 Ill. 554.

Defendant in error insists that this case is governed by the decision of Sharp, C. J., in *Re Nichols' Will, Phebus et al. v. Vinson et al.*, 64 Okl. 241, 168 Pac. 1087. In that case the court was in session on July 7, 8, and 9, 1915, and made orders in that case on each day. On July 9, 1915, the court granted leave to withdraw depositions for the purpose of attaching notice and certificate. It also ordered the stenographer to make a transcript of the record and file same with the clerk on July 19, 1915, and this case had been specifically set for trial on July 19, 1915. Then the court adjourned, subject to call. On July 19, 1915, the court convened with Judge Charles G. Watts presiding and the cause came on for trial. The records in the office of the clerk of the Supreme Court showed that orders assigning Judge Watts to hold court in Pottawatomie county were made by Chief Justice Kane as follows: On July 3d, to hold court July 7th and 8th; on July 8th, to hold court July 9th; July 17th, to hold court for one week beginning July 19th; July 24th, a further order to hold court for one week beginning July 26th. The opinion then makes it clear that the court is not determining the effect of an order of adjournment, subject to call, as an abstract proposition, but viewed in the light of all the orders made in this case, and then states:

"It is possible that cases may arise wherein a different rule should be applied, but such is not the case under consideration."

The case of *Railroad Co. v. Hand*, 7 Kan. 380, quoted from in the majority opinion, is based on an entirely different statute than ours. One of the reasons advanced in that opinion is that the term is considered as one day; that judgments all relate back to the first day of the term; this rule does not obtain in this state under our statutes.

All proceedings had in a court at a time when the holding of such court is not authorized by law or when the term has expired or its jurisdiction is not exercised within the time prescribed by law; it is not a legally constituted court, and such proceedings are void. 11 Cyc. 728.

"An assemblage of the proper officers at the proper place, but at a time not authorized by law, does not constitute a court; and any judicial proceeding then had, which under the law can be had only in term time, are null and void." In *re James*, 4 Okl. Cr. R. 94, 111 Pac. 947.

"A judgment of the probate court rendered in a civil action wherein the sum in controversy exceeds the jurisdiction of a justice of the peace, and which judgment was so rendered at the time when the court was not legally in session, is void for want of jurisdiction.

"Judgments rendered by a court not legally in session are void.

"Where terms of court are, under the law,

fixed at stated periods, and the court fails to convene at the time so fixed, and by reason thereof, the court is not legally in session, the parties to an action cannot, by agreement, confer jurisdiction upon the court to render a judgment binding upon the parties." *American Fire Ins. Co. v. Pappe*, 4 Okl. 110, 43 Pac. 1065; *Garlick v. Dunn*, 42 Ala. 404; *Brumley v. State*, 20 Ark. 77; *Cain v. Goda*, 84 Ind. 209; *McCool v. State*, 7 Ind. 378; *White v. Riggs*, 27 Me. 114; *Ex parte De Hay*, 3 S. C. 564; *Hodges v. Ward*, 1 Tex. 244; *Wilson v. State*, 37 Tex. Cr. R. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; *Withers v. Fuller*, 30 Grat. (Va.) 547; *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448.

If the trial was had and judgment rendered when the court was not legally in session, the act of the court was *coram non jure* and void. *American Fire Ins. Co. v. Pappe*, supra; In *re McClaskey*, 2 Okl. 568, 37 Pac. 854; In *re McClaskey*, 52 Kan. 34, 34 Pac. 459; In *re Terrill*, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327; *Earls v. Earls*, supra; In *re Millington*, 24 Kan. 214; *Galusha v. Butterfield*, 3 Ill. 227; In *re Walter James*, 4 Okl. Cr. R. 110, 111 Pac. 947, supra; *Wightman v. Karsner*, 20 Ala. 446; *State v. Roberts*, 8 Nev. 239.

Defendant in error says that both parties announced ready for trial. The record shows that no objection was made on the ground that the court was not legally in session; but, even had they tried the case by agreement, this would not give the court jurisdiction, for jurisdiction cannot be conferred by agreement. *American Fire Ins. Co. v. Pappe*, supra; *Earls v. Earls*, supra; *Galusha v. Butterfield*, supra; *Francis v. Wells*, 4 Colo. 274.

The judgment should have been set aside because it was void.

BREWER v. STATE. (No. A-3498.)

(Criminal Court of Appeals of Oklahoma.
May 27, 1921.)

(Syllabus by Editorial Staff.)

Intoxicating liquors §236(20)—Evidence insufficient to sustain conviction for transporting liquor.

In a prosecution for transporting intoxicating liquor, evidence held insufficient to sustain a conviction.

Appeal from County Court, Hughes County; John L. Coffman, Judge.

Jesse Brewer was convicted of transporting intoxicating liquor, and he appeals. Reversed.

J. L. Skinner, of Holdenville, for plaintiff in error.

The Attorney General and W. O. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was convicted on a charge of transporting intoxicating liquor from a point unknown in Hughes county to the town of Yeager on or about the 24th day of March, 1918, and in accordance with the verdict of the jury was sentenced to be confined for 30 days in the county jail and to pay a fine of \$50. He appeals from the judgment.

The evidence shows that the defendant was arrested as he got off of the north-bound Frisco passenger train at the town of Yeager, by an officer, and a quart of whisky and a pint of alcohol was taken from his grip.

For the defense, Sam Hughes, sheriff of Hughes county, testified that he is well acquainted with the defendant's general reputation in the community where he resides for being an upright and law-abiding man, and that that reputation was good.

Dr. A. M. Butts testified that he was the defendant's family physician, and about the date alleged was treating the defendant's daughter, and advised the defendant that a teaspoonful of whisky three or four times a day would help the girl to get better and advised the use of alcohol.

As a witness in his own behalf the defendant testified that he lived a mile south of Yeager; that he had been at Fort Worth, Tex., and had lawfully purchased this whisky for medicinal purposes, under the advice of his family physician; that he did not have the whisky for the purpose of drinking it, or for the purpose of sale, but solely for medicinal purposes.

We deem it unnecessary to consider the various errors assigned. It is sufficient to say after a careful examination and consideration of the testimony we are of the opinion that the conviction is not sustained by the evidence. Wherefore the judgment is reversed.

RODDIE v. STATE. (No. A-3576.)

(Criminal Court of Appeals of Oklahoma.
May 23, 1921.)

(Syllabus by the Court.)

1. Criminal law §364(1)—When explanatory declarations admissible stated.

If a declaration which serves to explain an act is made by the defendant while doing the act, such declaration is admissible in evidence when the motive, object, or purpose of the act is the subject of the inquiry.

2. Criminal law §363—Declarations admissible as part of res gestæ.

Declarations, as a part of the res gestæ, are regarded as verbal acts or verbal parts of an act, indicating a present purpose or inten-

tion, and therefore are admitted in proof like any other material facts.

3. Criminal law §312, 345, 363, 364(2)—Declarations not incompetent merely because preceding actual commission of crime; preparations always relevant to show intent; declarations accompanying acts of preparation admissible.

If a declaration explains a relevant fact, it is not incompetent merely because its utterance precludes the actual commission of the crime. Evidence is always relevant which shows that the defendant made preparations to commit a crime, and from such preparative actions a criminal intention may be inferred. Declarations accompanying these acts of preparation are received to explain their significance, and, indirectly, to illuminate the subsequent conduct and state of mind of the defendant.

4. Criminal law §364(2)—Defendant's declarations held admissible as res gestæ.

On a trial for murder it became important to ascertain in what state of mind defendant was at the time he discharged his pistol, whether the act was done with deliberation, or under such sudden excitement of fear, or surprise, or provocation as would reduce the homicide from murder to manslaughter, or as would justify the use of a deadly weapon in resisting an assault. The evidence showed that defendant had an affray with the father of the deceased at the courthouse; that he then went to his office and was informed that deceased and his father were on the streets looking for him for the purpose of doing him great bodily harm; that defendant then took a pistol from his desk and put it in his pocket, and went down on the street, and went into the second store from the stairway to his office; he came out and passed a drug store adjoining said stairway, stopped and talked with a group of men, then turned and went to the drug store in front of which the shooting occurred. Each witness who testified to these acts of the defendant was asked what statement, if any, defendant made. On the state's objections, the statements by witnesses as to what defendant said were excluded. *Held*, that the defendant's statements and declarations were admissible as a part of the res gestæ, and their exclusion was prejudicial error.

5. Homicide §110, 116(4)—"Great personal injury" defined.

The phrase "great personal injury," as used in the statute (section 2334, Rev. Laws 1910), means something more than apprehension, however imminent, of a mere battery. It means a serious and severe bodily injury of a greater degree, not necessarily amounting to a felony. In order to justify the assault and to slay an assailant, within the meaning of this section, there must be an apparent design on the part of such assailant to either take the life of the person assailed or the infliction of some great bodily injury, not necessarily amounting to a felony, if carried out, and, in addition thereto, there must be reasonable ground for believing that there is imminent danger of such design being accomplished.

[Ed. Note.—For other definitions, see Words and Phrases, Great Personal Injury.]

(193 P.)

6. Criminal law §814(1)—Homicide §300 (7)—Instruction leaving jury in doubt as to how to apply it erroneous; instruction as to "malming" error.

An instruction is erroneous, although correct as an abstract proposition of law, if it leaves the jury in doubt or uncertainty as to how it should be applied to the evidence.

7. Criminal law §923(9)—Objection to juror on ground of opinion not available after conviction in absence of challenge.

Where a defendant accepts a juror without availing himself of the right to challenge him for cause, he will not, after conviction, be allowed to make the objection that the juror had formed and expressed an opinion adverse to him, as a ground for a new trial.

8. Criminal law §1163(6)—Misconduct of one juror is misconduct of jury; prejudice to defendant from misconduct of jury will be presumed.

The jury being composed of 12 individuals, the misconduct of any juror which might have been prejudicial to the defendant is misconduct of the jury, because the jury can only act as a unit, and where in a capital case such misconduct exposed the jury to improper influences, prejudice to the defendant will be presumed, and the burden of proof is on the state to show that as a matter of fact the defendant suffered no injury by reason of such misconduct.

9. Criminal law §639(1) — Judges §21 — Judge cannot be practicing attorney.

Under the statutes of this state an attorney at law, who holds a commission as judge of any court of record in this state, is prohibited from practicing law as an attorney, counselor, or advocate in any of the state courts so long as he occupies such official position.

10. Criminal law §1186(1)—Disqualification of judge and participation by him in trial error.

When a judge of a court of record disqualifies in a criminal case and on the part of the prosecution participates in the trial, a judgment of conviction will be reversed on the ground that the defendant did not have a fair and impartial trial.

Appeal from District Court, Pontotoc County; C. E. Dudley, Judge.

Reuben M. Roddie was convicted of manslaughter in the first degree, and he appeals. Reversed and remanded.

Robert Wimbish, King & Crawford, W. F. Schulte, and B. C. King, all of Ada, J. B. Dudley, of Oklahoma City, and Ben F. Williams and John E. Luttrell, both of Norman, for plaintiff in error.

S. P. Freeling, Atty. Gen., W. C. Hall, Asst. Atty. Gen., Wayne Wadlington, Co. Atty., of Ada, W. W. Pryor, of Wewoka, and J. F. McKeel, of Ada, for the State.

DOYLE, P. J. This appeal is from a judgment of conviction in the district court

of Pontotoc county, rendered January 20, 1919, in pursuance of a verdict finding the defendant guilty of manslaughter in the first degree and assessing his punishment at confinement in the penitentiary for 10 years.

The information in substance charged that the defendant, Reuben M. Roddie, did in said county on the 3d day of October, 1917, commit the crime of murder by shooting one Percy Barton with an automatic pistol.

Reuben M. Roddie, the defendant, is a lawyer, an ex-state senator, and has been prominent in political affairs in the state. The deceased, Percy Barton, was a soldier, home on a furlough, about 22 years of age. He was the son of C. O. Barton, a lawyer and a former judge of the county court of Pontotoc county.

The evidence shows that on the 3d day of October, 1918, the defendant and Judge Barton were opposing counsel in a matter being heard before the district court of Pontotoc county. In the course of the hearing, just before the noon hour, an altercation occurred between the defendant and Judge Barton, and they engaged in a fist fight in the court room, which was soon stopped and the parties separated by bystanders. The court properly excluded the details of the difficulty between the defendant and Judge Barton. Immediately after the affray Judge Barton called the defendant a vile name and said, "You will answer for this," and left the courtroom. The defendant then went to his office. A few minutes later Judge Barton returned to the courthouse, accompanied by his son, Percy, the deceased. The father directed his son to go into the courtroom, but if court was in session not to jump on him in there. They looked in the courtroom. Not seeing the defendant, they left the courthouse, and the father was heard to say to his son, "The damn cowardly son of a bitch has gone, but, if you don't hunt him up and whip him for beating up your daddy, you are no son of mine, and I will disown you." On leaving the courthouse the Bartons went to Main street, and Percy Barton passed along Main street in front of the stairway leading to the defendant's law office. Meeting Dr. Ross, he asked him to go and attend to his father's injuries. Dr. Ross went to Judge Barton's office for that purpose, and Percy Barton entered the Smith drug store.

The courthouse in the city of Ada is on Twelfth street and fronts north. Twelfth street is parallel to and a block south of Main street. On the south side of Main street, fronting north, is the Smith drug store. Next east is the Rollow hardware store, and next east of the hardware store is the Model clothing store. The street running north and south east of the block containing these stores is Broadway. The front stairway leading to the defendant's law of-

place is between the Smith drug store and the Rollow hardware store. There is also a back stairway to this building, the same being opposite the front of the courthouse. Shortly after arriving at his office the defendant was called over the telephone by Walter Goyne, a constable and special deputy sheriff and told that the Bartons, father and son, were at the courthouse looking for him, and that he had better go home and stay out of the way or there would be trouble. The defendant sent his stenographer, Miss Tampa Cole, down on Main street to see if the Bartons were anywhere in sight. Miss Cole went down on Main street, and not seeing the Bartons came back and so reported. There was an abrasion on the neck of the defendant as the result of his fight, and the blood from this had soiled his collar and tie, which he took off. After Miss Cole reported to him he went down the front stairway to Main street and went one door west to the Model clothing store and purchased a collar and tie. While in the store Walter Goyne came in and again told him that the Bartons were walking the streets looking for him; that he had better go home to avoid serious trouble. He replied that he did not like to run away, but would go home. The defendant on leaving the clothing store passed the Smith drug store, stopped and spoke to Walter Goyne, who was in company with John Ralls, chief of police of Ada, Theodore Rogers, and Henry Stuckey. He then noticed or his attention was called to the fact that his neck was still bleeding, and he remarked that he would go in the drug store and get something to put on it. He started towards the drug store, and as he approached the entrance the deceased came out. The testimony is conflicting as to the acts of the deceased just before and at the time of the shooting. The testimony for the state tends to show that the deceased advanced upon and made an assault upon the defendant with his fist, and that the defendant drew a 32 automatic pistol and fired; that there was a short interval, and then there was two or three more shots in quick succession. The deceased fell to the sidewalk almost in front of the Rollow hardware store. Walter Goyne stepped up, took the defendant's pistol from him, and took him to jail.

The shooting occurred between 12 and 1 o'clock. The deceased died about 9:30 that evening. There was a bullet hole through his right arm, one through his left arm, one through his right thigh, and one through his left thigh. One or two witnesses testified that four shots were fired. A statement of the deceased made shortly before his death was admitted as a dying declaration. He was asked by a doctor, "How did this happen?" and said:

"I waited there until he came up. As I reached to get him he was too quick for me, and got

his gun and shot me. He got me, but if he hadn't gotten me, I would have gotten him. He beat up my dad. It was up to me to take him up. I was going to whip him man to man."

As a witness in his own behalf the defendant testified that after the difficulty in the courtroom he went to his office, and shortly after Walter Goyne called him by telephone and told him that Judge Barton and Percy Barton had been to the courthouse hunting for him; that he had better go home or get out of the way to avoid trouble; that, hearing this, he was alarmed, and took his pistol from the drawer of his desk and went down on the street and into the Model clothing store and bought a collar and tie; while in the store Walter Goyne came in and told him that the Bartons were walking the streets hunting for him; that he had better get off the street or he might get killed; leaving the store, he went up the street to where Walter Goyne, John Ralls, Henry Stuckey, and Theodore Rogers were standing; that he did not look in the Smith drug store in passing on the way to where these men were standing, and did not see the deceased in the store. After standing a minute or so on the street, he started into Smith's drug store, because his neck had begun to bleed and he wanted to get something to stop it; as he reached the vestibule of the drug store he saw the deceased, who rushed upon and attacked him, and as he expected to be killed either by Percy Barton or his father, he jumped back and reached for his gun, and threw his left arm up to protect his face, and drew his gun from his right hand pocket and fired; that deceased kept coming on and caught hold of the pistol; then he fired twice rapidly and turned around, expecting to see Judge Barton, and saw John Ralls walking towards him with a gun; that Walter Goyne came up to him, and he handed him the pistol.

Nothing in the foregoing statement is to be taken as expressing the views of this court upon the weight of the evidence. That consideration is not before us. The statement is made for a better understanding of the propositions of law which we are called upon to consider.

Numerous errors have been assigned, and the questions thereby presented have been ably and elaborately discussed by counsel on both sides, both orally and in the briefs. The view we are constrained by our sense of judicial duty to take of this case will render it unnecessary to pass upon all the questions discussed by counsel, but some of these questions we will consider and decide.

One of the grounds relied upon for a reversal of the judgment is that the court erred in refusing to admit competent, material, and relevant evidence offered by the defendant.

When the defendant's witness Walter

Goyne was upon the stand he was questioned as to what the defendant said to him and others on the street just before he left them to go into Smith's drug store. The court sustained the state's objection to this offered testimony, as appears from the following statement in the record:

"Q. Do you know for what purpose Mr. Roddie went in the drug store? A. Well, I do not know only what he said.

"Q. Well, I will ask you to state if his neck was bleeding at the time. A. Yes, sir.

"Q. What, if anything, was said about going to get some medicine for it?" (The state objects as incompetent, irrelevant, and immaterial. Objection sustained. Exception reserved.)

"Counsel for the Defendant (out of the hearing of the jury): We expect the answer to be that he said he would go in the drug store to get some medicine for his neck.

"Q. When Roddie left, where did he start to go? A. He started to go in the drug store.

"Q. For what purpose, if you know?

"The State: Same objection.

"The Court: The witness has answered that he only knew what Mr. Roddie said. Objection will be sustained. He may answer if he knows.

"A. Nothing only what he said is all.

"The Court: Objection sustained. Exceptions reserved.

"Counsel for the Defendant: We expect the witness to state that he went there to get something for his neck."

The same offer of evidence was made when the defendant's witness Henry Stuckey was on the stand, as appears by the following statement in the record:

"Q. After John Ralls left, what, if anything, did Roddie do or say. A. Roddie felt of his neck and asked—(The state objects as incompetent, irrelevant, and immaterial.)

"The Court: Objection will be sustained as to what he said. Exception reserved.

"Counsel for the Defendant: The answer will be that he made the remark that he would go into the drug store and get some medicine for his neck."

Miss Tampa Cole testified that she had been in the defendant's employ as a stenographer for some years; that the defendant came to his office about 12:30; his neck was bleeding and his collar and tie were bloody; in a few minutes Walter Goyne called over the telephone and asked for the defendant, and he talked with him over the telephone; then the defendant went to a desk drawer and took out a revolver and put it in his pocket. She was then asked:

"Q. You may state to the jury whether or not at that time he sent you anywhere for any purpose? (State objects, incompetent, irrelevant, and immaterial.)"

The jury was excused in charge of the bailiff. Thereupon the defendant's counsel stated:

"We expect her answer to be that he sent her out with instructions to go down on the street and see if these parties were not on

Main street; that if they were not he was going to go to dinner; that she went down on the street and walked up and down Main street and returned and reported to him that she did not see either one of them."

In the absence of the jury this witness testified:

"Mr. Roddie told me to go down on the street and see if I could see Percy Barton or his father, and if they were on the street he would stay in his office. I went down the street and as I passed Broadway I looked both west, north, and south and did not see anything of them. I came back to the office and told him that I did not see them or either of them.

"By the Court: Any statement that he made to her about going down on the street to ascertain where the Bartons were would be self-serving; anything that he said to her about going down on the street, what she said to him when she came back, is not competent."

Exception reserved.

It is earnestly contended on the part of the defendant that all this evidence was admissible as a part of the res geste, and that the exclusion of this offered evidence was prejudicial to the substantial rights of the defendant.

In view of the varying theories based upon the facts attending this homicide, it became important to ascertain, and it was a material fact for the jury to determine, what was the defendant's purpose in arming himself and in going to the drug store. Acts which a defendant may do and justify under a plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. However, there is no fixed rule applicable to every case. If a man, while in the lawful pursuit of his business, without fault on his part, is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of an accomplishment of this design, he may, acting under these fears alone, slay his assailant and be justified by the appearances, and, as where the attack is sudden and the danger imminent, he may increase his peril by retreating, so situated he may stand his ground and slay his assailant.

On the other hand, if one who has taken the life of an assailant was himself in the wrong, he cannot plead self-defense, but the wrong which will preclude him from making that defense must relate to the assault in resistance of which the assailant was killed.

If after the affray in the courthouse the defendant armed himself with a deadly weapon and sought the deceased with a view of provoking a difficulty, or with the intent of having an affray, and the deceased assaulted him and he killed his assailant, his plea of self-defense would be of no avail; for the law will not hold him guiltless who, by seeking a

combat and continuing therein, brings upon himself the necessity of killing his fellow man.

[4] We are clearly of the opinion that the defendant's declarations should have been admitted as a part of the *res gestæ*.

[2] Declarations, as a part of the *res gestæ*, are regarded as "verbal acts or verbal parts of an act, indicating a present purpose or intention, and therefore are admitted in proof like any other material facts." 3 Wigmore, Ev. § 1732; 1 Greenl. Ev. § 108; 10 R. C. L. 76.

[3] Underhill says:

"The rule of the *res gestæ* is based upon the principle that, when one part of a transaction is shown by one party, the other may bring out all or any part of the remainder. Hence the whole declaration or conversation must be stated and admitted. * * *

"If the declaration meets the requirements of the rule now under consideration—that is, if it explains or illustrates a relevant fact, it is not incompetent, merely because its utterance precedes the actual commission of the crime. Evidence is always relevant which shows that the accused made preparations to commit a crime, and from such preparative actions a criminal intention may, with justice, be inferred.

"Declarations accompanying these acts of preparation are received to explain and unfold their significance, and indirectly to illuminate the subsequent language, conduct, and state of mind of the accused."

Underhill, Cr. Ev. §§ 99 and 100.

[1] If the declaration is made while doing an act the nature, object, or motive of which is a subject of inquiry, and serves to explain it, then such declaration is admissible in evidence. And it is generally in this class of cases, where either the nature, object, or motive of the act is material, that this rule receives its broadest application.

In *Sunday v. State*, 14 Okl. Cr. 620, 174 Pac. 1095, it was held:

"On a trial for murder, where it appeared that the deceased and the defendant had an altercation during the progress of a card game, and the defendant then went to his home and procured a gun, and returned therewith, and shot the deceased, statements made by the defendant to his sisters that he was taking the gun with the intention of arresting the deceased were admissible as part of the *res gestæ*."

In the opinion it is said:

"Self-serving declarations are not admissible for the defense, unless they form a part of the *res gestæ*. Declarations as a part of the *res gestæ* are regarded as verbal acts indicating a present purpose and intention, and therefore are admitted in proof like any other material facts."

It is urged that the offered testimony was of the utmost importance to the defendant; that on the theory of the state it was argued to the jury by counsel for the state that the defendant armed himself and was either

seeking the deceased and his father, or was going where he might expect to meet them with the intention of having an affray; that the action of the defendant in sending Miss Cole to see if she could see anything of the Bartons, if unexplained by his statement of purpose in so doing, might be argued and was argued to be for the purpose of locating them so that he might hunt them up for the purpose of engaging in a difficulty; and that the offered testimony was material as tending to show the state of mind of the defendant, and went to form a part of the *res gestæ*.

The court held that the acts of the defendant at the time in question were admissible, and allowed the witnesses Goynes, Stuckey, and Miss Cole to testify what the defendant did in their presence, but excluded the declarations of the defendant which accompanied and tended to explain his actions. Under the rule above stated, if the acts themselves were admissible, the defendant's declarations which accompanied them were also admissible. What bearing it might have had in the minds of the jury had this evidence been admitted is not a question for our consideration. The defendant in a criminal prosecution for any offense is entitled to a fair and impartial trial, conducted in accordance with the rules of law. The question of his guilt or innocence should be determined upon legal evidence, and where competent and material evidence has been offered on the part of the defendant and erroneously rejected by the court, we are not at liberty to say that the error is merely technical, or that the substantial rights of the defendant have not been prejudiced. Here the defendant was on trial for his life, and he was entitled to the benefit of whatever competent evidence he could produce.

It is also contended that the defendant did not have a fair and impartial trial, in that Lee Nettles, one of the trial jurors, had formed and expressed an opinion adverse to the defendant previous to his being sworn as a juror. This was one of the grounds of the motion for new trial, and was supported by affidavits. According to the affidavit of L. J. Crowder, the juror Nettles came into affiant's place of business and made the following statement, "I see that Roddie is back; he is guilty and should be punished; he ought to have from 10 to 20 years in the penitentiary." According to the affidavit of B. F. McCauley, the juror Nettles came into affiant's place of business, and while he was there the defendant came in, and after transacting some business left, and immediately thereafter the juror Nettles remarked to affiant, "Roddie's trial is coming up pretty soon, isn't it?" that affiant replied he did not know. Said juror further stated, "Roddie is guilty and should be punished. He ought to be sent to the penitentiary from 10 to 20 years." Also

affidavits that neither the defendant nor his counsel knew at the time of the impaneling of the jury that the alleged statements had been made.

The state offered nothing in rebuttal of these affidavits, but stood on the statements of the juror made on his voir dire. The record does not contain the examination of the jury upon their voir dire, but it is conceded that the juror Nettles was not examined by counsel for the defendant.

[7] In *Horton v. State*, 10 Okl. Cr. 294, 136 Pac. 177, this court said:

"We think it may be safely said that upon principle, if the defendant accepts a juror without availing himself of the right to examine such juror on voir dire, for the purpose of testing his impartiality, or without availing himself of the right to challenge him for cause, and it should be discovered after verdict that he was incompetent by reason of prejudice, the defendant would not be entitled to a new trial on that ground under our statute."

[8] It was further shown by affidavits in support of the motion for new trial that the juror Nettles was guilty of misconduct in separating from the other jurors, without leave of court, and in holding a private conversation with his wife. The testimony taken on the hearing of the motion shows that the juror Nettles and his wife had their living rooms in the same building across the hall from the office of Judge Barton, the father of the deceased; that his wife attended the trial of the case and sat in the courtroom with the wife and mother of the deceased, and that evening the juror went to his living rooms and talked with his wife; that he first told the bailiff that he wanted to get his overcoat; one of the bailiffs went and got the coat for him; he then insisted that he should go to his rooms to get some face cream; the bailiffs took the juror upstairs and allowed him to enter his room; one of the bailiffs followed, and found him talking to his wife and making no effort to get what he said he wanted; that the bailiff was compelled to forcibly take him from the room and place him with the other jurors.

The state offered nothing in rebuttal, and the evidence in support of this ground for a new trial was uncontroverted.

The defendant in any criminal case is entitled as a matter of right to require in the first instance a compliance with the provisions of law safeguarding his right to a fair and impartial trial; and, if the provisions of law intended for his security are willfully disregarded, he may require the state to show that he has not been prejudiced by reason of such noncompliance.

Under the provisions of our Criminal Code, jurors sworn to try a felony case may be kept together in charge of proper officers, or may in the discretion of the court, at any time before the submission of the case to

them, be permitted to separate. Section 5899, Rev. Laws.

In *Armstrong v. State*, 2 Okl. Cr. 567, 103 Pac. 658, 24 L. R. A. (N. S.) 776, there was no proof of misconduct while the jury was separated. This court said:

"The legal presumption is that jurors perform their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that, during the adjournment of a trial, the jurors were permitted to separate. The defendant must affirmatively show that by reason thereof he was denied a fair and impartial trial, or that his substantial rights were prejudiced thereby."

In *Weatherholt v. State*, 9 Okl. Cr. 161, 131 Pac. 185, it is said:

"The fact that a juror in a capital case became separated from his fellow jurors at a recess during the trial, and left the custody of the officers who had the jury in charge, is not sufficient ground to grant a new trial, where it does not appear that he had any communication with any one concerning the cause, either directly by conversation, or indirectly, by overhearing the observations of others, or that he did any act inconsistent with his duty as a juror during such separation."

Among the personal safeguards contained in section 20, art. 2, Const., is the right of the accused in a criminal prosecution to have "a speedy and public trial by an impartial jury." A jury being composed of 12 individuals, the misconduct of any juror, is misconduct of the jury, because the jury act as a unit, and misconduct by one or more of the jury which might have been prejudicial to the defendant raises the presumption in a capital case that the defendant has been prejudiced thereby, and the burden of proof would be on the state to show that as a matter of fact the defendant suffered no injury by reason of such misconduct.

It follows that in a trial for murder, if a juror willfully and without necessity withdraws from his fellows and goes to a place where communication may be secretly had with another, his willful conduct, unexplained, may be sufficient to impair the faith which would otherwise be reposed in the integrity of his verdict, and in this case, under the circumstances shown, which exposed the jury to improper influences, the burden of proving there was no prejudice to the defendant resulting from the misconduct complained of was upon the state.

Another ground of the motion for a new trial was that the defendant did not have a fair and impartial trial for the reason that J. W. Bolen, the regular judge of the district court, participated in the prosecution after having certified his disqualification to try the case. On the hearing, Judge Bolen testified in part as follows:

"Q. During the progress of the trial, Judge, did you take any active part in it? A. I was

not very active; no; I did a few things, not very many.

"Q. Now, when the panel was drawn for the trial of this case, they were summoned to be here on Monday morning? A. Yes, sir.

"Q. At which time you opened court and discharged the jury? A. Until Tuesday.

"Q. When you discharged the jury, I will ask you if you didn't make this statement, 'that none of the jurors need come to you to offer any excuse, because you would not discharge them, as you and the defendant were not sweethearts?' A. I said in substance that the defendant and myself were not sweethearts, and if I discharged any of the jurors there would be criticism.

"Q. Did you participate in the trial to the extent of assisting in the selection of the jury? A. I made some suggestions; yes.

"Q. Did you write a note giving the names of Lee Nettles and Jim Whitaker, and say that they were men friendly to John Ralls, and they would never believe that John Ralls fired the shot? A. After Nettles was accepted and the jury sworn the defense seemed to start out upon the theory that John Ralls fired the shot that might have killed the Barton boy, and I knew that Lee Nettles or Jim Whitaker either wouldn't like the idea of accusing John Ralls of murder. I simply made that suggestion to some lawyer in the case, I don't know who; I made the suggestion, however.

"Q. Did you write that (producing a note which read as follows):

<p>'Lee Nettles & Jim Whitaker</p>	<p>are good friends to Jno Ralls will never believe he fired a shot.'</p>
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A. Yes, sir."

[9] Under the statutes of this state an attorney at law who holds a commission as a judge of any court of record of this state is prohibited from practicing law as an attorney, counselor, or advocate in any of the state courts so long as he occupies such official position. Section 240, Rev. Laws.

The law aims, as far as possible, to give the accused a trial that shall not only be fair, but as free as may be from any suspicion of partiality or undue influence. The impropriety of a judge leaving the bench and appearing as counsel in a criminal case on trial in his own court is perfectly apparent, and could not be otherwise than prejudicial to the substantial rights of the defendant.

In the case of Lilly v. State, 7 Okl. Cr. 284, 123 Pac. 575, Ann. Cas. 1914B, 443, this court held that:

"When a judge of a court of record vacates the bench and prosecutes a person charged with crime in the court over which he presides and before a jury drawn and impaneled by him, a judgment of conviction had under such circumstances will be reversed."

[10] In this case we are of opinion that the testimony of the judge of the district court of Pontotoc county shows that he participated in the trial to such an extent as to prejudice the rights of the defendant.

Several errors assigned are based on the

refusal to give instructions requested and on exceptions taken to certain instructions given. The instructions given by the court embraced the law of all proper requests made by the defendant, and it seems to us that the charge of the court fully covered every phase of the case to which the testimony is applicable. It would be unprofitable to extend this opinion with a reproduction of all the instructions excepted to. We will, however, notice some of the objections urged against the instructions that were given.

The fifteenth instruction reads:

"By serious bodily injury is meant to maim or to inflict an injury which may be permanent in its character, or which may result in death."

To this instruction the objection stated is:

"The decisions, in defining the nature of the injury or harm to prevent which one may resist to the point of taking life, includes a wider scope of possible injury and injuries of a less serious character than those classified in the instruction given in this case"

—citing *Boykin v. People*, 22 Colo. 503, 45 Pac. 422, holding that the words "great bodily harm" in the law of self-defense "mean something more than a mere slight injury like a simple assault and battery, from which only a slight injury would likely to be suffered. It means a serious and severe injury of a greater degree," and *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154, holding that "great bodily injury does not necessarily amount to a felony committed on the person." The court said:

"The phrase 'great bodily injury' is difficult to define, for the reason that it well defines itself. It means a 'great bodily injury,' as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault, something more than attack with the hand or fist would usually be required, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such extreme severity as to produce great bodily injury, and yet be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty of a felony, depending upon the circumstances; but, as such an injury may, under some circumstances, be committed, and still the offender not be guilty of a felony, it is therefore not accurate to define 'great bodily injury' as 'a felony committed on the person.' What constitutes a great bodily injury, and whether the circumstances in any case are such as to justify one in believing that such an injury is about to be committed upon him, and in defending himself against it, are matters which must be left, to a great extent, to the judgment of the jury."

In *High v. State*, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488, cited in the defendant's brief, the court said:

"If the assault and battery in such a case is so slight as to show no intention to inflict pain or injury, then to kill the assailant would be murder; if pain, bloodshed, or great bodily injury be inflicted, then to kill the assailant will be either manslaughter or justifiable self-defense. Mr. Wharton says: 'If such intended beating is of a character to imperil life, or to maim, then the intent is felonious, and the assailed is excused in taking life when necessary to repel the assault. On the other hand, the killing of the assailant under such circumstances, the design of the assailant being to beat, is not murder, and at the highest is manslaughter.' Whart. on Hom. (2d Ed.) § 480. It will be noticed that he limits self-defense which would excuse 'to imperil life or to maim,' and not to an attack which might produce serious bodily injury, with or without imperiling life.

"We are of opinion the correct doctrine is more fully and lucidly expressed by the Supreme Court of Pennsylvania in the case of *Commonwealth v. Drum*, 58 Pennsylvania State, 1, than in any authority to which we have access, and it occurs to us that the following excerpts are peculiarly in harmony with our statutes upon the subject. Justice Agnew says: 'The act of the slayer must be such as is necessary to protect the person from death or great bodily harm, and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great and must arise from imminent peril of life or great bodily injury. If there be nothing in the circumstances indicating to the slayer at the time of his act that his assailant is about to take his life or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal or nearly equal strength in taking his assailant's life with a deadly weapon. In such a case it requires a great disparity of size and strength on the part of the slayer, and a very violent assault on the part of his assailant, to excuse it. The disparity, on the one hand, and the violence, on the other, must be such as to convince the jury that great bodily harm, if not death, might have been suffered unless the slayer had thus defended himself, or that the slayer had reasonable ground to think it would be. * * * The true criterion of self-defense in such a case is whether there existed such a necessity for killing the adversary as required the slayer to do it in defense of his life, or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of fighting him with his fists only, and where under the circumstances nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case (pain or bloodshed supervening) it would be manslaughter. * * * But a blow or blows are just cause of provocation, and, if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant

in an honest purpose of saving himself from this great harm.' See *Kingen v. State*, 45 Ind. 519, also reported in *Horrigan & Thomp. Self-Defense*, 183. And in such a case, as in all cases of resistance to violence to the person, the assailed party is not bound to retreat, and the reasonable expectations and appearances of serious bodily injury must be judged of from his standpoint."

Our Penal Code provides that homicide is justifiable when committed by any person, when resisting any attempt to murder such person, or to commit any felony upon him, or when committed in the lawful defense of such person, when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished. Section 2334, Rev. Laws.

[5] The phrase "great personal injury," as used in the statute, means something more than apprehension, however imminent, of a mere battery; it means a serious and severe bodily injury of a greater degree, not necessarily amounting to a felony. In order to justify the assault and to slay an assailant, within the meaning of this section, there must be an apparent design on the part of such assailant to either take the life of the person assailed or the infliction of some great personal injury, not necessarily amounting to a felony, if carried out, and in addition thereto there must be reasonable ground for believing that there is imminent danger of such design being accomplished. The use of a deadly weapon is justifiable for the purpose only of preventing an unlawful and violent attack on one's person, of such a nature as to produce a reasonable expectation or fear of death or great bodily injury about to be inflicted. There may be circumstances under which one violently attacked by another who is unarmed will be justified in using a deadly weapon in his defense, such as great disparity in years or one greatly his superior physically. Ordinarily the mere fact that one is approached in a threatening manner by another who is unarmed, and who is not his superior physically, will not justify him in using such a weapon. However, it is for the jury to say whether a person assaulted with hands or fists could, under the circumstances of the case, justifiably resist the assault with a deadly weapon.

[6] The word "maim" in its ordinary sense means "serious physical injury," and its use in that sense in defining the phrase "serious bodily injury" would not mean the infliction of some great personal injury amounting to a felony. However, in view of the statutory definition of the offense of "maiming" (section 2345, Rev. Laws), we are inclined to think that the use of the word "maim" in this instruction might have left the jury in doubt or uncertainty as to how it should be applied to the evidence in the case, and for

this reason the fifteenth instruction should not have been given. We think the better practice is for the courts not to attempt to define the words "great personal injury" as used in the statute, or the phrase "serious bodily injury" or "great bodily injury." These words and phrases define themselves and are used in their ordinary sense in common acceptance among the people, and need no explanation from the court in its charge to the jury.

It is also urged that the court erred in refusing to instruct the jury on the theory that the father of the deceased and the deceased were acting together in making the assault upon the defendant at the time the shooting occurred.

In lieu of the instruction requested the court gave the following:

"No. 18. Evidence has been offered before you for the purpose of showing that a short time prior to the difficulty the deceased and his father were at the courthouse and on the streets looking for defendant for the purpose of engaging in a difficulty. If you find from the evidence in this case that deceased and his father were at the courthouse and on the streets looking for defendant for the purpose of engaging in a difficulty, you may consider this fact for the purpose of ascertaining whether or not the deceased was the aggressor in the difficulty in which he lost his life, and if you find that it was communicated to the defendant that deceased and his father were out looking for him for the purpose of engaging in a difficulty and doing him great bodily harm, you may also consider this in connection with all the other testimony in the case, for the purpose of ascertaining whether or not the defendant believed that he was about to lose his life or suffer great bodily harm at the hands of the deceased, and that he acted under the influence of such fear at the time."

On this phase of the case we think this instruction was as favorable to the defendant as he had a right to demand, because there was no testimony offered tending to show that the father of the deceased was present at the time the shooting occurred.

As to other criticisms made, we deem it sufficient to say that the instructions, taken as a whole, were very fair to the defendant. We have, however, pointed out one error, and, as the cause must be retried, we will add that the court should, for the reasons stated, omit the fifteenth instruction.

The questions already discussed are sufficient to dispose of the appeal. From a careful examination of the whole case, and for the reasons hereinbefore stated, we are clearly of the opinion that the defendant did not have that fair and impartial trial to which he was entitled under the law.

The judgment of the trial court is therefore reversed, and a new trial awarded.

MATSON and BESSEY, JJ., concur.

FRIEDMAN v. STATE. (No. A-3667.)

(Criminal Court of Appeals of Oklahoma.
June 3, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors §=226—General reputation of defendant's place of business admissible on charge of having in possession intoxicating liquor with intent to violate law.

Where one is charged with having in his possession intoxicating liquor with the intent of violating the prohibitory law, the general reputation of his place of business as being a place where intoxicating liquors were sold may be shown upon the laying of a proper predicate for the introduction of such testimony.

2. Intoxicating liquors §=236(6½)—Evidence sustaining conviction of unlawfully possessing intoxicating liquor.

The evidence examined, and found sufficient to support the verdict.

Appeal from Superior Court, Okmulgee County, Henryetta Division.

J. B. Friedman was convicted of possessing intoxicating liquors with intent to violate the prohibitory liquor laws, and he appeals. Affirmed.

James Hepburn, of Okmulgee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall and E. L. Fulton, Asst. Attys. Gen., for the State.

BESSEY, J. J. B. Friedman was on October 13, 1919, convicted of having had in his possession, on April 22, 1919, certain intoxicating liquors, with the intention of violating the prohibitory laws of this state, and sentenced to pay a fine of \$500 and to serve a term of six months in the county jail.

The proof on the part of the state shows that the plaintiff in error, herein referred to as the defendant, at and before the time alleged in the information, was keeping a grocery and feed store in the town of Henryetta, and that he had there for sale, to be drunk on the premises, several casks and containers of cider and other soft drinks; that he also had there large quantities of alcoholic fruit extracts and a gallon jar of Jamaica ginger, ginger ale, or Belfast ginger ale, which, by actual analysis, contained 42 per cent. of alcohol by volume. It was shown that many persons, including Indians and negroes, who were in the habit of drinking liquor to excess, resorted to this place and were often seen there in an intoxicated condition.

It was the theory of the state that this Jamaica ginger, or whatever it was, was used to "spike" the cider and other beverages

there sold, for the purpose of giving these drinks the alcoholic content desired, and the evidence, to some degree at least, bears out this theory.

The defendant testified that he had purchased this gallon of ginger ale for another person, and that at the time it was seized by the officers it was there awaiting delivery to this third person, that he did not know that it contained an unlawful quantity of alcohol, and that he had not used it and had no intention of using it in connection with his soft drink business, or otherwise.

[1] Defendant complains that the state, over his objections, was permitted to show the general reputation of the place as a place where intoxicating liquors were sold, without reciting testimony on this point in detail. We think the record shows a sufficient predicate for such testimony. *Felas v. State*, 16 Okl. Cr. 631, 185 Pac. 839; *Ward v. State*, 15 Okl. Cr. 150, 175 Pac. 557; *Dunbar v. State*, 15 Okl. Cr. 513, 178 Pac. 609.

[2] None of the witnesses testified that they had seen the defendant "spike" the soft drinks there so popular with Indians and negroes, who in some way or other became intoxicated there, but the circumstances of having a room provided for tipping, the character of the persons who frequented the place, and the large quantities of alcoholic fruit extract kept there justified the jury in finding that this particular ginger ale, or Jamaica ginger was kept for an unlawful purpose.

The judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

ADEAHOLT v. STATE. (No. A-3630.)

(Criminal Court of Appeals of Oklahoma.
June 3, 1921.)

(Syllabus by the Court.)

Criminal law §1159(3)—Conviction on conflicting evidence not disturbed, where trial fair.

Where it appears upon the examination of the whole record that the defendant had the advantage of a fair and orderly trial, the verdict will not be disturbed because the evidence was in some particulars conflicting.

Appeal from Superior Court, Okmulgee County; R. E. Simpson, Judge.

On March 4, 1919, L. E. Adeaholt was convicted of the crime of assault to commit robbery, his punishment was assessed at 2 years and 6 months in the state penitentiary, and he appeals. Affirmed.

R. C. Roland, of Ada, for plaintiff in error.
S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The evidence on the part of the state is to the effect that on January 7, 1919, Lon James and W. B. Chadwick were in company with the defendant and Oscar Minton at two certain pool halls in Henryetta the early part of the night; that there was some talk of a poker game among them, and from the conversation the defendant and his codefendant, Minton, learned or believed that Chadwick had \$25 on his person; that Chadwick and James left the pool hall to go to their home in the outskirts of town, and just after they had crossed a bridge, at a place where the street was not lighted, the defendant and his codefendant, Minton, approached rapidly from the rear and by means of a searchlight and a revolver pointed at these state's witnesses compelled them to hold up their hands, while Minton searched Chadwick, but found nothing.

The defense was an alibi. Defendant claimed that he retired early that night, and sought to show by two witnesses that he was in his room at a rooming house at the time the offense was alleged to have taken place. The defendant had previously been conducting a restaurant at Dustin, but at this time was out of employment and was in Henryetta on no particular business.

Several witnesses testified to the defendant's good character. On the contrary, it appears that the defendant was a frequenter of pool halls and a poker player. The same appears as to the habits and character of the state's witnesses.

The evidence was conflicting, but from a careful examination of the whole record, it appears that the defendant had the advantage of a fair, orderly trial. The testimony introduced was admissible, and the instructions of the court fairly covered the law of the case.

The only error seriously urged here is that the verdict was contrary to the evidence. The jury in the first instance, are the sole judges of the weight of the testimony and the credibility of the witnesses, and on a motion for a new trial the trial judge was called upon to weigh the testimony. Both the judge and the jury had the advantage of observing the witnesses and their demeanor. There was sufficient substantial evidence, if believed by the jury, to sustain the verdict rendered, and where no prejudice, passion, or other irregularity appears of record, this court would not be justified in disturbing such verdict because the testimony was conflicting.

The judgment of the trial court is therefore affirmed.

DOYLE, P. J., and MATSON, J., concur.

(27 Wyo. 410)

QUINLAN v. JONES et al. (No. 990.)

(Supreme Court of Wyoming. June 4, 1921.)

1. Husband and wife \S 133(1) — Wife held estopped from disputing right of husband to execute mortgage.

In an action to replevy certain personal property mortgaged to defendants by plaintiff's husband, evidence held to show plaintiff was estopped from disputing the right of her husband to execute the mortgage.

2. Appeal and error \S 1041(4)—Fact amendment, conforming defendants' answer to proof not filed, immaterial where evidence showed plaintiff estopped.

In an action to replevy certain personal property mortgaged to defendants by plaintiff's husband, where the evidence showed plaintiff was estopped from disputing her husband's right to execute the mortgage, the fact that an amendment conforming defendant's answer to the proof was not filed was immaterial.

3. Replevin \S 96—Not necessary to determine value of replevined property separate from damages for taking same.

At common law an action in replevin tests only the right of possession of the replevined property at the time of the commencement of the action and the value of the property is immaterial, so that it is not necessary, in the absence of a statutory requirement, that the value of the property be found separate from the damages awarded defendant for the taking of the same under the writ.

4. Replevin \S 96—Statute held not to require finding of value of replevined property separate from damages for taking same.

Under Comp. St. 1920, §§ 6275-6292, where the plaintiff in replevin obtains possession of the property by giving bond, the title thereto rests in him, and, if the defendant prevails, he must be awarded such damages as are right and proper (section 6287), consisting of the value of the property plus interest, or plus the value of the use thereof, in case that value exceeds the interest, so that it is not necessary to specifically find, in the verdict or judgment, the value of the property as a separate item from the damages awarded defendant.

5. Appeal and error \S 1071(4)—Finding damages for taking, instead of value of property taken by replevin, not reversible error.

Even where a statute requires that the value of replevined property be found, the finding of the damages for the taking of the same, instead of the value thereof, is a matter of form and a mere irregularity which will not warrant reversal.

6. Replevin \S 106—Defendant's damages for taking of property by replevin stated.

In an action in replevin, the judgment, if for the defendant, must be for the value of his special interest, if the value of the property exceeds that interest, but must in no event exceed the value of the property.

7. Replevin \S 70—No presumption value of replevined property equals or exceeds value of chattel mortgage on same.

In an action to replevy certain personal property mortgaged to defendants by plaintiff's husband, there is no presumption that the value of the property is equal to or exceeds the value of defendant's special interest, the value of the latter not being admitted, the debt not being plaintiff's, and it being a matter of common experience that chattel mortgages are frequently given when the value of the property is not equal to the amount secured thereby, particularly when it is intended as partial security only.

8. Evidence \S 54 — Presumption must rest upon reason and common experience.

A presumption must rest upon reason, and have as its basis either common experience or a compelling necessity.

9. Damages \S 163(1) — Must prove damages beyond nominal.

Where any one claims damages from another, beyond nominal, he must prove them.

10. Replevin \S 70 — Burden on defendant to prove damages by taking of property under writ.

In an action in replevin, the burden of proof was on defendants to prove their damages by reason of the taking of the property under the writ, the petitioner having to prove only his right of possession of the property at the commencement of the action, the rule not being changed by reason of the fact that the statute permits the determination of the defendant's rights in the main action.

11. Evidence \S 113(3)—An appraisal of replevined property made in former suit held inadmissible.

In an action to replevy certain personal property mortgaged to defendants by plaintiff's husband, an appraisal in a former case between defendant and plaintiff's husband could not be taken as evidence of the value of the property, being incompetent, as against plaintiff, who was not a party to the suit, the items therein not being properly certified, and the paper not having been introduced in evidence.

Appeal from District Court, Fremont County; Charles E. Winter, Judge.

Action by Bessie M. Quinlan against Edith A. Jones and husband. Judgment for defendants, and plaintiff appeals. Reversed in part and remanded, with directions.

J. M. Hodgson, of Cheyenne, for appellant. John Dillon and Gordon J. Christie, both of Lander, for respondents.

BLUME, J. This an action in replevin, instituted by the appellant against appellees in Fremont county for the recovery of some live stock, a wagon, and two sets of harness. A bond was furnished, and the property was delivered to the plaintiff. The answer contains a general denial. It also sets up a

special interest in the appellees by virtue of a chattel mortgage on said property and a truck, dated January 23, 1918, filed for record January 26, 1918, securing notes aggregating \$4,000 and interest, executed to appellee Edith A. Jones by Martin W. Quinlan, husband of appellant. The answer further alleges an estoppel, claiming that during the negotiations for the sale of the above truck to Martin W. Quinlan, appellant represented to appellees that said Martin W. Quinlan was the owner of the property in controversy, and had full authority to mortgage the same, and, relying thereon, that appellees sold said truck to Martin W. Quinlan. An order was made at the conclusion of the testimony, permitting the filing of an amendment to the answer conforming the pleadings to the proof, which amendment, however, was never filed. The case was tried to the court without a jury. The court found generally for the appellees, that Edith A. Jones had the right of possession of the property in controversy at the commencement of the action, and that by reason of the taking of said property under the writ of replevin she had been damaged in the sum of \$2,347.28, and entered judgment accordingly. From this judgment the appellant has filed her direct appeal herein.

[1, 2] 1. Counsel for the appellant contend that the judgment is contrary to the evidence, and that no estoppel, particularly such as was pleaded, was shown. It appears that Martin W. Quinlan, husband of appellant, wanted to buy a truck, and arrangements therefor had been made in the early part of January, 1918, with the Shockley Service Corporation. Squier Jones testified that he, acting as agent for his wife, Edith A. Jones, was called on to furnish the purchase money for the truck, make a loan, and take the property, together with the truck to be bought, as security; that he was called out to the farm where appellant and her husband were living; that some time, probably before January 20, he went to look over the property in controversy; that it was pointed out to him by Martin W. Quinlan, in the presence of the latter's wife, who helped in showing it; that they both were perfectly willing that the property should be mortgaged. The appellant concedes this, but claims that the mortgage was to be given for a new truck and not a secondhand one; but Jones states that he was not told as to whether it was to be secondhand or new. The latter further testifies that, while both at that time talked of giving the mortgage, the appellant made no claim of ownership to the property in controversy; that it was understood among them "when the mortgage was to be given," and (quoting him) "I was to go to Casper with Mr. Quinlan, draw up the papers there, and he was to take the truck." These conversations were no doubt construed by the lower court to mean that, inasmuch as appellant was not to go

along to Casper, Martin W. Quinlan was to sign and execute the mortgage. It would seem, from a letter which appellant wrote, that she was aware on January 20 that the new truck for which arrangements had been made had been sold to other parties, and that none but a secondhand one could be bought. In any event, about January 22, Martin W. Quinlan and Squier Jones, pursuant to arrangements, went to Casper, and, finding the new truck gone, Quinlan bought a secondhand truck. Jones testifies that the notes and mortgages above mentioned were executed by Quinlan on January 23d to pay \$3,200 to the sales corporation and \$800 to himself for expenses and commission; that only \$500 was paid on that date to the sales corporation; the balance of \$2,700 was to be paid when the truck would be delivered at a later date. Quinlan testifies that upon arrival home he informed his wife of the purchase of the truck and the execution of the mortgage, and that she objected. But no such objections were communicated to appellees. Jones testifies that some three weeks later, when the truck was ready for delivery, appellant called him over the phone, telling him that her husband would be down on the train the next morning to go after the truck, and that he told her, "as they had previously talked," that he would meet him and give him the check; that even at that time she made no objection against her husband executing the mortgage; that pursuant to this conversation he met her husband the next morning, and gave him a check for \$2,700, and that he was never informed of any claim of ownership of the property in controversy on the part of appellant until the following May. The last conversation over the telephone stands undenied, and there are other facts and circumstances in the record showing that appellant recognized the validity of the mortgage, but we cannot take the space or time in pointing them out in detail. Suffice it to say, that we think that the lower court was justified by the evidence in holding that appellant was estopped from disputing the right of her husband to execute the mortgage in question. Nor is it material that the amendment conforming the pleadings to the proof was not actually filed. *Kuhn v. McKay*, 7 Wyo. 42, 57, 49 Pac. 473, 51 Pac. 205.

[3] 2. Counsel for appellant further contend that the court should have found the value of the property in controversy separate from the damages awarded the appellee Edith A. Jones. There are many cases sustaining that contention, and *Cobbey on Replevin*, in section 1061, states that the only correct practice is to find the value in all cases. It would, no doubt, be the better practice to do that, and if that had been done in this case, it would not have been necessary to have had any further proceedings herein. We find, however, upon investigation, that the author-

titles which hold that to be an essential requisite all base their holding upon a statute. Our replevin law was taken from Ohio, and it is a significant fact that counsel have not been able to cite us a single case from that state holding the rule, under a statute identical with ours, for which they contend. At common law an action in replevin tested only the right of possession of the replevined property at the time of the commencement of the action. The value of the property was immaterial, and no method was provided whereby that could be determined. *Wilson v. Fuller*, 9 Kan. 176; *Humphrey v. Baker* (Okla.) 176 Pac. 897; *Bell v. Bartlett*, 7 N. H. 178. See *Wells on Replevin*, § 760, *Thomas v. Spofford*, 46 Me. 408.

[4, 5] But the scope of the action has been both changed as well as broadened by our statute. In this state, where the plaintiff in replevin obtains possession of the property by giving bond, the title thereto rests in him, and the bond stands in place of the property. *Hunt v. Thompson*, 19 Wyo. 523, 120 Pac. 181, 122 Pac. 624; *Boswell v. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; *Gregory v. Morris*, 96 U. S. 619, 624, 24 L. Ed. 740; *Smith v. McGregor*, 10 Ohio St. 461, 470. And the statute contemplates that the rights of the parties, growing out of the action, may be settled in one suit. In case the defendant prevails, he must be awarded such damages as are right and proper (section 6287), consisting of the value of the property plus interest, or plus the value of the use thereof in case that value exceeds the interest. *Hunt v. Thompson*, supra; and see *Smith v. McGregor*, supra, *Bell v. Bartlett*, supra. The "value," therefore, of the property is merged, as it were, in the "damages" to be awarded, and the statute evidently did not contemplate that it is necessary to specifically find in the verdict or the judgment the former as a separate item from the latter. Even in cases where the statute requires that the value must be found, it has been held that to find the "damages," instead of the "value," is a matter of form, and at most a mere irregularity, which will not warrant the reversal of the case. *Agency of Can. C. & F. Co. v. Pennsylvania I. W. Co.*, 256 Fed. 339, 167 C. C. A. 509; *Western Stage Co. v. Walker*, 2 Iowa, 504, 520, 65 Am. Dec. 789; *Svendsen v. Ketchmark*, 39 S. D. 61, 162 N. W. 932; *Brannin v. Bremen*, 2 N. M. 40.

[6] 3. Appellant further contends that the amount of the judgment is excessive; that it appears that the damages of \$2,347.28 found by the court is the full amount or indebtedness due Edith A. Jones on the notes secured by the mortgage, including the accrued interest, and, after deducting \$1,900—the value of the truck voluntarily turned over in the summer of 1918 to apply on the notes—and that no attention was paid to the value of the property, which is much less than the

amount of the judgment. The contention appears to be true. We shall advert later to the question of what evidence was adduced on the question of the value of the property. It is the undoubted rule that against the general owner of the property, the owner of a special interest therein, such as the appellee Edith A. Jones, had in this case, the judgment, if for the defendant, must be for the value of the special interest, if the value of the property exceeds that interest, but must in no event exceed the value of the property. *Jennings v. Johnson*, 17 Ohio, 154, 49 Am. Dec. 451; *Sutcliffe v. Dohrman*, 18 Ohio, 181, 51 Am. Dec. 450; *Cruts v. Wray*, 19 Neb. 581, 27 N. W. 634; *Cobbey on Replevin*, § 971; 34 Cyc. 1568.

[7, 8] Counsel for appellees concede this to be the true rule, but contend that the burden of proof was on appellant, and that there was nothing required of appellees beyond showing the value of this special interest. They cite, in support of that contention, the case of *Gamble v. Wilson*, 33 Neb. 270, 50 N. W. 3, where the court held that where the value of the special interest is admitted, and no evidence is given as to the value of the property, it will be presumed that such value is equal to or exceeds the value of the special interest. No such admission is found in the case at bar. Besides, the special interest in the case cited amounted to \$134, arising as a result of an attachment on property which Gamble held under a bill of sale to secure the sum of \$1,700. Perhaps the court was influenced in its decision by the thought that it might not unreasonably be presumed that Gamble would not have loaned that amount of money on property which was not worth more than \$134. In the case at bar, appellant was not the debtor of Edith A. Jones; she had not signed the mortgage nor the notes secured thereby. The debt was that of her husband. We cannot conceive how it could be reasonably said that A. mortgages the property of B. even with the latter's consent, it can be presumed that the value of the property mortgaged is equal to, or greater than, the debt. In fact, we do not believe that any such presumption can arise in any case where a lien, mortgage, or other special interest is granted. Still, that is substantially what we would have to hold, if we admitted the soundness of appellee's contention. A presumption must rest upon reason; it must have as its basis either common experience or a compelling necessity; a presumption, such as contended for, has neither; for we know from common experience that chattel mortgages are frequently given, when the value of the property mortgaged is not equal to the amount secured thereby, particularly when it is intended as partial security only, additional, for instance, to a real estate mortgage. And in this case the purchased truck was also included in the mortgage, and had been turned over to

appellee for the purpose of applying the value thereof on the mortgage, so that any such presumption, if valid, would be far-reaching, indeed.

[9, 10] It is a fundamental principle in law that each litigant must take care of his own rights. To hold that a plaintiff in replevin, to whom has been delivered the property in controversy, is compelled to see that defendants' damages are properly awarded, is to cast upon him the burden, not only of protecting his own rights, but that of his adversary as well. We know of no exception that, where any one claims damages from another, beyond nominal, he must prove them. If appellant had forcibly abducted the property in controversy, and the appellees had sued her to recover the value, the latter would have been compelled to prove their damages. The fact that appellant took them through the sheriff, under process of law, is simply another method of asportation, and in no way changes the burden of proving the value of the property taken. The claim of damages, consisting in such case of the value of the property plus interest, or plus the value of the use, is that of the appellees; the appellant is in no wise interested therein, except only to defend against it, if it is made. An action in replevin is *sui generis*, and that is particularly true where under the statute the value of the property in controversy becomes important. At common law, as we have seen, the question of the value of the property did not generally enter into the case. But under the statute the rights of the parties arising out of the case are intended to be settled in the one action. Two cases are thus combined into one. Hence both parties are actors; both in turn are plaintiffs. All that the petitioner in replevin, where he seizes the property, needs to do, is to prove his right of possession to the property at the commencement of the action. Even before trial he has in his possession the substantial fruits of any judgment he might obtain, and he would be glad and willing to go without further contest, and might do so, were it not for the fact that he must meet the claim for damages that may be made by his adversary. The claim of the latter is affirmative, in the nature of a cross-suit, and upon him rests the burden to sustain it by competent evidence, and he cannot rely upon the plaintiff to do this for him. These principles are amply illustrated and either directly or impliedly held or applied in *Corbett v. Pond*, 10 App. D. C. 17; *Yates v. Fassett and Whetlock*, 5 Denio (N. Y.) 21; *Gould v. Scannell*, 13 Cal. 481; *Archer v. Long*, 32 S. C. 171, 11 S. E. 86; *Jackson v. Morgan*, 167 Ind. 528, 78 N. E. 633; *Daniels v. Mansbridge*, 4 Ind. T. 104, 69 S. W. 815; *Stevens v. Tuite*, 104 Mass. 328. See, also, *Reed v. Carpenter*, 2 Ohio, 79; 34 Cyc. 1509-1511; *Cobbey on Replevin*, § 5. In *Gilroy v. Svenson-Hickok Co.*, 103 App. Div. 574, 93

N. Y. Supp. 132, and *Schnitzer v. Russell*, 81 N. J. Law, 146, 80 Atl. 938, judgments in favor of defendants were reversed on account of the want of proper proof of value of the property. It has been held that the burden of proving the value of the property, or damages, in an action on a replevin bond, which stands in place of the property, is on the plaintiff; that is to say, the defendant in the replevin action, where these questions were not litigated in the latter action (*Leonard v. Whitney*, 109 Mass. 265; *Austin v. Moore*, 7 Metc. [Mass.] 116; *Sopris v. Lilley*, 2 Colo. 496); and there is no sound reason for holding that this burden should be shifted simply because it is permitted by statute to determine these questions in the main action. Under this rule, then, in a case where the property has been delivered to the plaintiff, the defendant in replevin, if he claims to be the general owner of the property, must contest that point; if he claims only a special interest, he must establish that; in either case he must prove the value of the property in controversy, when that is to be considered in determining the amount of his recovery. We see no reason why a party, holding only a special interest, should be specially favored and relieved from the responsibility resting upon the party claiming to be general owner, by indulging in presumptions which are unwarranted. It is for him to establish the damages which are right and proper, which cannot be done unless the value of the property in controversy is shown.

[11] 4. The appellees insist that there is no evidence of the value of the property in controversy in the record. The appellant contends that a certain paper in the record should be taken as the evidence on that subject. That paper purports to be an appraisal in the case of *Edith A. Jones, Plaintiff, v. Martin W. Quinlan, Defendant*, made in September, 1918. Such appraisal would, of course, be incompetent at least against the appellant, since she was not a party to the suit. It sets out separate items of property, together with amounts opposite thereto, showing a total value of \$1,550. But these items are not certified by any one, and in the certificate proper of the appraisers the amount is left blank. Further, it does not appear that the paper was introduced in evidence. Appellees started to offer all the papers in the case last mentioned, but if any were actually offered and introduced, on which the record is not altogether clear, they were finally limited to the "pleadings, *amavavit* of replevin, writ and judgment" in that case. Besides, the case was clearly tried under a misapprehension as to the burden of proof on this subject, and we see nothing else to do than to send the case back, for the sole purpose, however, as is authorized by chapter 145 of the session Laws of 1921, of having the lower court determine the damages to be awarded the ap-

pellee Edith A. Jones upon the rule herein stated, and for that purpose to determine the value of the property in controversy. The case is accordingly affirmed as to the finding and judgment in favor of appellees generally, but is reversed as to the finding of damages and the amount of the money judgment in favor of appellee Edith A. Jones, and the case is remanded to the district court of Fremont county, with directions to vacate the former judgment entered herein in so far as it appertains to such finding of damages and such money judgment, and to retry the issue as to the amount of damages, in accordance with this opinion.

POTTER, O. J., and TIDBALL, District Judge, concur.

(60 Mont. 32)

MASON v. SWEE. (No. 4362.)

(Supreme Court of Montana. May 9, 1921.)

Appeal and error \S 1000—Findings of jury approved by court in equity case not to be disturbed.

While the findings of a jury in an equity case are only advisory and may be adopted or rejected by the trial court as his view of the evidence may dictate, yet, where the findings of such a jury have been approved by the court, they will not be disturbed unless the evidence, viewed as a whole, clearly preponderates against such findings.

Commissioners' Opinion.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by Dwight N. Mason against John Swee. From order overruling defendant's motion for new trial and from judgment for plaintiff, defendant appeals. Judgment and order modified and affirmed.

E. C. Mulroney, of Missoula, C. F. Rathbone, of Fresno, Cal., Albert Besancon, of Missoula, and L. I. Wallace, of Ronan, for appellant.

Harry H. Parsons and A. N. Whitlock, both of Missoula, for respondent.

SPENCER, C. This action was tried in the court below upon appropriate pleadings presenting for determination primarily the issue as to whether or not a general copartnership was entered into between plaintiff and defendant, and for an accounting. By written stipulation entered into and filed at the commencement of the trial, the parties agreed that the only questions that should be submitted to the jury were whether such partnership ever existed, when it began and terminated, and what percentage of the profits each partner was entitled to, and that, if the jury decide that a partnership as claimed by the plaintiff did so exist and final de-

cree to that effect be entered, an accounting should be had before a referee to be agreed upon by the parties, or designated by the court. The suit was in equity before a jury in its advisory capacity. The response of the jury to the interrogatories submitted was in favor of the plaintiff. The findings of the jury were subsequently adopted by the court, conclusions of law based thereon were made, and decree entered accordingly. Motion for a new trial was made and denied. From the order of the court overruling the motion of the defendant for a new trial and from the judgment these appeals are prosecuted.

The appellant relies upon 14 specifications of error for a reversal, but a careful examination of the record, together with the briefs of counsel, discloses no necessity for separate consideration thereof, and all will be disposed of in the discussion following.

The special interrogatories submitted to the jury and their findings thereon were:

"Interrogatory No. 1: Was there ever a partnership existing between the plaintiff and the defendant in the business of practicing law? Answer to interrogatory No. 1: Yes.

"Interrogatory No. 2: If you answer the interrogatory No. 1 in the affirmative, state when said copartnership began. Answer to interrogatory No. 2: November, 1910.

"Interrogatory No. 3: If you answer interrogatory No. 1 in the affirmative, state when said copartnership ended, if at all. Answer to interrogatory No. 3: May 18, 1915.

"Interrogatory No. 4: If you answer interrogatory No. 1 in the affirmative, state what share or percentages of the profits each partner was to receive. Answer to interrogatory No. 4: 50 per cent. each."

The testimony submitted upon behalf of plaintiff, if standing alone, appears to be amply sufficient to sustain the foregoing findings. The evidence of the defendant, however, produces a substantial conflict upon every material issue tendered by the plaintiff. The jury found the preponderance in favor of the plaintiff. By repeated declarations of this court, the burden rests upon the appellant to show such preponderance decisively to be otherwise in order to sustain a reversal. *Heilman v. Loughrin et al.*, 57 Mont. 380, 188 Pac. 370; *Smith v. Hoffman*, 56 Mont. 299, 184 Pac. 842; *Roberts v. Oechsli*, 54 Mont. 589, 172 Pac. 1037; *Robitaille v. Boulet*, 53 Mont. 66, 161 Pac. 163; *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76; *Dean et al. v. Stewart et al.*, 49 Mont. 506, 143 Pac. 966. The trial court and the jury hearing the evidence, seeing the witnesses and observing their demeanor and appearance upon the stand, and having before them all of the attendant circumstances, are better able to judge of the credibility and fix the weight to be given to evidence of the various witnesses than is this court, and hence, the jury having resolved the prepon-

derance based upon a substantial conflict in competent evidence in favor of the plaintiff, and the court having approved their findings, we think their findings should not be disturbed.

It is true that the findings of a jury in an equity case are only advisory and may be adopted or rejected by the trial court as his view of the evidence may dictate (*Bosanatz v. Ostronich*, 57 Mont. 197, 187 Pac. 1009), yet the services of a jury once being had in an equity case, they occupy largely the same position upon principle as if rendering their verdict in a case at law, and therefore their findings of fact upon a substantial conflict in evidence should not be rejected unless the evidence viewed as a whole clearly preponderates against such findings (*Bosanatz v. Ostronich*, supra).

The evidence in this case is voluminous, covering transactions by and between plaintiff and defendant over a period of years from 1910 to 1915. No principle of law is involved upon this appeal requiring a decision for the purpose of establishing precedent, and a review of the facts as shown by the proof would avail nothing, and could only serve to point out a sharp and substantial conflict, which, pursuant to its many declarations, precludes this court from doing other than sustain the findings of the court below. *Bosanatz v. Ostronich*, supra; *Previsich v. Butte Elec. Ry. Co.*, 47 Mont. 170, 131 Pac. 25; *Murphy v. Cooper*, 41 Mont. 72, 103 Pac. 576. We find no error in the record to justify a reversal.

It is to be observed, however, that plaintiff testified that a full settlement of all fees between himself and defendant was had up to July 1, 1914, and he makes no claim to his testimony for any accounting prior to that date. We think the decree of the lower court should be modified so as to exclude an accounting between these parties prior to July 1, 1914, and with that modification we recommend that the judgment and order of the lower court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the decree of the lower court be modified so as to exclude an accounting between the parties prior to July 1, 1914, and, as so modified, the judgment and order of said court is affirmed.

(59 Mont. 527)

STATE ex rel. STEVENS et al. v. McLEISH et al. (Nos. 4844, 4845.)

(Supreme Court of Montana. May 2, 1921.)

1. Counties \S 3—Creation is exclusive legislative control.

The creation of new counties is a subject exclusively of legislative cognizance and control.

2. Counties \S 13 — Publication of notice of hearing of petition for creation of new county jurisdictional.

The publication of notice of hearing of petition for creation of new county out of portions of existing counties at least once a week for two weeks next preceding the date fixed for such hearing, in newspapers of general circulation published within each of the old counties, and within boundaries of proposed new county, as required by Sess. Laws 1919, c. 226, held jurisdictional, the publication of a sufficient notice in only one of the old counties and in the boundaries of the proposed new county without a sufficient publication in the other old county being insufficient to give the board of county commissioners jurisdiction to proceed in the matter of the creation of the new county.

3. Newspapers \S 1(4)—Designation of paper for publication of notice of hearing of petition for creation of new county held not to comply with statute.

The county clerk's designation of the *Lewistown Argus*, in Fergus county, for publication of notice of hearing of a petition for creation of a new county, was not a designation of the Fergus County Argus in which the notice was published at Lewistown, and, there being no such paper as the *Lewistown Argus* published in that county, the act of the clerk did not comply with Sess. Laws 1919, c. 226, in designating a paper in that county.

4. Counties \S 13—Statute requiring notice of hearing on petition for new county during the two weeks "next preceding" the hearing construed "next."

Publication of notice of hearing of petition for creation of new county under Sess. Laws 1919, c. 226, requiring the publication of notice "at least once a week for two weeks next preceding the date fixed for such hearing," must be made within the 14 days previous to the date of hearing, since the word "next" means in the nearest time, and just after, and the words "next preceding" mean immediately preceding.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Next; Second Series, Next Preceding.]

5. Counties \S 196(1) — Defective notice of hearing on petition for new county may be set aside at the suit of interested taxpayer.

A notice of hearing on petition for creation of new county before the county board, if defective by reason of a departure from Sess. Laws 1919, c. 226, prescribing the requirements as to contents, publication, etc., may be set aside by a court of competent jurisdiction at the suit of an interested taxpayer brought for that purpose.

Brantly, C. J., and Holloway, J., dissenting.

Applications by the State of Montana, on the relation of George H. Stevens and another, for writ of mandate and for writ of certiorari against A. E. McLeish and others, constituting the Board of County Commission-

ers of Chouteau County, Mont., and another, requiring the board to reconvene and make an order nullifying all its proceedings had on and after the 29th day of November, 1920, attempting to create Banner county out of portions of Chouteau and Fergus counties. Order of board calling election in the matter of the creation of the proposed county, and all subsequent proceedings based thereon, annulled.

Henry C. Smith, of Helena, for relators.
Norris, Hurd & Rhoades, of Great Falls, for respondents.

COOPER, J. On March 30, 1921, relators presented to this court an application for a writ of mandate and, in aid thereof, a writ of certiorari, addressed to the board of county commissioners of Chouteau county, requiring it to reconvene and make an order nullifying all of its proceedings had on and after the 29th day of November, 1920, attempting to create Banner county out of portions of Chouteau and Fergus counties. The writs were issued as prayed for, and returns made showing all of the proceedings had and done. They were treated as companion writs, consolidated, briefed, argued, and presented together upon motions to quash, accompanied in each case by what respondents term an answer on the merits. The two petitions allege substantially the following facts:

The relators are qualified electors and resident taxpayers of Chouteau county, are now, and always have been, opposed to the creation of Banner county. The respondents are members of and compose the board of county commissioners of Chouteau county. Both relators voted at the general election of 1918, and are now here representing themselves and all other persons similarly situated and affected by the acts of the respondents. It also appears that, on or about October 30, 1920, two petitions, one bearing the signatures of electors and taxpayers of Fergus county, and the other of electors and taxpayers of Chouteau county, were filed with the county clerk of Chouteau county, praying that Banner county, be created out of territory embraced within those two counties; that neither of the relators signed the petition; that the area proposed to be taken from Chouteau county is larger than the territory to be taken from Fergus county; that on November 6, 1920, the county clerk of Chouteau county fixed November 29, 1920, as the date for hearing the prayer of the petitioners and all opponents thereto; and that he also designated the River Press, a newspaper of general circulation, published at Ft. Benton, in Chouteau county, the Lewistown Argus, a newspaper of general circulation published at Lewistown, Fergus county, Mont., and the Geraldine Review, a newspaper of general circulation published in the town of GERAL-

dine, within the boundaries of the proposed new county, as the official newspapers for the publication of the notice, under the provisions of chapter 226 of the Session Laws of 1919.

The petition further states that when the board of county commissioners met, in pursuance to the published notice, the affidavits of the publishers of the newspapers designated for the publication of such notice show that it was published in the River Press on November 10 and 17; in the Fergus County Argus on November 12 and 19; and in the Geraldine Review on November 11, 19 and 25. The board of county commissioners met on the date fixed, and as so noticed, November 29, 1920, and proceeded with the hearing, made an order proclaiming an election to be held on the 29th day of March, 1921, and directing notice thereof to be given, for the purpose of determining the question whether Banner county should be created or not. The election was held, and resulted in more than 58 per cent. of the vote being cast in favor of the creation of the new county. The board now threatens to, and will, proceed to canvass the votes cast at such election, declare the result thereof, and proceed by resolution to declare the new county created and established, and will cause a copy of the resolution to be filed in the office of the secretary of state, and perform such other acts and duties as are required by the act in question to create Banner county, irrespective of the irregularities mentioned and the irreparable injury to the citizens and taxpayers of the counties of Chouteau and Fergus.

The argument proceeded upon the assumption that the validity of the acts of the county board depended upon the question whether the notice had been published by the clerk as the statute requires. If we disregard technical defects in the manner in which the petitions were presented to this court, the two applications together present the question whether the statutory mandate regarding the publication of the notice has been followed.

[1] The creation of new counties is a subject exclusively of legislative cognizance and control. *State ex rel. Koefod v. Board of County Commissioners*, 56 Mont. 355, 185 Pac. 147.

It "is purely statutory, and for every act of the board justification must be found written in the statute in express terms, or necessarily implied." *State ex rel. Jacobson v. Board of County Commissioners*, 47 Mont. 531, 134 Pac. 291.

[2, 3] The act makes it the duty of the clerk to fix the date of hearing, order the publication, and designate the newspapers in which notice shall be published. No duty devolves upon the county board until the date

fixed by the clerk for the hearing and publication of the required notice. As the board acquires no power to act by virtue of the mere filing of the petition, it seems to follow that the jurisdiction of the board in the premises is derived from that portion of the statute which declares that notice of hearing shall be given by publication in certain newspapers "at least once a week for two weeks next preceding the date fixed for such hearing." The purpose of this notice is manifest. The legislative assembly has provided for separate notices, by enacting that one notice shall be published in each of the old counties, and also one in the proposed new county, if there be a newspaper of general circulation published therein. Presumably, the notice in the River Press was intended to bring home to the people of Chouteau county knowledge, actual or constructive, that on November 29 a hearing would be had before the county board on a proposition to take away a part of their county; the notice in the Argus was designed to notify the people of Fergus county of the same thing; and that in the Review was intended to be a particular notification to the people within the boundaries of the proposed new county that such territory was sought to be erected into a new county. It therefore follows that publication in the Argus and in the Review was not any constructive notice to the qualified electors of Chouteau county. If an insufficient notice would suffice in Chouteau county, then we see no reason why an equally defective publication could not be given in Fergus county, and perhaps in the proposed new county as well, thus nullifying the provisions of the act entirely, so far as notice is concerned. Neither do we think announcement by the clerk that the notice should be published in the Lewistown Argus was the statutory designation that notice should be published in the Fergus County Argus. There was no such newspaper as the Lewistown Argus published, and hence the act of the clerk was not a compliance with the direction of the statute in that respect.

We regard the publication of the notice substantially in the manner pointed out by the act itself, as an essential prerequisite to jurisdiction on the part of the county board. A departure from its commands amounts to a disregard of the legislative will. Publication of notice may be likened to constructive service of process in a judicial or quasi judicial proceeding, without which the tribunal has no authority to proceed at all.

"In proceedings for the creation of a new county, the board of county commissioners is required to act as a quasi judicial tribunal." *State ex rel. Jacobson v. Board of County Commissioners*, supra, at page 536 of 47 Mont., at page 283 of 134 Pac.

[4] The statute provides that the notice "shall be published at least once a week for

two weeks next preceding the date fixed for the hearing." A week consists of 7 consecutive days. Rev. Codes, § 2030. The two weeks, or 14 consecutive days, next preceding the 29th day of November, 1920, the date of this hearing, began on November 15 and ended on November 28. During that period there was but one publication of the notice in the River Press; to wit, on November 17. In the week next or immediately preceding November 29, there was not any publication. If we construe the statute to mean calendar weeks, the result is the same. The calendar week next preceding November 29 began on Sunday, November 21, and ended with Saturday, November 27, and during that week the River Press did not publish the notice. The statute declares that the notice must have been published at least once in this week. In the case of *State v. Hamilton*, 74 Kan. 461, 87 Pac. 363, the Supreme Court of Kansas held that the words "during the year next preceding such election" clearly meant the preceding year, counting back from the date of making the list. See, also, *Lay v. Shores*, 112 Miss. 140, 72 South. 881, where the Supreme Court of Mississippi, in passing upon a similar point, used this language:

"We are not permitted to inquire the reasons prompting the Legislature to require the publication of the notice 'for three weeks next preceding the meeting'—we know that it is so, and the record shows that the notice does not square with the legislative requirement."

In the case of *Jackson v. Guss*, 86 Kan. 280, 120 Pac. 353, the Supreme Court of Kansas held that a sale of school land without giving the full 28 days' notice required by the statute was a nullity. "Next" means "in the nearest time;" "just after." *Century Dictionary*; *Webster's International Dictionary*. "Next preceding the election" means immediately preceding the election. *Dowty v. Pittwood*, 23 Mont. 113, 57 Pac. 727.

[5] The basis of the whole proceeding is the notice of hearing before the county board; and if defective by reason of a departure from the statutory requirements, it may be set aside by a court of competent jurisdiction at the suit of an interested taxpayer brought for that purpose. Should the board continue to act upon the assumption that it has established Banner county upon a valid foundation, and proceed to provide funds from the public revenues of the county for the purpose of enabling it to function, its efforts may be resisted at the first step by judicial proceedings instituted to restrain it. An early decision in the present proceeding by this court may, therefore, prevent a multiplicity of actions and prolonged litigation between the board and the taxpayers opposing it. The publication of the notice is an antecedent step in acquiring jurisdiction, which neither the county board, this court, nor any other tribunal other than the legis-

lative assembly may change, qualify, or dispense with; and although the statute in other respects may have been strictly complied with, omission to publish the notice as the statute directs renders all subsequent proceedings null and void.

When the mode of exercising any power is pointed out in the statute granting it, the mode thus prescribed must be pursued in all substantial particulars. The publication of notice of intention to create an improvement district is one of the three essential jurisdictional steps which must be taken in substantial conformity to the statute. *Shapard v. City of Missoula*, 49 Mont. 269, 141 Pac. 544; *Johnston v. City of Hardin*, 55 Mont. 574, 179 Pac. 824; *McGillic v. Corby*, 37 Mont. 249, 95 Pac. 1063, 17 L. R. A. (N. S.) 1263; 20 Am. & Eng. Ency. Law, 1142. We do not, however, wish to be understood as holding that proceedings before the board of county commissioners in the creation of a new county are in all respects analogous to those creating special improvement districts in cities.

It must be conceded that if no notice were published at all, the attempt of the county board to create a new county would be wholly insufficient. Here it appears that the publication was not made for two weeks next preceding the date of the meeting of the board, as the statute requires. The statutory requirement as to the publication of notice of the hearing on the petitions for the creation of Banner county not having been met as required, it is, in effect, the same as if no notice whatsoever had been given. Such notice being a jurisdictional requirement, notwithstanding the election held carried by a substantial majority, we are constrained to declare the order of the board of county commissioners of Chouteau county proclaiming an election to be held on March 29, 1921, and directing notice thereof to be given, null and void.

It is therefore ordered that the order of the board of county commissioners of Chouteau county calling the election in the matter of the creation of the proposed Banner county, and all subsequent proceedings based thereon, be, and they are hereby, annulled.

REYNOLDS and GALEN, JJ., concur.
BRANTLY, C. J. and HOLLOWAY, J., dissent.

(60 Mont. 82)

TERRY v. STEPHENS et al. (No. 4375.)

(Supreme Court of Montana. May 16, 1921.)

Brokers — 34—Owner held not entitled to recover part of purchase price retained by broker under agreement with purchaser on ground of misrepresentations as to value of land.

Owner, who exchanged land in part payment for other land after inspection of the other

land, and who was apparently satisfied with the transaction until his discovery that his brokers who effected exchange had been permitted by other party to transaction to retain a portion of the purchase price in addition to the commission paid him by such owner, could not recover the portion of the purchase price so received by the brokers on ground that they misrepresented the value of the land, where there is no proof of the value of either property or the price of the land received in exchange, and it appears that all negotiations had to do with the trade price between him and the brokers.

Commissioners' Opinion.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by D. S. Terry against Allen Stephens and another. From judgment for plaintiff, and from order denying motion for new trial, the named defendant appeals. Judgment and order reversed, and cause remanded, with directions.

Murphy & Whitlock, of Missoula, for appellant.

Harry H. Parsons and Thomas N. Marlowe, both of Missoula, for respondent.

JACKSON, C. Plaintiff alleges in substance that he owned certain property at Paradise, Mont.; that W. H. Montgomery & Co. owned 150 acres of land in the Flint Creek district; that defendants were real estate agents and brokers in Missoula, Mont.; that in May, 1913, plaintiff obtained the services of the defendants as agents or brokers to sell or exchange his property, agreeing to pay defendants 5 per cent. of the purchase or exchange price, which was set at \$3,800; that subsequently the defendants notified plaintiff that they had listed with them the Montgomery land at a price of not less than \$7,800, which figure was low and the market price for it, and that in obtaining title thereto the plaintiff's title to his lands would be credited in the sum of \$3,800, leaving a balance due to W. H. Montgomery & Co. on the exchange of \$4,000; that the defendants represented to the plaintiff that the price of the Montgomery land was so low that Montgomery would pay no commission, and before the sale could be consummated, plaintiff would have to pay defendants the entire commission; that plaintiff accepted the proposition and offer, and did pay to defendants the sum of \$430 as commission; that plaintiff relied implicitly on the representations of defendants, and that he was not acquainted with the market and actual value of the Flint Creek lands, and the representations were made by the defendants with the object and intent that they should be believed and relied on by plaintiff; that, so believing and relying, plaintiff conveyed title to his lands to the defendants for convenience, and at their request, and executed a written con-

tract, under defendants' direction, with W. H. Montgomery & Co. to purchase the Flint Creek lands and pay a balance therefor of \$3,700; that the representations and statements of defendants were false, and were known to be false by defendants when made, and were made in an unlawful attempt to profit in the transaction, and for the purpose of having plaintiff act on the same; that plaintiff believed them to be true and acted upon them; that the W. H. Montgomery Company received but \$4,800 for their property, and this plaintiff was defrauded by the defendants of \$3,000, which defendants kept, converted to their own use, and defrauded the plaintiff thereof. Then it is alleged that the fraud herein was not discovered until March, 1915, when plaintiff, conferring with Montgomery, discovered what the company had received for the Flint Creek property, and that defendants, while acting as his agents, charged him a commission on one hand, and made a wrongful and illegal profit on the other. Plaintiff prayed judgment in the sum of \$3,000. The defendant Hooverson was not served and did not appear. The answer of defendant Stephens denies the allegations of plaintiff, except the execution of the contract between W. H. Montgomery & Co. and the plaintiff, and by way of affirmative defense pleads the statute of limitations (subdivision 4, § 6449, R. C.) and the statute of frauds. The reply is a denial of the affirmative defense and by estoppel. A trial was had to a jury. Defendant's motions for nonsuit and directed verdict were denied, and verdict returned for the plaintiff in the sum of \$3,000. Defendant appealed from the judgment and the order denying a new trial.

Fourteen specifications of error are set out. It is not necessary to consider any of them, except those bearing on the action of the court in denying defendant's motions for nonsuit and directed verdict, as reversal is made imperative by plaintiff's own case.

Plaintiff's case showed that he owned the Paradise property, and desired to dispose of it by sale or trade, and through the defendants went to look at some land in the Flint Creek district at \$55 per acre, which plaintiff did not like, and some at \$52 per acre, which he did like; that plaintiff, an experienced rancher for 15 or 18 years, "thoroughly familiar with ranching and ranch property in this section of the country," went over and across the \$52 land he subsequently bought, examined it as much as he cared to, satisfied himself, then came back to Missoula and concluded the deal. Plaintiff says:

"I was satisfied with the arrangement that was proposed."

He then deeded his Paradise property to Hooverson and Stephens, and was credited therefor in the sum of \$3,800. With respect to this he testified:

"It didn't make any difference to me whether the proceeds of this property were turned over to the Montgomery people or kept by Hooverson and Stephens. I had made my bargain and turned over my property and received a contract to the Flint Creek Valley land. I had a contract to pay \$3,700, and I carried out that contract and lived on the Flint Creek property."

He then signed the contract, obligating himself to pay to W. H. Montgomery & Co. \$3,700, the balance of the price he agreed to pay for 150 acres of Flint Creek Valley land at \$52 per acre, less \$300. The deposition of W. H. Montgomery, introduced in plaintiff's case, shows that the Montgomery company had a contract with Hooverson to accept for the Flint Creek land the sum of \$4,800, subject to a commission of \$500, and that it was immaterial to the company what the land sold for; that "so far as we were concerned he was at liberty to sell at any price, and net to us the amount agreed upon." Plaintiff paid to Stephens, or to Hooverson and Stephens, the sum of \$430 as commission for the sale price on both properties, \$300 of which was on the Montgomery purchase price, which sum was deducted from \$7,800, and \$130 on his own.

Some time after the first payment set out in the contract between W. H. Montgomery & Co. and plaintiff, he discovered that the company had received the price testified to by W. H. Montgomery. He had already moved on the land, and apparently was satisfied with his bargain until this time.

This is, in effect, the plaintiff's case, and under no conceivable theory did he sustain the allegations of his complaint. He offered no proof of the value of either of the pieces of property, and nowhere does it appear what Montgomery's price was, but all of the negotiations had to do with the trade price between plaintiff and defendants. This cannot be construed as fraud or misrepresentation, in view of plaintiff's testimony that he was satisfied with his bargain. *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 901; *Grinrod v. Bond Co.*, 34 Mont. 169, 85 Pac. 891.

Plaintiff is conclusively shown by his own case to have dealt with the defendant at arm's length, relying upon his own judgment. The motion for a nonsuit should have been granted. Defendant's case does not help plaintiff in any particular, but goes to explain the business relations between the defendants and plaintiff, with respect to the exchange, and the court erred in denying the motion for a directed verdict.

Because of the foregoing reasons, we recommend that the judgment and order denying the motion for a new trial be reversed, and that the cause be remanded to the district court, with directions to set aside the verdict and judgment for the plaintiff, and

to enter judgment for defendant for his costs.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order of the lower court be reversed and the cause remanded, with directions to set aside the verdict and judgment for the plaintiff and to enter judgment for defendant for his costs.

(59 Mont. 600)

STATE ex rel. SAMLIN v. DISTRICT COURT OF SIXTEENTH JUDICIAL DIST., IN AND FOR CUSTER COUNTY et al. (No. 4824.)

(Supreme Court of Montana. May 6, 1921.)

1. Constitutional law \S 251—Searches and seizures \S 7—Amendments to federal Constitution held not limitations on power of states.

The prohibitions as to search and seizure and due process of law, embodied in Const. U. S. Amends. 4 and 5, are not limitations on the power of the several states, but operate exclusively on the delegated powers of the federal government.

2. Searches and seizures \S 7—Constitutional prohibition of unreasonable searches and seizures strictly construed in favor of citizen.

Const. art. 3, \S 7, providing that no warrant to search any place or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, nor without probable cause supported by oath or affirmation reduced to writing, being intended to take away from the Legislature the power to authorize an invasion of the rights of the citizen by a search of his home or a seizure of his person or property in any other case than it permits, is to be strictly construed in his favor.

3. Searches and seizures \S 3—Search warrant issued on applicant's conclusion, without facts stated, is not showing of "probable cause supported by oath or affirmation."

A search warrant issued on a conclusion of the applicant, without any facts stated in the application on which the judicial officer to whom it is addressed may form his own conclusion, is not a showing of "probable cause supported by oath or affirmation," within the meaning of Const. Mont. art. 3, \S 7.

4. Constitutional law \S 20—Legislative construction of guaranty against unreasonable searches and seizures held strongly persuasive on issue as to violation.

Rev. Codes, $\S\S$ 9676-9696, providing that a search warrant cannot be issued, but on probable cause supported by affidavit, and defining the procedure necessary to obtain one, being a construction by the Legislature of Const. art. 3, \S 7, prohibiting the issuance of search warrants, except on probable cause, are strongly persua-

sive on the courts in determining whether that article has been violated.

5. Intoxicating liquors \S 250—Prohibition Enforcement Act held in pari materia with provisions of Codes on subject of search warrants.

Prohibition Enforcement Act, \S 7, authorizing the district judge to issue a search warrant if it shall be made to appear to him that there is probable cause to believe that intoxicating liquor is being manufactured, sold, etc., but not attempting to lay down any procedure, is in pari materia with Rev. Codes, $\S\S$ 9676-9696, defining the procedure in the issuance of search warrants by magistrates, and the power of the district judge is the same as that of the magistrate, and subject to the same limitations.

6. Intoxicating liquors \S 248—Use of word "complaint" in Prohibition Enforcement Act, instead of "affidavit," held not to imply less stringent rule in issuance of such warrants.

The use of the word "complaint" in Prohibition Enforcement Act, \S 7, instead of "affidavit," as used in Rev. Codes, \S 9678, prohibiting the issuance of search warrants but on probable cause, supported by affidavit, does not imply a less stringent rule to be observed by the district judge in determining whether such warrant should be issued; the requirement of the act being that if, on sworn complaint of any person it shall be made to appear to any judge of the district court that there is probable cause to believe that intoxicating liquor is being manufactured, such judge shall issue a warrant, etc., in the absence of which probable cause there is nothing before the judge to bring his power into activity.

7. Intoxicating liquors \S 250—In search warrant proceeding, possessor of liquors not required to rebut prima facie case based on mere hearsay or rumor.

Under Rev. Code, $\S\S$ 9676-9696, there must be submitted to the judge or magistrate something more than statements based on hearsay or rumor before he may issue a search warrant, and Prohibition Enforcement Act, \S 8, providing that the complaint on which the warrant is issued and the possession of intoxicating liquors seized are prima facie evidence of the contraband character of the liquors, did not cast the burden upon the possessor to rebut a prima facie case based on mere hearsay or rumor.

8. Intoxicating liquors \S 255—Possessor of liquors unlawfully seized entitled to have same returned to him.

A chief of police, who seized whisky under the supposed authority of a search warrant which was invalid under Prohibition Enforcement Act, \S 7, committed a trespass, and would not be permitted to retain the liquor for any purpose, and the owner was entitled to have it returned to him.

9. Criminal law \S 395—Articles wrongfully taken from accused may be used as evidence against him.

Articles wrongfully taken from one accused of crime may be used as evidence against him on the trial, though objection is made that the

prosecutor obtained possession of them unlawfully.

10. Arrest ¶71—Articles wrongfully taken from accused must be returned, where the question is raised by a direct proceeding.

Where articles are wrongfully taken from one accused of crime, to be used as evidence against him, if the question is raised before the trial by a direct proceeding, it is the duty of the court to direct return of them to the accused.

11. Criminal law ¶395—Rule that papers wrongfully taken from accused must be returned applies to any kind of personal property.

The rule that, on an application by an accused from whom papers have been unlawfully taken for use as evidence against him, if the court erroneously refuses to order a return of the papers, and thereafter receives them in evidence over his objection, it is reversible error, applies to any kind of personal property.

Original application by the State, on the relation of John Samlin, for a writ of prohibition directed to the District Court of the Sixteenth Judicial District in and for Custer County, and another. Peremptory writ ordered, with directions.

Frank Hunter, Daniel L. O'Hern, and William Truscott, all of Miles City, for relator.

W. D. Rankin, Atty. Gen., L. A. Foot, Asst. Atty. Gen., W. C. Packer, of Miles City, and C. A. Spaulding, of Helena, for defendants.

BRANTLY, C. J. Original application for a writ of prohibition, directed to the district court of Custer county and to Hon. S. D. McKinnon, one of the Judges thereof, to stay further action in a search warrant proceeding instituted by one R. B. Hayes, under the provisions of chapter 143 of the Session Laws of 1917, commonly called the Prohibition Enforcement Act.

On February 11 of this year Hayes filed a "complaint" in the district court of Custer county, the part of which material here is the following:

"State of Montana, County of Custer—ss:

"R. B. Hayes, being first duly sworn, deposes and says: That he has probable cause to believe, and does believe, that on the 5th day of February, A. D. 1921, intoxicating liquors were, and have been ever since said date, and still are possessed, kept, and disposed of and unlawfully introduced into the state of Montana by the said defendant [relator] and other persons, to affiant unknown, at a place," etc., describing it as situate in Miles City. It concluded with a prayer for the issuance of a warrant to search the premises.

The defendant judge issued the warrant, which was put in the hands of Martin Golden, chief of police of Miles City, for execution. This he did by a search of the prem-

ises described, and found there a quantity of whisky in bottles, which he seized, certifying in his return that he held the same in his possession, subject to the order of the court. He further certified that, having found no one in possession of the whisky, he posted a copy of the warrant on the door of the garage on the premises in which the whisky was found. On February 19 the judge made an order fixing March 3, at 10 o'clock a. m. as the time for a hearing to determine whether the whisky should be adjudged forfeited. A copy of the order was served on the relator. On that date he appeared by counsel and moved the court to quash the warrant and to order the whisky forthwith returned to the premises and to his possession, on the ground, among others, that the issuance of said alleged warrant was and is without and in excess of jurisdiction because in violation of the provisions of the Fourth and Fifth Amendment to the Constitution of the United States, of section 7 of article 3 of the Constitution of Montana, of sections 7 and 8 of the Prohibition Enforcement Act, and of the sections of the Revised Codes providing for the issuance of search warrants. The motion was denied, and the hearing was continued to May 9 at 10 o'clock a. m. Thereupon application for the writ was made to this court. An alternative writ was issued and made returnable for hearing on March 14. The defendants appeared by counsel and moved that the writ be quashed and the application dismissed, on the ground that upon the facts stated in the complaint the relator is not entitled to relief. The application was thereupon submitted for decision on the merits.

It will be noted that the statement in the complaint is that "he [affiant] has probable cause to believe, and does believe, that on the 5th day of February, A. D. 1921," etc. The ultimate question submitted for decision is whether this statement, in the form of a conclusion by the affiant, though under oath, was sufficient to give the court or judge jurisdiction to issue the search warrant. The solution of this question depends upon the meaning of the section of our state Constitution prohibiting unreasonable searches and seizures, upon which the relator relies, and the provisions of law on the subject enacted in pursuance of it.

[1] Consideration of the scope and application of Amendments 4 and 5 of the Constitution of the United States is not pertinent. It is well settled that the prohibitions embodied in them are not limitations upon the power of the several states, but operate exclusively upon the delegated powers of the federal government. It is not necessary here to do more than call attention to some of the decisions of the Supreme Court of the United States which have discussed them

and defined their application. *Barron v. City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Fox v. Ohio*, 5 How. 434, 12 L. Ed. 213; *Smith v. State of Maryland*, 18 How. 76, 15 L. Ed. 269; *Withers v. Buckley*, 20 How. 90, 15 L. Ed. 816; *Twitchell v. Commonwealth*, 7 Wall. 327, 19 L. Ed. 223; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915B, 1177. Indeed, the rule announced in these cases applies to all the amendments, unless a contrary purpose is clearly expressed or implied by the terms in which they are couched. *United States v. Cruikshank*, supra.

[2] The provision of our state Constitution referred to is:

"The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing."

The general provisions relating to search warrants are sections 9676 to 9696 of the Revised Codes. Section 9677 enumerates the grounds upon which they may issue. The first subdivision of this section applies to cases where property has been stolen or embezzled; the second, to cases where property has been used as a means of committing a felony; the third, to cases where property is in the possession of any person who intends to use it as a means of committing a public offense, or is in possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.

Sections 9678, 9679, 9680, and 9681 provide:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched." Section 9678.

"The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them." Section 9679.

"The depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." Section 9680.

"If the magistrate is satisfied of the existence of the grounds of application or that there is probable cause to believe their existence, he may issue the warrant. * * *" Section 9681.

Section 7 of the Prohibition Enforcement Act (Laws 1917, p. 241) declares:

"If, upon the sworn complaint of any person, it shall be made to appear to any judge of the

district court that there is probable cause to believe that intoxicating liquor is being manufactured, sold, exchanged, given away, * * * such judge shall, with or without the approval of the county attorney, issue a warrant directed to any peace officer in the county, and commanding him to search the premises designated and described in such complaint and warrant, and to seize all intoxicating liquor there found, together with the vessels in which it is contained," etc.

We shall not undertake to enter into a detailed discussion of the reasons, from a historical point of view, which prompted the incorporation in the federal Constitution of a specific guaranty against unreasonable searches and seizures, nor why, though couched in somewhat varying terms, it appears in the Constitutions of the several states. It is sufficient to say that when the colonies had gained their independence and were engaged in establishing the federal and the several state governments under written Constitutions, they deemed it wise to incorporate in them in crystallized form the principles laid down as a part of the English Constitution by Lord Camden in his decision in the case of *Entick v. Carrington*, 19 St. Tr. 1030, and make them applicable to all invasions on the part of any of the several governments or any of their employees, of the sanctity of the home of a citizen, his personal security, personal liberty and private property where there is not probable cause to believe that his rights in this behalf have been forfeited by his own criminal conduct. As new states were formed from time to time, they also incorporated the guaranty in their Constitutions, until now it is found, in some form, in those of all the states.

Speaking of the Fourth Amendment to the Constitution of the United States, Mr. Justice Day, in *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, said:

"The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

This forceful statement of the learned justice applies as well to the guaranty found in our own Constitution; for, except that the order in which the several clauses in it are arranged is different, it is expressive of the same fundamental principles and was intended to be equally as effective to prevent an invasion of the rights of the citizen of the state under the guise of law by the state government or any of its officers. Since it was intended to take away from the Legislature the power to authorize an invasion of the rights of the citizen by a search of his home or a seizure of his person or property in any other case than it permits, it is to be strictly construed in his favor. On this subject the eminent author, Mr. Cooley, in his work on Constitutional Limitations, has this to say:

"For the service of criminal process, the houses of private parties are subject to be broken and under circumstances which are fully explained in the works on criminal law, and need not be enumerated here. And there are also cases where search warrants are allowed to be issued, under which an officer may be protected in the like action. But as search warrants are a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection, it is essential that these rules be carefully observed. In the first place, they are only to be granted in the cases expressly authorized by law, and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place. And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it." Page 429.

To the same effect is the rule stated by the author of the text in volume 24 of *Ruling Case Law*, at page 704, as follows:

"This restriction was intended to operate on legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction."

While some of the courts do not adhere to the doctrine declared by these text-writers, it is, we think, supported by the weight of authority. *Weeks v. United States*, supra;

People ex rel. Simpson Co. v. Kempner, 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914D, 169; *State v. Peterson & Romano* (Wyo.) 194 Pac. 342; *Johnston v. United States*, 87 Fed. 187, 30 C. C. A. 612; *United States v. Tureaud* (C. C.) 20 Fed. 621; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363; *State v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 Ann. Cas. 650; *State v. Patterson*, 13 N. D. 70, 99 N. W. 67; *Chipman v. Bates*, 15 Vt. 51, 40 Am. Dec. 663; *Kniseley v. Ham*, 39 Okl. 623, 136 Pac. 427, 49 L. R. A. (N. S.) 770; *Commonwealth v. Leddy*, 105 Mass. 381; 24 R. C. L. p. 767.

[3] The exact question presented here has never before arisen in this state. The rule announced in the foregoing cases, however, was recognized and adverted to by this court in the cases of *State ex rel. Streit v. Justice Court*, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156, and *State v. Malarky*, 57 Mont. 132, 187 Pac. 635. Under this doctrine, the facts upon which the application is made must be stated under oath, and the magistrate to whom it is presented must determine their sufficiency without reference to the opinion or belief of the applicant. A warrant issued upon a conclusion of the applicant, without any facts stated in the application upon which the judicial officer to whom it is addressed may form his own conclusion, is not a showing of "probable cause supported by oath or affirmation" within the meaning of the guaranty.

[4] The Legislature, in enacting the provisions of the Codes, quoted supra, gave its construction to the guaranty, and this construction is strongly persuasive, even without the authorities cited supra, against the validity of the proceedings under consideration. These sections declare (1) that a search warrant cannot be issued but upon probable cause supported by affidavit; (2) that the magistrate, before granting it, must examine on oath the complainant (affiant) and any witnesses he may produce, and take their depositions in writing; (3) that the depositions must set forth the facts tending to establish the grounds of the application or probable cause; and (4) that if the magistrate is thereupon satisfied of the existence of the grounds of the application—that is, that there is probable cause to believe that they exist—he must issue the warrant. These provisions embody in substance the rule laid down in his text by Mr. Cooley, and the conclusion, it seems, cannot be avoided that in formulating them the Legislature had it in mind. Since they are the only ones in our Codes prescribing a procedure for the issuance of a search warrant, and since the warrant can be issued only under the authority of law, it is manifest that a warrant could not lawfully be issued in this state at all but for these provisions.

[5] In enacting the Prohibition Enforcement Act, the Legislature manifestly did not

intend to amend or modify these general provisions. The excerpt from section 7 of the act, supra, authorizes the district judge to issue the warrant if it shall be made to appear to him that there is probable cause to believe that intoxicating liquor is being manufactured, sold, etc. In enacting it the Legislature must have had in mind the general provisions of the Codes, for it did not attempt to lay down any procedure, and it expressly recognized the necessity that the district judge, acting as the magistrate, should determine the question of the existence or nonexistence of probable cause, and issue or refuse to issue the warrant accordingly. The act, so far as it relates to the issuance of such warrants, is in *pari materia* with the provisions of the Codes on the same subject and must be construed accordingly. The power of the district judge in this behalf is therefore the same as that of the magistrate and is subject to exactly the same limitations.

[6] That the word "complaint" appears in the act, instead of the word "affidavit," used in section 9678, supra, does not imply that a less stringent rule may be observed by the district judge, for the requirement is "if, upon the sworn complaint of any person, it shall be made to appear to any judge of the district court that there is probable cause to believe that intoxicating liquor is being manufactured, . . . such judge shall issue a warrant," etc. In other words, there must be a foundation in the facts presented to him for the conclusion that probable cause exists, or he has nothing before him to bring his power into activity. Our conclusion is that the proceeding in the district court was void *ab initio* and that the writ should be made peremptory.

[7] Counsel have devoted considerable space in their briefs to a discussion of the question whether an affidavit or complaint made upon information and belief meets the requirements of the guaranty of the Constitution and of the statute, supra. Strictly speaking, this question does not arise in this case. Under the provisions of the Codes, supra, however, clearly there must be submitted to the judge or magistrate something more than statements based upon hearsay or rumor. By section 8 of the Prohibition Enforcement Act, the complaint or affidavit, upon which the warrant is issued and the possession of the intoxicating liquors seized under it, are made *prima facie* evidence of the contraband character of the liquors, implements, etc., used in connection with it. If nothing more than statements resting upon hearsay and rumor is required as a basis for the issuance of the warrant, mere hearsay or rumor is thus made sufficient to show that the possession of the liquors, etc., is in violation of the act, however lawful such possession may have been, and casts the burden upon the possessor to rebut the *prima facie* case thus made against him, under the

pain of suffering forfeiture of his property. In view of the provisions of the Codes, supra, we may not conclude that in enacting the Prohibition Enforcement Act the Legislature intended that it should authorize such a result. For a discussion of this subject and an extensive review of the authorities, reference is made to the case of *State v. Peterson & Romano*, supra.

[8, 9] In his petition relator asks that, if the writ is issued, it include as a part of the relief granted an order that the whisky seized under the warrant be returned to him. We think that he is entitled to this relief. In proceeding under the warrant, the chief of police committed a trespass by an invasion of the rights guaranteed to the relator by the Constitution. The seizure of the whisky was an unlawful act. The officer may not be permitted to retain it for any purpose. It is well settled that articles wrongfully taken from one accused of crime may be used as evidence against him upon the trial, though objection is made that the prosecution obtained possession of them unlawfully. If they are in other respects competent and material, the trial court will not pause to inquire by what means they came into the possession of the prosecution. *State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648; *People ex rel. Simpson Co. v. Kempner*, supra; *Weeks v. United States*, supra; *People v. Marxhausen*, 204 Mich. 559, 171 N. W. 557, 3 A. I. R. 1505; *State v. Peterson & Romano*, supra. This question will be left to be determined in an independent action brought by the accused against the one who wrongfully secured possession.

[10] When, however, the question is raised before the trial, by a direct proceeding instituted to test the question as to the legality of the means by which possession of the articles has been secured, it then becomes the duty of the court to direct return of them to the accused, if it determines that unlawful means have been employed to secure possession. In 10 R. C. L. at page 933, the rule is stated as follows:

"The principle underlying the decisions admitting the evidence is that an objection to an offer of proof made on the trial of a cause raises no other question than that of the competency, relevancy and materiality of the evidence offered, and that consequently the court, on such an objection, cannot enter on the trial of a collateral issue as to the source from which the evidence was obtained. But, since there is a right, there must of necessity be a remedy, and the remedy is to be found in the making of a timely application to the court for an order directing the return to the applicant of the papers unlawfully seized. On such an application, the question of the illegality of the seizure may be fully heard, and if the court erroneously refuses to order a return of the papers, and thereafter receives them in evidence against the applicant over his objection, it is an error for

which a judgment of conviction must be reversed."

[11] The author refers specifically to papers, but the rule stated applies to any kind of personal property. *State v. Peterson & Romano, People ex rel. Simpson Co. v. Kemper, and State v. Marxhausen, supra.* There is some conflict in the authorities upon the subject, but in our opinion the rule as stated in the text quoted is based upon the better reason and meets with our approval.

It is ordered that a peremptory writ issue, and that the district court order the chief of police, who has the whisky in his possession, to return it to the possession of the relator. Writ issued.

REYNOLDS, COOPER, HOLLOWAY, and GALEN, JJ., concur.

(60 Mont. 74)

HOELLER v. MOOG et al. (No. 4370.)

(Supreme Court of Montana. May 16, 1921.)

1. Chattel mortgages \Leftrightarrow 139 — Executed by purchaser under unrecorded conditional sale contract to bona fide mortgagee good as against mortgagee's assignee with notice.

Where chattel mortgage was executed by conditional sale purchaser and was filed for record prior to the recordation of the conditional sale contract under Rev. Codes, § 5757, as re-enacted by Laws 1913, c. 86, and section 5092 as amended by Laws 1911, c. 52, the mortgage is valid in hands of mortgagee's assignee where mortgagee was a bona fide mortgagee for value without notice, though the assignee had knowledge of the existence of the conditional sale contract, since the assignee succeeded to the rights of the mortgagee as to whom the mortgage was valid.

2. Chattel mortgages \Leftrightarrow 17—Conditional sale purchaser has "mortgageable interest."

Purchaser under conditional sale contract has a mortgageable interest.

Commissioners' Opinion. Appeal from District Court, Hill County; W. B. Rhoades, Judge.

Action by Anna Hoeller against John A. Moog and others. From judgment for plaintiff, and from order denying motion for new trial, defendants appeal. Judgment and order reversed, with directions.

H. S. Kline and C. B. Elwell, both of Havre, for appellants.

F. N. Utter, of Havre, for respondent.

SPENCER, C. This is an action to enjoin the sale of a hotel building at Inverness, Hill county, Mont., under mortgage foreclosure. Defendants have appealed from an adverse judgment and order denying their motion for a new trial.

As a reversal must be had herein, it is worthy of note that the pleadings upon which this action was predicated are replete with a useless and almost endless line of repetitions; that the printed transcript contains many clerical errors and inaccuracies in the evidence, and presents evidence so vague and incomplete as to preclude a satisfactory conclusion by this court. Testimony was received as to exhibits which do not appear in the record, such as Plaintiff's Exhibit H, while other exhibits appear which were referred to neither in the pleadings nor proof, such as Defendants' Exhibit 4. We find the record incumbered by Plaintiff's Exhibit D, a mortgage from Gesche to Foorman in 1912, Exhibit E, Power of Attorney, Foorman to Baatz, and Exhibit F, promissory note Gesche to Foorman, to secure which Exhibit D was executed, all of which, so far as the evidence discloses, are wholly immaterial, and neither tend to prove or disprove any of the issues material upon the trial, while Plaintiff's Exhibit I appears to be incompetent for any purpose. We think we may, with propriety, call attention of counsel to their duty to clients and the court, to present the full merits of their contentions and preserve the record so that this court, if called upon, may review them with intelligence, and not be required to delve into the realms of speculation.

The record before us is wholly unsatisfactory, but we believe the pleadings and proof disclose the following facts to be incontestible: That upon December 20, 1913, Amanda L. Gesche was the owner of a two-story, frame hotel building situated in the town site of Inverness, Hill county, Mont.; that upon the same date she sold said hotel building to Amelia Wyant upon what is commonly called a conditional sales contract, reserving in herself, however, title to said hotel building until finally paid for, according to the terms of said contract; that upon December 27, 1913, Amelia Wyant and her husband, A. L. Wyant, mortgaged said hotel building to the Chester State Bank of Chester, Mont., to secure the loan of a sum of money, represented by a note of even date with said mortgage; that upon January 8, 1914, the mortgage was filed for record in the office of the clerk and recorder of Hill county; that upon April 12, 1914, Amanda L. Gesche sold and assigned to this plaintiff, Anna Hoeller, all of her right, title, and interest in and to the conditional contract of sale before mentioned; that upon April 15, 1914, the conditional contract of sale was filed for record in the office of the clerk and recorder of Hill county; that upon April 25, 1914, the assignment of said contract was likewise filed for record, and that subsequently, on April 30, 1914, the chattel mortgage to the Chester State Bank was assigned

to the defendants, Moog, Carver and Barringer, and that they are now the owners and holders of the same. All parties to this action have treated the building in controversy as personal property, and the record is silent as to who owns the realty upon which it stands.

Appellants assign five specifications of error, but in disposing of the questions involved in these appeals, we think it only necessary to consider assignment No. 4, which is as follows:

"Error in holding that at the time Amelia Wyant and A. L. Wyant gave their mortgage to the Chester State Bank they had no interest in the Hotel Inverness which they could mortgage, and that the Hotel Inverness never became subject to that mortgage."

The question primarily material herein is, what right, if any, did the Chester State Bank acquire by virtue of its mortgage from Amelia Wyant and husband under date of December 27, 1913?

Chapter 86, Laws of the Thirteenth Session, p. 378, re-enacts section 5757, R. C., and provides:

"Any interest in personal property which is capable of being transferred may be mortgaged"

—so that, if the Chester State Bank was a bona fide mortgagee prior to the filing for record of the conditional contract of sale from Amanda L. Gesche to Amelia Wyant, its rights became fixed under the provisions of section 5092, R. C., as amended by chapter 52, Session Laws of 1911, as follows:

"All contracts, notes and instruments for the transfer or sale of personal property, where the title is stipulated to remain in the vendor until the payment of the purchase price or some part thereof, shall be in writing, and the original or true copy thereof, certified by the county clerk and recorder, shall be filed with the county clerk and recorder of the county where in the property is situated; otherwise, any such contract, note or instrument is void as to bona fide purchasers, mortgagees, or attaching creditors of such property prior to such filing." *Cuerth v. Arbogast*, 48 Mont. 217, 136 Pac. 883.

And likewise its assignees, the defendants herein, occupied the same position as the Chester State Bank, and were entitled to the same rights and immunities which said bank acquired, which seems to preclude any argument as to the rights of the Chester State Bank, if in fact it is a bona fide mortgagee for value and without notice.

The testimony of J. O. Berglin, cashier of the Chester State Bank, is the only evidence in the record pertaining to the bona fides of the said bank mortgagee, and in so far as his

evidence is of any probative value it does tend to show that the Chester State Bank is a holder of the mortgage in good faith for value and without notice. If the Chester State Bank was a mortgagee in good faith, and its mortgage filed prior to the filing of the conditional contract of sale, it then had a vested right and ownership (Revised Codes, § 5092, as amended, supra), of which it could not be divested except by voluntary act on its part, or by operation of law through the statute of limitations, and hence it could sell or assign its rights to third persons who would occupy the same position and succeed to the same rights as the bank itself.

[1] The complaint charges that the mortgage to the Chester State Bank was taken in the name of said bank as mortgagee, but for the use and benefit of these defendants. The evidence does not support this allegation. The court made no finding as to the rights acquired by the Chester State Bank under its mortgage, but did find that between December 20, 1913, and December 27, 1913, the date of the mortgage, the defendants had actual notice of the existence of the conditional contract of sale between Amanda L. Gesche and Amelia Wyant, and that Amanda L. Gesche was the owner of the hotel building in controversy, and upon this finding based its judgment that the mortgage to the Chester State Bank was of no effect and void as to this plaintiff. We think this was error.

[2] It would be an anomaly in the law to say that the bank had rights as a bona fide mortgagee, but that it lost those rights and lost its bona fides upon assignment of its mortgage, even though defendants may have possessed actual knowledge of the existence of the conditional contract of sale. Even under the doctrine of implied findings approved in this state (*Crosby v. Robbins*, 56 Mont. 179, 182 Pac. 122), to be consistent with its express findings, and to support its judgment, the court must have impliedly found the Chester State Bank had knowledge of the title of the plaintiff in the building in controversy at the time it accepted its mortgage from Amelia Wyant, but such implied finding would be wholly unwarranted under the proof. Amelia Wyant held a mortgageable interest in the property, but upon the record as a whole we think a retrial should be had, and recommend that the judgment and order denying a new trial be reversed, with directions to grant a new trial.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order denying a new trial be reversed, with directions to grant a new trial.

(116 Wash. 65)

CITY OF BELLINGHAM v. BELLINGHAM PUB. CO. (No. 16563.)

(Supreme Court of Washington. June 2, 1921.)

1. Newspapers \Leftrightarrow 1 (3)—Paper published every day save Monday a "legal daily paper" under statute.

A newspaper published every day except Monday may be a legal "daily newspaper" for the publication of legal notices within the meaning of Laws 1921, c. 99, providing that no newspaper shall be considered a legal newspaper unless it shall have been published continually (legal holidays and Sundays excepted) as a daily or weekly newspaper for at least six months, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Daily Newspaper.]

2. Newspapers \Leftrightarrow 2—Change of name did not affect right to publish legal notices.

Change of name of newspaper from the "American Reveille" to the "Bellingham Reveille" did not affect the legality of the publication of city's legal notices therein; such change not being a change in the identity of the paper under Laws 1921, c. 99, and the city cannot therefore avoid a contract with such paper for publication.

Department 2.

Appeal from Superior Court, Whatcom County; W. P. Brown, Judge.

Action by the City of Bellingham against the Bellingham Publishing Company. Judgment for defendant and plaintiff appeals. Affirmed.

T. D. J. Healy, of Bellingham, for appellant.

Newman, Howard & Kindall, of Bellingham, for respondent.

PARKER, C. J. This cause was presented to the superior court for Whatcom county for final disposition upon the merits, upon an agreed statement of facts under sections 378-380, Rem. Code, relating to agreed cases. The purpose of the action is to have judicially determined whether or not the city may lawfully avoid and treat as no longer binding upon it a contract entered into by it with the defendant publishing company for the publication in its newspaper of the city's legal notices during the year 1921. The controversy has arisen because of a change in the name of the defendant's newspaper, and also because of the passage of the act of the Legislature of 1921, entitled: "An act relating to and regulating the publication of legal and other official notices and fixing the fees therefor;" chapter 99, Laws of 1921; furnishing, as it is claimed, grounds for the contention that the defendant's newspaper is not, and especially will not be after

the going into effect of the act of 1921, which will soon occur, "a legal newspaper" for the publication of the city's legal notices. Upon submission of the cause to the superior court, judgment was rendered against the city, holding, in substance, that the defendant's newspaper was, and will continue to be during the whole of the year 1921, if its publication be continued as when this case was commenced, a legal newspaper for the publication of the city's legal notices during the whole of the year 1921. From this disposition of the cause in the superior court, the city has appealed to this court.

The controlling facts may be summarized as follows: Respondent publishing company is, and for several years past has been, a domestic corporation of this state, and the publisher of a daily newspaper, printed and published in the English language, in the city of Bellingham, of general circulation in that city, being published on every day of the week except Monday. Prior to May 1, 1921, respondent's newspaper was named and known as the "American Reveille," the Sunday issue being designated as the "Sunday American Reveille." On May 1, 1921, the name of the paper was changed by respondent to the "Bellingham Reveille," the Sunday edition being designated as the "Bellingham Sunday Reveille." Otherwise, the paper has in all respects been, and will continue to be, printed, published, and circulated as now being printed, published, and circulated. During the late session of the Legislature there was passed an act entitled as above quoted which was approved by the Governor on March 16, and will soon become effective. The following are the only provisions of that act which we need here notice:

"Sec. 1. No newspaper shall be considered a legal newspaper for the publication of any advertisement, notice, summons, report, proceeding or other official document now or hereafter required by law to be published unless such newspaper shall have been published in the English language continually (legal holidays and Sundays excepted) as a daily or weekly newspaper, as the case may be, in the city or town where the same is published at the time of the publication of such official document, for at least six months prior to the date of such publication, and shall be printed either in whole or in part in an office maintained at the place of publication. * * *

"Sec. 6. Where any law or ordinance of any incorporated city or town in this state provides for the publication of any form of notice or advertisement for consecutive days in a daily newspaper, the publication of such notice on legal holidays and Sundays may be omitted without in any manner affecting the legality of such notice or advertisement: Provided, that the publication of the required number of notices is complied with."

[1] Our principal inquiry seems to be, Will respondent's newspaper be "a legal [daily]

newspaper" for the publication of the city's legal notices after the going into effect of the act of 1921? The language of section 1 above quoted may seem to lend support to the view that respondent's newspaper will not be a daily legal newspaper after the going into effect of the act, having in view the fact that respondent's newspaper has not been, and will not thereafter be, published on Mondays, from which fact there seems room for arguing that the paper has not been, and will not be, "published * * * continually (legal holidays and Sundays excepted) as a daily * * * newspaper, * * * for at least six months. * * *"

We are of the opinion, however, that this language is not intended as a definition of what constitutes a weekly or daily newspaper, speaking generally; but that the only purpose of this language is to define and prescribe the period during which a daily or weekly newspaper shall have been maintained and published regularly as such before it shall be "considered a legal newspaper for the publication of" legal notices. We do not overlook the words "legal holidays and Sundays excepted," parenthetically embodied in section 1; but those words, we think, mean only that the publication, or failure of publication, of holiday and Sunday issues, shall be ignored in determining whether or not the paper has been regularly and continuously published for six months. If the publication of a paper on every week day, save Monday, makes it a daily paper, such continued publication for a period of six months manifestly makes it a "legal [daily] newspaper for the publication of" legal notices. In *Fairhaven Publishing Co. v. Bellingham*, 51 Wash. 108, 98 Pac. 97, 16 Ann. Cas. 420, the status of the predecessor of this same paper was drawn in question, and in holding that it was in law a daily paper this court said:

"The only question we are required to notice is whether the *Morning Reville* is a daily paper, within the meaning of that term, as it is used in the city charter. We think it is. The term 'daily,' as applied to the publication of newspapers, is relative. It has never been given the exclusive meaning of every day of the week, month or year, but papers published every day except Sunday, or every day except Monday, or every day except both Sunday and Monday, are regarded by the general public as daily papers. This court in *Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802, held that a paper published every day except Sunday and legal holidays was a daily paper, and cited approvingly a case from California which held that a paper published every day except Monday was such a paper. A paper omitting both days may be less a daily publication than either of these cited instances, but it is not so widely different from them as to require it to be put into a distinct class. It is a daily paper in the popular sense, and it was

in this sense that the term was used in the city charter."

Nor do we think that section 6 of the act argues to the contrary of our conclusion. That section manifestly was embodied in the act merely for the purpose of enabling the publication of legal notices to be omitted from holiday and Sunday issues of newspapers, "Provided, that the publication of the required number of notices is complied with"; that is, that the publication of a notice daily for the required number of consecutive days, omitting holiday and Sunday issues, will be regarded as a consecutive daily publication of such notice.

[2] Does the change of the name of respondent's newspaper render it a different newspaper from its predecessor in name, during the six months next following such change of name? We are quite convinced that the mere change of the name from the "*American Reville*" to the "*Bellingham Reville*," in view of the other conceded facts shown by this record, is not a change in the identity of the paper; and, that being our conclusion it follows that such change of name has not affected, and will not affect, the legality of the publication of the city's legal notices therein during any portion of the year 1921; assuming, of course, that the paper will be continued to be printed and published as printed and published at the time of the commencement of this action.

The judgment is affirmed.

MITCHELL, MACKINTOSH, MAIN, and
TOLMAN, JJ., concur.

(115 Wash. 651)

HOPTOWIT v. BROWN et ux. (No. 16214.)

(Supreme Court of Washington. May 23, 1921.)

1. Pleading ¶34(1)—Plaintiff entitled to have complaint tested by allegations as whole.

A plaintiff is entitled to have his complaint, when questioned as to its sufficiency, tested by its allegations as a whole.

2. Fraud ¶10—Misrepresentations of future events or of law may be actionable.

It is not the rule that all fraudulent misrepresentations of future events or of law, where a person is deceived thereby to his injury, are nonactionable.

3. Fraud ¶10—Buyer's representations of future events and of law, inducing sale by Indian allottee, held actionable.

Complaint of an Indian woman, the seller of land, against the buyers thereof, alleging that she was inexperienced in business affairs, and that when she was in a weakened condition in a hospital defendant induced her to sell the land on his terms by fraudulently misrepresentations.

senting that, when government patent to it was issued to her, she would have to make payment for a water right, etc., held sufficient as against defendant's claim that any misrepresentations by him were of future events or of law.

4. Appeal and error ¶989—Supreme Court cannot inquire further than to determine there is substantial evidence to support verdict.

In an action at law triable by jury, the Supreme Court cannot inquire into the state of the evidence, further than to determine that the verdict is not without substantial evidence in its support.

5. Fraud ¶49—Proof of misrepresentations through agent admissible under pleading.

In an action by the seller against the buyer of land on account of his fraud in inducing her to make the conveyance on his terms, under a general allegation that the buyer made misrepresentations, it was competent to show that he made them through his agent, plaintiff's brother.

6. Evidence ¶159—Any one may testify as to whether there is a document containing a particular matter.

Where the controversy is over the contents of a written document, the document itself is the best evidence; but where the inquiry is whether there is a document containing a particular matter, as a rule or regulation of the United States requiring an Indian allottee, on an allotment of land to him in fee, to pay immediately the government charges for a water right thereon, any one having knowledge of the fact, as the supervisor of irrigation in the Indian service of the United States, may testify thereto.

7. Trial ¶295(3)—Omission in instruction immaterial, where supplied in instructions as a whole.

Instructions must be read as a whole, and omission of a particular matter from one charge was not misleading, where elsewhere in its instructions the court in positive and direct language emphasized such matter.

Department 1.

Appeal from Superior Court, Yakima County; Geo. B. Holden, Judge.

Action by Hattie Purns Hoptowit against Reese B. Brown and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Preble McAulay & Meigs, of Yakima, and Ellis & Evans, of Tacoma, for appellants.

Griffin & Griffin, of Seattle, for respondent.

FULLERTON, J. On May 5, 1919, the respondent, Hattie Purns Hoptowit, conveyed by warranty deed to the appellant Reese B. Brown an 80-acre tract of land situated on the Yakima Indian reservation. In this action the respondent recovered in damages against the appellants based on the ground that she had been induced to sell the land at much less than its actual value by false and

fraudulent representations made by the appellant Reese B. Brown, and confirmed by her brother, whom the appellant had hired for that purpose. The appeal is from the judgment entered.

The first assignment of error questions the sufficiency of the complaint, and it is necessary to notice its allegations. In the complaint it is alleged that the respondent is an Indian woman, of very limited education, wholly inexperienced in business affairs; that shortly before the execution of the deed she had been left a widow; that the land in question had been allotted to her by the government of the United States many years before the execution of the deed; and that a fee patent had been issued to her for the land, but shortly before such time, a fact which she did not then know. It is further alleged:

"That on or about the 5th day of May, 1919, the plaintiff was then sick and confined in the St. Elizabeth Hospital, in the city of Yakima, Yakima county, Wash., and had shortly theretofore been confined, and was very weak and in ill health, both in body and mind. That at about 4 o'clock in the afternoon of said day the plaintiff's brother, Phillip Purns, upon whom the plaintiff had relied for advice in business transactions, and in whom the plaintiff had and reposed full confidence, came to plaintiff and informed plaintiff that the defendant Reese B. Brown desired to purchase from the plaintiff said lands above described, and that he was willing to pay therefor the sum of \$14,000. That the plaintiff informed her brother, Phillip Purns, that she did not desire to sell said lands for \$14,000, or at all. That thereafter, and on the same night, and at about 9 o'clock p. m., the plaintiff's brother, Phillip Purns, and the defendant Reese B. Brown returned to the hospital, in which the plaintiff was then confined, and to the plaintiff's room, at which said time and hour the said Reese B. Brown wrongfully, fraudulently, maliciously, and with the intent and purpose of wronging, cheating, and defrauding this plaintiff out of said lands, and for the purpose of procuring a conveyance of said lands, and for the purpose of procuring a conveyance of said lands at much less than their real value, in the presence of plaintiff's brother, Phillip Purns, told the plaintiff that a fee patent to the lands hereinbefore described would soon be issued to the plaintiff. That as soon as said fee patent was issued to the plaintiff the plaintiff would be required to pay immediately to the United States government the sum of \$7,000 for a permanent water right for said lands, and that if said sum of \$7,000 was not paid immediately for said water right that the lands would be sold by the United States government to pay for said water right and taxes, and that the plaintiff would get very little, if anything at all, out of said lands, if said lands were so sold for the water right and taxes. That said defendant Reese B. Brown further told and represented to plaintiff that he was the only person who would buy said lands, except at a government sale, and that if the property was sold by the government the plaintiff would not receive to exceed \$4,000 therefor, and that

such sum as the plaintiff did receive would only be paid to her in small installments extending over a number of years. That said defendant Reese B. Brown further told plaintiff, for the purposes aforesaid, that if the plaintiff did not sell the lands to him and sign a deed therefor he would buy said lands of the United States government at the government sale, and that he could purchase said lands from the United States government at government sale for \$4,000. That said defendant Reese B. Brown further told the plaintiff, for the purposes aforesaid, that the reason the government was going to issue a fee patent to plaintiff was so they could immediately sell the said lands and retain from the sale thereof \$7,000 for the water right, and that if she did not sell and convey her lands to him that this plaintiff would lose all of her rights to said lands and would receive nothing therefor. That the said defendant Reese B. Brown further told the plaintiff, for the purposes aforesaid, that he was going away that night to South America, and that unless the plaintiff so sold and signed a deed to said lands conveying them to said defendant immediately that the sale could not be made at all and that the plaintiff would lose the said lands. That the said defendant Reese B. Brown also informed the plaintiff, for the purposes aforesaid, that the plaintiff's brother, Phillip Purns, and other Indians, had sold their lands to him at prices ranging from \$4,000 for 40 acres to \$8,000 for 80 acres, but that said lands so sold by said Indians to said defendant were worth twice as much as the lands of the plaintiff. That the said defendant Reese B. Brown also told the plaintiff, for the purposes aforesaid, that the reason why the lands upon the Tieton Project and in the Naches Valley were being sold as high as \$14,000 to \$16,000 was because the permanent water rights upon said lands were all paid, and that no lands similar to the plaintiff's were being sold for more than \$7,000 where the water rights were not paid for. That in said conversation at said time the said defendant Reese B. Brown, for the purposes aforesaid, frequently referred to plaintiff's brother, Phillip Purns, to corroborate his said statements, and his said statements were corroborated by the plaintiff's brother, Phillip Purns, at all such times."

In the succeeding paragraph of the complaint the truth of the representations are negatived by appropriate allegations, and it is further alleged therein:

"That the defendant Reese B. Brown wrongfully, fraudulently, and maliciously procured the assistance of plaintiff's brother, Phillip Purns, to aid him in securing a deed of conveyance of said lands from plaintiff, and to confirm his untrue, false, and fraudulent statements and misrepresentations, by paying to plaintiff's brother the sum of \$500, all of which was unknown to the plaintiff at said time, but has since come to the knowledge of the plaintiff."

It is further alleged:

"That the plaintiff's husband had left debts and funeral expenses amounting to approximately \$1,800. That plaintiff had no means

with which to pay said debts and expenses, and had no means for paying immediately the permanent water right upon said land. That she was very weak in mind and body, and very much distressed at said time, and especially by the representations and statements made by the said Reese B. Brown in the presence of, and confirmed by, the plaintiff's brother, Phillip Purns. That plaintiff relied upon said statements and representations so made by defendant Reese B. Brown, and confirmed by plaintiff's brother, and believed the same to be true, and at 11 o'clock at night, when the plaintiff had become so fatigued and distressed that she could no longer resist the solicitations and importunities of the said Reese B. Brown, she was induced to sign a deed of conveyance to the said Reese B. Brown, conveying said lands for the consideration of \$7,200. That said lands at said time were worth the full sum of \$20,000, and that plaintiff was wrongfully cheated and defrauded of the sum of \$12,800, and that plaintiff would not have signed said deed of conveyance, and would not have acknowledged the same, if plaintiff had not believed and relied upon the wrongful statements and representations, hereinbefore set forth, made by the said Reese B. Brown."

[1] The appellants argue, in support of this branch of the case, that the alleged false and fraudulent representations are divisible into two branches—misrepresentations of fact and misrepresentations of law; that in so far as they relate to facts they "predicate only of the future, and that they so plainly predicate merely Brown's opinion of matters, concerning which the sources of information were available to her as to him, and are either so obviously absurd or are so plainly of matters not under Brown's control that, as matter of law, an ordinarily prudent person would not rely thereon"; and that the representations of matters of law are not actionable under the general rule that every one is bound and presumed to know the law. But it is a familiar rule that a plaintiff is entitled to have his complaint, when questioned as to its sufficiency, tested by its allegations as a whole. It may be that no single one of the representations made would be in itself sufficient to deceive a person of ordinary prudence, yet their combined effect, when considered with the circumstances, may be sufficient to induce a person to act who usually possesses more than the ordinary caution. In this instance the surroundings are very effectually pictured, and enough is alleged to show that the respondent was never what the law would consider an ordinarily prudent person, and that she did not at the time possess even her usual normality. Clearly the law will not under these circumstances hold her to a very strict accountability, and will relieve her from her voluntary acts, whereby she has been deceived and defrauded, on much slighter grounds than it would an ordinary person, or even herself, had she possessed her usual normality and

had not been deceived at the appellants' procurement by the criminal act of one in whom she had theretofore imposed and did then impose trust and confidence.

[2] Nor is it the rule that all fraudulent misrepresentations of future events, or all fraudulent misrepresentations of law, where a person is deceived thereby to his injury, are nonactionable. They are generally held so because they are in their nature matters of opinion, of which the one party is presumably as well informed as the other; but the exceptions are as well defined as the rule itself, and circumstances such as are here shown are generally held to constitute an exception. See *White v. Harrigan*, 9 A. L. R. 1041, and the annotations thereto.

[3] What we have said is based on the assumption that the appellants' contentions accurately reflect the allegations of the complaint. It seems to us, however, that the allegations with respect to matters of fact relate to past and existing facts, as well as facts that will happen in the future, and that the alleged misrepresentations of matters of law relate to questions of mixed law and fact, rather than to mere questions of law. On this theory the complaint should be sustained, even though it could be said that the rule of law we have applied is not pertinent to the specific charges.

[4] The respondent offered no evidence to sustain the allegations of her complaint relating to the Tieton Project, the sales of lands to the appellant by the respondent's brother and by other Indians, or the allegation that no lands similar to plaintiff's were being sold for more than \$7,000, whereon the water rights were not paid for, and the court expressly withdrew from the jury any consideration of these allegations when making up their verdict. It is argued that without these allegations the complaint does not state a cause of action; that proofs of the remaining allegations would in consequence be insufficient to prove a cause of action, and because thereof the court erred in denying the appellants' challenge to the sufficiency of the evidence. But we are clear that a cause of action was stated in the complaint aside from the allegations withdrawn, and it would follow that proofs of them would be sufficient to sustain a verdict. On the general challenge to the sufficiency of the evidence to sustain the verdict, the most that can be claimed is that the evidence was conflicting. While the examination of the evidence as a whole has convinced us that the jury could well have found for the other side, it has also convinced us that the verdict is not without substantial evidence in its support, and, since the action was one at law and triable by jury, this is as far as we are permitted to inquire.

[5] In the course of the trial, over the objection of the appellants, the court permitted

the respondent's brother to testify to certain representations made by the appellant Reese B. Brown, which Brown requested that he repeat to his sister, and to the fact that he did so repeat them to her. It is objected that this was error, because this is representation by procurement, and there is no such charge in the complaint. "In other words," to quote from the brief, "under a complaint alleging only representations by defendant's own mouth, over defendant's objections, the court permitted testimony of representation by procurement." But the representations, whether made by the appellant personally or by another through his procurement, are still the appellant's representations, and under a general allegation that he made them it is competent to show that he made them through his agent.

[6] The court permitted the supervisor of irrigation in the Indian service of the United States to testify that there was no rule or regulation promulgated by the United States which required an Indian allottee, on an allotment of land to him in fee, to pay immediately the government charges for a water right thereon. This was in support of the allegation of the complaint to the effect that the appellant Reese B. Brown had falsely represented that upon the issuance of such fee patent immediate payment for water rights would be exacted by the government. It is urged that this was error, but we see no objection to the testimony. Where the controversy is over the contents of a written document, the document itself is, of course, the best evidence; but where the inquiry is whether there is a document containing a particular matter, any one having knowledge of the fact may testify thereto.

[7] The court gave to the jury, among others, the following instructions:

"I charge you that the plaintiff is not required to prove that all of the representations alleged in her complaint were made, or that all of them were untrue, or that all of those alleged were made knowingly, falsely, and maliciously, with the intent to defraud the plaintiff as alleged. It is sufficient if the substance of the allegations alleged in the complaint and not withdrawn from your consideration were made by the defendant Reese B. Brown as alleged, that they referred to material facts and were made as positive statements of fact, that they were in fact untrue and known by the defendant at the time to be untrue, that they were willfully and intentionally made by the defendant to defraud and cheat the plaintiff by procuring a deed to the land described at less than its fair value, that plaintiff did not know they were false, but believed them to be true, and relied upon them as true, was by them fraudulently induced to sell the land at less than its true market value, and that plaintiff would not have sold the lands if such statements had not been made by defendant.

"If you find from clear and convincing evidence that at the time and place alleged in the

plaintiff's complaint the defendant Reese B. Brown made the statements to the plaintiff as alleged in plaintiff's complaint, that such statements were wrongful and untrue, and were then known by said Reese B. Brown to be wrongful and untrue, that they were made by him for the purpose of deceiving and defrauding the plaintiff as alleged, and to induce her to deed the land described to him for the use of defendants at less than its value, that said statements were made as positive statements of facts, that the plaintiff did not know said statements were untrue, but believed them to be true, and relied upon said statements, and was induced thereby to deed the property described to the defendant Reese B. Brown at less than it was then fairly and reasonably worth in the open market, then your verdict should be in favor of the plaintiff and against the defendants for such sum as you find from a fair preponderance of the evidence the property deeded was reasonably worth over and above the sum paid for it, together with interest on such sum you may so find from the 5th day of May, 1919, to date, at the rate of 6 per cent. per annum."

It is objected to these instructions that they take from the jury the question whether the plaintiff exercised that degree of care necessary for her to exercise before she can claim that she was induced to part with her property because of deceit practiced upon her, and that it is therein decided as matter of law that she did exercise such care. Standing alone, the instructions may be subject to the objection urged; but it is a familiar principle that instructions must be read as a whole, and elsewhere in its instructions the court in positive and direct language emphasized the very matter here thought to be omitted. The jury, therefore, could not have been misled, and this is the determining question.

It is also objected that the court erred in refusing to give certain requested instructions; but, without further reference to them, we are clear that no reversible error was committed by their refusal.

The judgment is affirmed.

PARKER, C. J., and BRIDGES, MACKINTOSH, and HOLCOMB, JJ., concur.

(116 Wash. 56)

PRICE et al. v. HUMPTULIPS DRIVING CO. et al. (No. 16103.)

(Supreme Court of Washington. June 1, 1921.)

1. Adverse possession §73—Log driving company's filing of plat and notice with Secretary of State did not initiate adverse claim against riparian owners.

Under Const. art. 1, § 16, filing by a log driving company of plat and notice with the secretary of state as required by law relative

to the driving of logs down a river, did not initiate an adverse claim against riparian owners, nor was it the assertion of a legal right necessary to support a prescriptive title.

2. Eminent domain §280—Riparian owners, who consented to and participated in acts of log driving company in causing artificial freshets for floating logs, cannot enjoin continued rise of freshets.

Where riparian owners and their predecessors for 20 years had notice that a log driving company was using the river in the exercise of its public service functions, and for more than 10 years observed the use of their lands by the log driving company and the erosion thereof by artificial freshets made to float logs, and used the freshets for their own logs without objection, they cannot enjoin the use of artificial freshets for floating logs.

En Banc.

Appeal from Superior Court, Grays Harbor County; H. W. B. Hewen, Judge.

Action by J. H. Price and another against Humptulips Driving Company and others. From judgment for defendants, plaintiffs appeal. Affirmed.

W. H. Abel, of Montesano, E. E. Boner, of Aberdeen, and M. J. Gordon, of Tacoma, for appellants.

Theo. B. Bruener, of Aberdeen, and John T. Welsh, of South Bend, for respondents.

MACKINTOSH, J. This is an action in equity, wherein the plaintiffs seek to enjoin the defendants from creating artificial freshets in the Humptulips river, and to prevent the change of the channel of that river, and to restrain the defendants from trespassing upon plaintiffs' lands which abut upon that river. The defendants claim the right to create the artificial freshets and to do the acts complained of, based upon prescription.

The Humptulips river rises in the Olympic Mountains and by a tortuous channel, through heavily timbered country, reaches Grays Harbor. The Humptulips is a meandered stream, and in its natural state was floatable for logs. In 1900 the defendant incorporated as a public service corporation for the purpose of driving logs down the Humptulips river, past and through the lands involved in this proceeding. Within the statutory time it filed in the office of the secretary of state the required plat and notice. In 1903 it had finished a splash dam on one of the branches of the river several miles above the plaintiffs' land. This dam has been continuously used since that time. In 1907 another splash dam was completed upon the other branch of the river also several miles above the plaintiffs' property, and likewise this dam has been in continuous operation since its completion. By means of these two dams the waters of the river were impounded and artificial freshets were created to assist in driving logs down the river. These artificial

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freshets have added to the natural erosion created by the current and have caused the river to encroach upon the plaintiffs' adjacent land. The defendant since 1900 has been upon the river, improving the channel, straightening its course, removing rocks and obstructions and doing other things necessary to facilitate the driving of logs, and in doing this has gone upon the banks of the river and has used donkey engines thereon for the purpose of sacking logs. All these things were necessary to the successful driving of the stream and have been done for more than ten years prior to the commencement of this suit.

The property in question here, prior to 1912, had been owned for many years by the Lytle Logging & Mercantile Company. In 1904, 1905, and 1906 this company logged into the river and consented to the defendant entering upon its lands, sacking logs and creating artificial freshets and changing the channel. In 1912 the Lytle Logging & Mercantile Company sold the property to the Intervener, Walker Timber Company, which was also engaged in logging, and which continued to consent to the use made of the land by the driving company, and the creation of artificial freshets, and this permission was never withdrawn until shortly before this action was instituted. In October, 1919, the Intervener contracted to sell the property to the plaintiffs, who, in November, 1919, started this suit.

The trial court denied the injunction on the ground that the defendant is a public service corporation, performing a public function, and that it had taken the lands of the plaintiffs for its corporate purposes, and that the taking had been complete for many years, and therefore the plaintiffs were not entitled to equitable relief. The court also found against the defendant's claim of prescriptive easement.

[1] Without a minute or detailed review of the testimony upon which the lower court came to the conclusion concerning the use of the plaintiffs' land by the defendant's employees and machinery and the encroachment upon the banks by the additional erosion caused by the artificial freshets, it is enough to say that a consideration of the testimony satisfies us that the trial court arrived at a proper conclusion, and was correct in holding that the defendant's claim of prescriptive right could not be sustained. The testimony satisfies us that the acts done by the defendant were done with the permission and the active acquiescence of the plaintiffs and their predecessors in interest; several written documents appear in the testimony which fortify this conclusion, and with the trial court we also agree in holding that the filing of the plat and notice with the secretary of state, as required, by law, did not initiate an adverse claim, nor was it the assertion of a legal right which is necessary to support a

prescriptive title. Article 1, § 16, of the state Constitution, prevents such filing from having the effect claimed for it by the defendant. As was said by this court in *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050:

"The landowner need do nothing before his property has been condemned by a municipal or public service corporation."

See, also, *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Nicomien Boom Co. v. North Shore, etc., Co.*, 40 Wash. 315, 82 Pac. 412. The filing of the notice and plat gave the defendant only the prior right of location on this stream for driving and booming purposes, and did not start the statute of limitations running against the plaintiffs or their predecessors, or initiate any right in hostility to their title.

[2] We do not agree, however, with the trial court in holding that this case falls within the operation of the rule announced where public service corporations, having taken possession of private property and constructed thereon improvements to be used in carrying on of public service, have been allowed to continue in the use of the property, and the property owner has been denied injunctive relief, and the corporation has been compelled to proceed to condemn. *Kakeldy v. Columbia & P. S. Ry. Co.*, 37 Wash. 675, 80 Pac. 205; *Dormese v. City of Roslyn*, 89 Wash. 106, 154 Pac. 140; *Habermann v. Ellensburg, etc., Co.*, 100 Wash. 229, 170 Pac. 571; *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911. The acts sought to be enjoined by this suit are not acts of taking which have already occurred, but acts which are likely to occur by the continued operation of the defendant. In other words, the plaintiffs are not seeking to enjoin the defendant from the use of the property which it has already taken without condemnation, but is seeking to enjoin the future infliction of damages. The plaintiffs are not in the position of the plaintiffs in the cases just above cited, but are in the position of those who, seeing a public service corporation about to enter upon their property, seek to enjoin the corporation before it has taken possession. Although upon the legal principles which we have thus discussed, we are in agreement with the plaintiffs' contention, we cannot agree that they are entitled to the relief which they seek. The granting of equitable relief is not a matter of right, but of grace, and before plaintiffs are entitled to the favorable decree of equity there must be justice in their claim. After the plaintiffs and their predecessors have acquiesced in the conduct of the defendant and public interest will be jeopardized by granting the relief prayed for, and such a grant would cause serious public inconvenience or loss without a corresponding advantage of the plaintiffs, the chancery court will not enjoin. Where under mutual agreement the plaintiffs, knowing all

the facts, having long delayed in entering the portals of the equitable tribunal, and that delay has been without good excuse, the doors are closed against them, for to allow them at this time to enter would result in greater damage to the defendant than that which the plaintiffs would suffer.

Here we have a situation where for 20 years the plaintiffs and their predecessors had notice that the defendant was using the stream in the exercise of its public service functions, where for more than 16 years they have observed the use of their lands by the defendant, and the erosion thereof by the artificial freshets, and not only have they stood by in silence, but they have actively participated in the enterprise. It was to their advantage that the streams and the contiguous banks be so used. They have taken the benefit of the operations of the defendant for the purposes of getting their timber to market, they have been, in effect, joint adventurers with the defendant in the opening up of this timber area. Not until they had reaped the benefits of this association do we find them objecting to the operation. Their conduct does not appeal to the conscience of the chancellor. By their own pleadings and proof they established that all the acts heretofore done have been done with their permission, and by these pleadings and proof they defeat the defendant's claim of a prescriptive right, and by these same pleadings and proof they establish the inequity of their own position. In 1903 the defendant built the first dam and the second in 1907. Both of these entailed the expenditure of large sums of money, both have been operated continuously since their construction; large sums of money have also been expended in straightening the river, in removing obstructions and similar work. The plaintiffs' predecessors have consigned their logs to the defendant conscious that their own lands were being eroded by the artificial freshets, and that the Humpulips river was being devoted to a public purpose. During that time the plaintiffs' predecessors often requested additional artificial freshets, so that their logs might be more quickly brought to market. The logs of many other landowners on the river were and are being consigned to the defendant. To now enjoin the defendant would result in shutting down many logging camps, the discontinuance of the employment of many men, thousands of logs in the river would be kept from the market, milling companies would be hampered by lack of logs, and public interest demands that no such untoward results be allowed for the benefit of one who, after all these years of acquiescence and knowledge and benefits received, now seeks the termination of this condition.

In 1909 the Lytle Logging & Mercantile Co., in an action against the defendant, reported in 60 Wash. 559, 111 Pac. 774, sought damages for changing the course of the river

across a portion of the land involved in this suit. That action by its complaint sought damages for future as well as past erosions to the portion of the land, but the judgment does not disclose whether future erosions were compensated for. If they were, the plaintiffs, of course, cannot again recover for them, and all the lands affected should have been included in the action. *Kline v. Stein*, 46 Wash. 546, 90 Pac. 1041, 123 Am. St. Rep. 940; *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566; *Brechlin v. Night Hawk Mining Co.*, 49 Wash. 198, 94 Pac. 928, 126 Am. St. Rep. 863. In any event, having then elected to proceed at law, and the use of the river being the same now as it was at the time the suit was begun in 1909, it would be inequitable to now compel the defendant to stop its continued use.

As the trial court said:

"The large cost of defendant's dams, large quantities of logs in the river requiring immediate transmission, are elements which the court should consider in granting or refusing an injunction. While the holding is that the action of the defendant had been by sufferance, nevertheless, the plaintiffs have endured the same for a long period, and should not now be allowed to peremptorily interrupt the business of the defendant driving company at this time by injunction." *Mahoney Land Co. v. Cayuga Investment Co.*, 88 Wash. 531, 153 Pac. 308, L. R. A. 1916C, 939, Ann. Cas. 1916C, 1234; *Robertson v. Seattle*, 87 Wash. 137, 79 Pac. 610.

"The equitable doctrine of acquiescence is freely applied to cases involving eminent domain rights. The underlying principle of the constitutional provisions allowing the taking of private property is that it is to be devoted to public use. Hence, when a landowner stands by until the public has acquired an interest in the use, there is strong reason for applying the doctrine, in addition to the familiar grounds covering its application to other cases. The United States Supreme Court in a recent case has laid down the rule in no uncertain language: 'If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal.' Accordingly, when a landowner stands by and makes no attempt to enjoin a railroad company from building over his land until large expenditures have been made, or the road has been completed, injunctive relief will be denied, and the party will be left to his remedy at law for damages. The same principle applies to the laying of pipes or

to a taking for any other public use. And although permission is granted to take upon the distinct understanding that compensation is to be made, an injunction will not issue, after the work has been done, for the purpose of enforcing payment. The doctrine also applies to cases involving the rights of railroads in streets." 5 Pomeroy's Equity Jurisprudence, § 1886; McCarthy v. Bunker Hill, etc., Co., 184 Fed. 927, 92 C. C. A. 259; 22 Cyc. 778, 784; Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 154 Pac. 450; Woodard v. West Side Mill Co., 43 Wash. 308, 86 Pac. 579.

"An injunction is an extraordinary remedy, and does not follow as of right even when a case of wrongful act is made out on one side and consequent injury on the other. In equity a decree is of grace rather than of right, and the court will always consider whether it will not do a greater injury by enjoining an act than would result from permitting the act to continue and leaving the party injured to his remedy in damages." Ferry-Leary Land Co. v. Holt & Jeffery, 53 Wash. 584, 102 Pac. 445.

For the reason that we find no equity in the plaintiffs' action, it is dismissed.

The judgment of the lower court is affirmed.

PARKER, C. J., and FULLERTON, TOLMAN, MITCHELL, and MAIN, JJ., concur.

(116 Wash. 27)

CONGER v. PIERCE COUNTY et al.
(No. 16310.)

(Supreme Court of Washington. May 28, 1921.)

1. Navigable waters ¶6—Statute relating to improvement, confinement, and protection of rivers and banks held not to contemplate improvement to make more navigable.

Laws 1913, p. 156, authorizing counties to contract together for administrative and financial co-operation in the improvement, confinement, and protection of rivers, and the banks, etc., does not contemplate an improvement for the purpose of making a stream more navigable, and the law applicable to improving navigable streams in aid of navigation was not involved in an action for damage done by erosion to lands by reason of work done under such statute.

2. Eminent domain ¶2(10) — County liable for erosion caused by improving navigable stream to prevent overflow.

A county, which straightens and otherwise improves a navigable stream under Laws 1913, p. 156, for the purpose of preventing it from overflowing its banks and thereby doing damage to public property, is liable to a landowner if, because of such improvements and the manner in which they are made, his property is eroded or washed away, since private property cannot be taken or damaged without compensation, in view of Const. art. 1, § 16.

3. Waters and water courses ¶171(1) — Landowner liable for erosion of property of another by change in stream.

While a private individual has a right, under certain circumstances, to protect himself against overflow, surface, and outflow waters, he cannot so change a stream, in an effort to protect his own property, as that he will thereby flood or erode the property of some one else.

4. Eminent domain ¶69—Property not to be damaged without compensation.

The state itself cannot take or damage private property for a public use, without compensating the owner, nor can it authorize a taking or damaging which is prohibited to it, under Const. art. 1, § 16.

5. Constitutional law ¶81 — Eminent domain ¶2(1)—Police power permits state to prevent things harmful to society, but does not authorize taking of property for public use.

The police power is an inherent power in the state, which permits it to prevent all things harmful to the comfort, welfare, and safety of society, and is based on necessity, exercised for the benefit of the public health, peace, and welfare, and regulating and restricting the use of private property in the interest of the public is its chief business, and is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public; but it does not authorize the taking or damaging of private property in the sense used in the Constitution with reference to taking such property for a public use.

6. Eminent domain ¶302—Erosion held direct result of act of county in straightening channel of river.

In an action against counties for damages for erosion of land, where it appears defendants' engineers must have known that improvements would cause plaintiff's property to be eroded and probably washed away, it could not be said that the damages were so remote and disconnected with the improvement of the river as to be purely incidental or consequential.

Holcomb, J., dissenting.

En Banc.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Henry Conger, as receiver of the Tacoma Meat Company, against Pierce County and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Davis & Neal, of Tacoma, for appellant.

J. W. Seiden, John A. Sorley, and F. D. Nash, all of Tacoma, and Malcolm Douglas, Howard A. Hanson, and Bert C. Ross, all of Seattle, for respondents.

BRIDGES, J. This was an action to recover damages caused by certain erosions, the result, it is alleged, of changes in and improvements of the Puyallup river, made by the defendants, which river, in part, forms the boundary line between the defendant coun-

ties and empties into Commencement Bay, at or near Tacoma. The complaint alleged, and the plaintiff's testimony tended to show, the following facts.

On December 17, 1917, and for a number of years prior thereto, the Tacoma Meat Company, a corporation, owned a small tract of land bordering on the Puyallup river, near its mouth, on which land it had erected various buildings in which it had carried on a general slaughtering and packing establishment. Within these buildings were considerable quantities of valuable machinery and other personal property. Prior to the making of the improvements hereinafter mentioned, the Puyallup river was a tortuous, navigable stream, which had been in the habit of overflowing its banks during the rainy seasons, and thus doing much damage to the bridges, roads, and other public property of the defendants. In 1913 the Legislature enacted a law which authorized any two counties, under certain circumstances, to jointly improve streams which flowed through both of such counties, or formed the boundary line between them, so as to correct, as far as might be, their habit of overflowing their banks and thereby causing damage. By virtue of this enactment the defendants entered into a contract, under date of January 19, 1914, for the purpose of straightening and deepening the channel of the Puyallup river and abating the flood tendencies. This contract formed a district within which such improvements should be made, and the plaintiff's property is located in the extreme northwesterly portion of such district.

After entering into the contract, the counties proceeded to make the improvements, and in many places they straightened the stream, and widened and deepened it, and placed various improvements along and upon the banks, with a view of keeping the waters from eroding them. A few hundred feet immediately above the plaintiff's property the river, previous to its improvement, took a wide bend to the southwest, and as the waters so ran they were in the habit of hitting the northeasterly bank at a point slightly upstream from the plaintiff's property, which act caused the waters to be deflected in such a way that very little, if any, erosion had occurred on the plaintiff's property in many years. In improving the stream the defendants eliminated the bend just mentioned, by causing the channel of the stream to be straightened, and as a result of such straightening, and the placing of concrete blocks on the banks for their protection, the waters of the stream were caused to come forcibly in contact with the bank on which plaintiff's property was situated, and during a high freshet in the winter of 1917, and after the defendants had completed their work of improving the river, there was such erosion of the plaintiff's lands as to cause its buildings

to lose their foundations and to be floated, together with their contents, out into Commencement Bay, or Puget Sound. The particular causes of the erosions are alleged to be the straightening of the channel in such manner as to throw the current of the stream against the river bank at the point of plaintiff's location, the placing of concrete protection on the bank opposite and a little above plaintiff's property in such way as to deflect the waters against the bank of the river where plaintiff's improvements were located, and the failure of the defendants to protect the banks along that part of the stream where plaintiff's property was situated.

When the plaintiff had rested its case, the trial court granted the defendants' motion to take the case from the jury and enter judgment dismissing the action. Later such judgment was made and entered, and the plaintiff has appealed. Since there was sufficient testimony to carry the case to the jury on the theory that respondents' acts had caused the damages suffered by appellant, we will henceforth speak of the damage as being caused by respondents, realizing of course, that, at best, it was a question for the jury.

[1] The arguments before this court have taken such a wide and varied range that it seems necessary for us at this time to show what the exact question before us is. In the first place, the appellant is not seeking any damage because its land and property were flooded. As a matter of fact, the waters at the time in question were so high as that all of plaintiff's property was flooded; but plaintiff seeks recovery only for damage done by erosion of his lands. In this way the direct question of damage by flooding is not involved. The testimony tends to show that the erosion was caused by such of the waters as were in the channel of the stream, and that the overflow waters did not cause any erosion. Again, although this stream is navigable within the improved district, we have concluded that the law applicable to improving navigable streams in aid of navigation is not directly involved. While the improvements made by the respondents may or may not have improved the stream for navigation, the purpose of the improvement was not in aid of navigation, but to correct the tendency of the stream to overflow its banks. The legislative enactment authorizing the counties to do this work (Laws 1913, p. 156) does not contemplate the improvement of the stream for the purpose of making it more navigable. Its title, which is as follows, quite correctly shows the purpose of the act:

"An act authorizing counties to contract together for administrative and financial co-operation in the improvement, confinement and protection of rivers and the banks, tributaries and outlets thereof, whose waters flowing into or through such counties work damage by inundation or otherwise, authorizing the levy of

taxes and the creation and disbursement of special funds for such purposes, delegating the power of eminent domain in aid of, and providing generally ways and means for the accomplishment of such purposes and the performance of such contracts."

[2] The direct question before us is whether a county which straightens and otherwise improves a navigable stream for the purpose of preventing it from overflowing its banks and thereby doing damage to the public property, where such improvements are made by virtue of express authority of the Legislature, is liable to a landowner if, because of such improvements, and the manner in which they are made, his property is eroded and washed away. The trial court stated its position, and, as we understand it, that of the respondents, in the following language:

"The Puyallup river, at the point in controversy, is a navigable and tidal stream. The state in its sovereign right is owner of the bed and banks and body of the stream, and as such owner may make such changes in the course of the river, and may improve the same by widening or deepening or straightening a channel, or in any other manner it may see fit, and it is not liable to the owner of the shore land for any damage that may result from so doing, either directly or indirectly. It owes no duty to the shore landowner to protect him from resulting damage on account of any improvement the state may make upon its own property in the banks or bed of the stream, and the shore landowner has no right to any protection from the result of the state's acts in dealing with the river channel and the waters flowing therein. * * *

The parties to the action have elaborately discussed the law of outlaw, or surface, waters. In our opinion, those questions are not in this case, and to undertake to discuss them would be to create confusion in a question already sufficiently difficult. The appellant is complaining only of the action of those portions of the waters which were within the bed of the stream. It is not complaining of any overflowed, outlaw, or surface waters. Certainly, so long as the waters are confined to the bed and banks of the stream, they cannot be outlaw waters.

[3] It seems certain that had a private individual or private corporation caused the damage which the appellant alleges, there would be a liability. While a private individual has a right, under certain circumstances, to protect himself against overflow, surface, and outlaw waters, he cannot so change the stream, in an effort to protect his own property, as that he will thereby flood or erode the property of some one else. It seems to us that the authorities are quite unanimous in this regard. A few of them are as follows: *Judson v. Tide Water Lumber Co.*, 51 Wash. 164, 98 Pac. 377; *Johnson v. Irvine Lumber Co.*, 75 Wash. 539, 135 Pac. 217; *Valley R. R. Co. v. Franz*, 43 Ohio St. 623, 4 N. E. 88;

Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; *Freeland v. Penna. R. R. Co.*, 197 Pa. 529, 47 Atl. 745, 58 L. R. A. 206, 80 Am. St. Rep. 850; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Bowers v. Miss. R. R., etc., Co.*, 78 Minn. 393, 81 N. W. 208, 79 Am. St. Rep. 395; *Morton v. Ore. Short Line Ry. Co.*, 48 Or. 444, 87 Pac. 151, 1046, 7 L. R. A. (N. S.) 344, and note, 120 Am. St. Rep. 827; *Town of Jefferson v. Hicks*, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214, and note.

But respondents contend that when they improved this river they were acting under direct legislative authority, and that what they did was for the state, and that when the state, either directly or through its appointed agents, acts for the good of the public, it cannot be made to respond for damages which may result to the private individual. They advocate the doctrine that the private individual, under such circumstances, must suffer for the public good. A wilderness of authorities are cited both in support of and against this proposition. It seems to us that a recurrence to certain fundamental principles may assist us in reaching a correct conclusion. One of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties against the demands and aggressions of the public. No better illustration of the progressive growth of this principle can be found than that contained in our various state Constitutions with reference to the taking of private property for a public use. It has been said that this power is a necessary incident to government, and was before and did not grow out of Constitutions. If so, the federal constitutional provision that private property should not be taken for a public use without compensation being made was but a written expression of a right which already existed, being placed in the Constitution for the purpose of emphasizing the desire to protect the rights of the individual. The national Constitution and the Constitutions of the earlier states went no farther than to provide that private property should not be taken for public use without compensation being made. Later Constitutions added to these provisions the idea that the compensation must be made before the taking is accomplished. Still later Constitutions, including that of the state of Washington, added an additional element, to wit, that private property may not be taken or damaged for the public use without compensation being first made. Article 1, § 16, State Constitution. It is true that this is not an eminent domain proceeding, but the principles of law involved in the power to take private property for a public use are involved here, because respondents are seeking to justify the damage alleged to have been done by them on the theory that

they were acting by virtue of law, and as an arm of the state, and for the use of the state, and for the public good.

[4, 5] Since, therefore, our Constitution expressly forbids the taking or damaging of private property for a public use, except upon just compensation first made, on what theory can respondents be relieved from any damage to appellant's property as a direct result of the improvements which were made in the Puyallup river? Certainly not simply because they were acting as an arm of the state, or alone because they were acting for the good of the public, or simply on the theory that the individual must suffer for the public good. To hold that they would be relieved on any of these grounds would be entirely to disregard the express provisions of our Constitution. The state itself cannot take or damage private property for a public use, without compensating the owner; nor can it authorize a taking or damaging which is prohibited to it. The only other principle of law under which respondents might be relieved would be the police power of the sovereign, because the only ways known to the law, whereby private property may be taken or damaged by the public, are by the principles of eminent domain or those of the police power. (If there may be a taking by taxation, that principle does not interest us here.) Indeed, it is the police power theory upon which respondents seem most strongly to rely. It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of Constitutions. It is easy to understand the principles upon which the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with nor antagonistic to the rules of law concerning the taking of private property for a public use. Because of its elasticity, and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state, which permits it to prevent all things harmful to the comfort, welfare, and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace, and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking or damaging of private property in the sense used in the Constitution with reference to taking such property for a public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoy-

ment, or, if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public. Lewis on Eminent Domain, § 6, writes of this subject:

"Every one is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this last duty which pertains to the police power of the state so far as the exercise of that power affects private property. Whatever restrains the Legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking, an exercise of police power, and not of eminent domain. But the moment the Legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power."

In the case of *Askam v. King County*, 9 Wash. 1, 38 Pac. 1097, speaking of police power, this court said:

"* * * While it is undoubtedly true that in extreme emergencies the rights of private parties as to property must yield to the requirements of the public, yet to authorize such interference the emergency must be such as to make the action necessary."

The specific question, then, is: Were the respondents in the exercise of the police power in making the improvements they made in the river in question? Our answer must be in the negative. The legislative act under which they made the improvement is entirely bare of any expression which would indicate that the Legislature considered that public necessity demanded or required the making of the improvement. Section 1, c. 54, p. 156, Laws 1913, being the act by virtue of which these improvements were made, provides that whenever any river shall flow in part through two counties, or shall form the boundary line between them, "* * * and the waters thereof have in the past been the cause of damage, by inundation or otherwise, to the roads, bridges or other public property situate in or to other public interests of both such counties, or the flow of such waters shall have alternated between the said counties so at one time or times such waters shall have caused damage to one county and at another time or times to the other county, and it shall be deemed by the boards of county commissioners of both counties to be for

the public interests of their respective counties that the flow of such waters be definitely confined to a particular channel, situate in whole or in part in either county, * * * then the counties interested may jointly make the desired improvement. The act provides that the expense of making such improvement shall be raised by an annual tax on all the property in the county, which tax is to be levied and collected as any other county tax. The act nowhere intimates that the counties would be relieved from any damages that may be done to private property; on the contrary, they are authorized to exercise the power of eminent domain for the purpose of acquiring lands on which the river may be straightened. The contract between the respondents, under which the work was done, directly recognizes that the river in the past has overflowed its banks and thereby damaged the roads, bridges, and other private property of the two counties, and that because thereof litigation between them had arisen, and that the purpose of the contemplated improvement is to settle such pending litigation and make improbable future suits, and to avoid future damage to the roads and bridges of the two counties. It will thus be seen that this improvement was not made to preserve public health, peace, morals or welfare; it was not done to reclaim large tracts of land which otherwise might have been a waste; the idea of impelling necessity, which seems to be the chief ingredient of the police power, is entirely absent. Respondents cite many cases which they contend support them in their argument of nonliability. While we have carefully read all of them, we cannot here take the space to digest them, nor even cite all of them. The leading ones are *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; *Cubbins v. Miss. Riv. Comm.*, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041; *Bass v. State*, 34 La. Ann. 494; *Hughes v. U. S.*, 230 U. S. 24, 33 Sup. Ct. 1019, 57 L. Ed. 1374, 46 L. R. A. (N. S.) 624; *McCoy v. Board of Directors*, 95 Ark. 345, 129 S. W. 1007, 29 L. R. A. (N. S.) 396; *Bedford v. U. S.*, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414; *Gray v. Reclamation Dist.*, 174 Cal. 622, 163 Pac. 1024.

The decisions in some of these cases are based upon constitutional provisions, which only prohibit the taking of private property without compensation, and are therefore, at least to that extent, not in point, in view of our constitutional provision. Others of the cases cited involve improvements made in aid of navigation, and are not in point or material here. Others of the cited cases arise in instances where the state, or some subdivision of it, has made improvements in streams solely for the purpose of preventing them from overflowing their banks, and by such improvements reclaiming or saving to the state and its people large tracts of land,

which are essential to the welfare of the public. Of this class, the case of *McCoy v. Board of Directors*, supra, concerning the Arkansas river, and *Gray v. Reclamation District*, supra, concerning the Sacramento river, may be considered leading cases. The last-cited case is particularly elaborately considered by the California Supreme Court. The reclamation district in that case built dikes, levees, and other works purely for the purpose of confining the waters of the Sacramento river within its banks, in order to reclaim very extensive tracts of otherwise valueless lands. Because of such improvements the plaintiff's lands were overflowed and damaged. The court applied the police power to these facts and held the district was not liable. Without approving or disapproving the conclusion of the court in that case, and in others along the same line, they are easily distinguishable from the case at bar. In those cases there are elements on which the police power is rightly based, but which facts are entirely absent from the case at bar. There the controlling purpose of the improvement was to reclaim and save to the people large tracts of rich lands which, because of inundation, were worthless. To that extent the public welfare was involved. Here the controlling purpose was the protection of the roads and bridges of the respondent counties. Neither the state nor the people of the state or counties were interested in the improvement, except in a very indirect way and as taxpayers.

We are confident that any damage that may have been done by the respondents cannot be excused under any reasonable interpretation of the law of police power. While no cases exactly in point have been cited or found by us, the following are a few of a great number which, in principle, support our views: *Burroughs v. Grays Harbor Boom Co. & Humptulips Driving Company*, 44 Wash. 630, 87 Pac. 937; *Askam v. King County*, supra; *Ordway v. Village of Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835; *Noonan v. City of Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Bradbury v. Vandalia Levee & Drainage Dist.*, 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904; *Barden v. Portage*, 79 Wis. 126, 48 N. W. 210; *Town of Jefferson v. Hicks*, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214; *Lewis, Eminent Domain*, §§ 115, 285, 306.

In the case of *Burroughs v. Grays Harbor Boom Co. & Humptulips Driving Company*, supra, the facts were that the driving company had built several splash dams for the purpose of creating artificial freshets in order to assist in the driving of saw logs down the river towards market. The testimony showed that these artificial freshets caused Burroughs' lands to be eroded. The latter by his action sought, among other things, to enjoin the creation of artificial freshets because of the damage they did to his lands. Substantially

the same argument was made by the driving company in that case as is made by the respondents here. It was there contended that the driving company was a quasi public corporation, directly authorized by legislative act, to create artificial freshets for the public good, and that it could not be held liable for damages caused by them. This court refused to adopt that view, and held that, if the driving company caused Burroughs' lands to be eroded by its artificial freshets, it would be liable therefor in damages. Answering this argument, Judge Dunbar, speaking for the court, said:

"This provision of the fundamental law [our constitutional provision with reference to taking of private property for public use] was construed by this court, in *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, and in many subsequent cases, to mean just what it said; and it can make no possible difference whether the property abuts on a street or river, or whether the invader of that right is a municipality, an individual, or a boom company. The constitutional guaranty applies equally in both cases."

Why, indeed, on general principles, should not the counties be liable if the damage to appellant is the direct result of the changing of the river channel and the currents of the stream? The counties were protecting themselves and their roads and bridges. May they do this in such a way as to injure private property without becoming liable therefor? Certainly not. They are in no better position than would be an individual who should do exactly the same thing. By the legislative authority they had a right to straighten the stream and change the currents thereof, but that legislative authority did not absolve them from liability for such damages as might directly result from such improvements.

[8] But respondents contend that, in any event, they are not liable here because the damage to appellant was not the direct result of improvements made by them, but was only what is sometimes termed indirect, or consequential, damages, for which there can be no liability. It is difficult to give any definition showing the difference between a direct and an indirect or consequential damage. This, however, may be easily shown by certain illustrations. Private property may be damaged and its value lessened because it is located close to some public building, such as a jail or hospital or public hall, yet such damage is purely incidental and not recoverable. The noise consequent on the operation of railroad trains upon private right of way may depreciate the value of adjoining private property and be an annoyance to those living in the immediate neighborhood, but such damage is purely consequential and is not recoverable. But the injury to appellant's property, if caused as contended for by it, cannot be

considered of this nature. The alleged erosion of its land, and thereby the destruction of its property, would be the direct result of the act of the respondents in straightening the channels of the river, and thereby changing the currents of the stream. There was testimony tending to show that respondents' engineers must of necessity have known that the improvements which they were making would cause the appellant's property to be eroded and probably washed away. Under these conditions it cannot be said that the damages are so remote and disconnected with the improvement of the river as to be purely incidental or consequential.

Briefly we hold that, if the damage in question was caused by the action of respondents in straightening the Puyallup river and thereby changing its currents, then the appellant is entitled to have its case submitted to a jury. It follows from what we have said that the trial court erred in taking the case from the jury.

The judgment dismissing the action is reversed, and the cause remanded for trial.

PARKER, C. J., and MACKINTOSH, FULLERTON, MAIN, TOLMAN, and MITCHELL, JJ., concur.

HOLCOMB, J. (dissenting). The foregoing opinion is an exceedingly able and admirable one, but I am unable to bring myself to concur in it. I agree with the conclusions of the trial judge quoted in the majority opinion.

I am firmly of the opinion that the act under which the work was done by the counties was an act under the police power. The improvements were certainly for the public welfare. It is assuredly in the interests of public welfare to improve the stream, so as to prevent flooding and destruction of county roads and bridges. If the safety of travel by the public is not the public welfare, it is difficult to conceive what would be.

It is determined that the Puyallup river is a navigable river. As such its sovereignty is in the state, the state having asserted absolute title and control of the beds, shores, and banks of navigable rivers. It is determined that the work by the counties was lawfully performed, and the counties had previously obtained the necessary rights of way and made compensation for any damage by reason of such taking and change of the channel of the stream. Therefore the damage to appellant, if attributable to respondents, is consequent upon a lawful act of respondents, and is *damnum absque injuria*. *Wiel, Water Rights*, § 248; *Dillon, Municipal Corporations* (4th Ed.) § 995; *Cooley, Constitutional Limitations*, p. 300; *Hill v. Newell*, 86 Wash. 277, 149 Pac. 951; *Schank v. Hines*, 192 Pac. 1016.

Other authorities could be cited from our own and other courts, but the above citations are sufficient to sustain my view.

I therefore dissent.

(116 Wash. 44)

WUNSCH v. CONSOLIDATED LAUNDRY CO. et al. (No. 16217.)

(Supreme Court of Washington. May '28, 1921.)

1. Pleading ¶237(8)—Amendment may change cause of action from tort to contract.

The statute providing that there shall be but one form of action for enforcement and protection of private right, the complaint, if alleging what was formerly denominated a tort, may, under the liberal statute of amendments, if the evidence tends to show a breach of duty or a breach of contract, be amended to conform thereto.

2. Appeal and error ¶236(1)—To complain of no continuance on amendment of complaint there must have been application.

While in case of amendment of complaint at trial, as in any other case, defendant has right to time to prepare to meet the new allegations, he making no demand therefor, but proceeding with the trial of the new issues, may not afterwards claim that he was prejudiced thereby.

3. Evidence ¶601(4)—Value of stock of new corporation some evidence of value of old corporation.

Evidence of the value of the stock of a new corporation is some evidence of the value of stock of an old corporation, for which the new corporation issued its stock "dollar for dollar."

4. Stipulations ¶14(12)—Inquiry on appeal as to value precluded by stipulation.

Inquiry on appeal as to value of stock, for conversion of which action was brought, is precluded by stipulation, made to allow omission of evidence from statement of facts, that if it be held on appeal that plaintiffs are entitled to money judgment, no question shall be raised as to the amount of such judgment as rendered by the trial court.

5. Corporations ¶590(1)—Corporation to which all property of another was illegally transferred liable to stockholders of the other.

Where some of the stockholders of an old corporation convey all its property, through the medium of trustees, holding merely the legal title, to another corporation, without compliance even with the forms of law, the new corporation is liable to nonparticipating stockholders of the old corporation for the value of their stock.

Department 1.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by C. Augustus Wunsch against the Consolidated Laundry Company and others. From a judgment against the named defendant, it appeals. Affirmed.

Chas. E. Swan, of Spokane, for appellant.
F. A. McMaster, of Spokane, for respondent.

FULLERTON, J. The respondent, Wunsch, instituted this action on behalf of himself and his assignors, O. C. Nelson, F. A. Nelson, Minnie Fletcher, and W. H. White, against the appellant Consolidated Laundry Company and others, to recover the value of certain shares of stock held by them in a corporation whose property it was alleged appellants had taken and converted to their own use. The trial court on the hearing dismissed the action as to the codefendants of the appellant corporation, and entered a judgment against it in the sum of \$874. This appeal followed.

The Hotel Laundry Company, the corporation whose property is alleged to have been converted, was organized in the early part of the year 1918 to do a general laundry business in the city of Spokane. Its chief promotor was one Charles Roberts, who seems to have been the active manager of the corporation during the months it engaged in business. To assist in the promotion of the corporation, Roberts engaged the services of the respondent and his assignors (with the exception of F. A. Nelson), agreeing to give them severally as compensation, in addition to a weekly wage, a certain number of shares of the corporation. On the organization of the corporation, pursuant to the agreement, shares of stock were issued to the person named in the following amounts; to Wunsch 50 shares; to O. C. Nelson, 20 shares; to Fletcher, 10 shares; and to White, 50 shares, each of such shares having a face value of \$10. F. A. Nelson, to whom were issued 150 shares, paid for his stock by turning over to the corporation certain laundry equipment which he had theretofore used in the operation of a laundry owned by himself individually. The number of shareholders on the organization of the corporation totaled about 90.

The corporation continued in business until the month of October of 1918. Whether it had been a profitable or a losing venture the evidence is in dispute. It had, however, during this time accumulated property of a considerable value, and had incurred a considerable debt. In the month named, a number of the stockholders of the corporation, some of whom were trustees, met to consider its affairs. This meeting was not held pursuant to a call of the trustees or pursuant to any notice given, and it does not appear that a majority of the stock of the corporation was represented thereat. At the meeting, the stockholders present agreed to abandon the corporation and the business as conducted by it, organize a new corporation with an increased capital stock, turn over to the new corporation all of the property assets and good will of the existing corporation, and require the new corporation to assume the debts of the old. It was agreed also that stock of the new corporation should

be issued to the stockholders of the old "dollar for dollar." Pursuant to this agreement the appellant corporation was organized. To it was transferred all of the property of the old corporation, and it assumed and agreed to pay all of the debts of the old corporation. Shares of stock of the new corporation were issued and delivered to all the shareholders of the old corporation in proportion to their holdings therein, save and except to the respondent and his assignors. No stock was delivered or tendered to them, for the reason that the organizers of the new corporation, after investigation, concluded that the stock issued to them by the old corporation was issued without consideration.

From the evidence introduced at the trial, the court found that the respondent and his assignors were holders for value of the stock issued to them by the first of the corporations, that it had a value at the time of the transfer in the sum of \$874, that the transfer of the property of the first corporation to the second was not in conformity with the rules of law, and was made without the knowledge or consent of the respondent or his assignors, and concluded as matter of law that the respondent was entitled to recover.

[1, 2] In the course of the proceedings, the court allowed the respondent to amend his complaint. It is urged that this was error, the reason given being that the amendment changed the cause of action from one sounding in tort to one sounding in contract. But we cannot conceive that the amendment had this effect. If the form of the action was tort prior to the amendment, it was so afterward. The amendment but added some additional facts brought out in the evidence at the trial, which were not contained in the original complaint. If, however, we were to concede that the amendment had the effect contended for, we could not concede that it would be fatal to the right of recovery. In this state it is provided by statute that there shall be but one form of action for the enforcement and protection of private rights, and it is especially enjoined by statute what the complaint shall contain. One of the requirements is that it contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. Manifestly, under the liberal provisions of our statute relating to amendments, which even permits amendments in this court, if the complaint alleges what was formerly denominated a tort, and the evidence tends to show a breach of duty or a breach of contract, the complaint may be amended to conform therewith. The defendant has, of course, in such a case, as he has in the case of all amendments to complaints, the right to time sufficient to prepare to meet the new allegations, but he cannot, if he does not demand the right, but tries the cause on the new issues, afterwards claim that he was prejudiced thereby.

[3] In addition to showing the exchange of the stock in the old corporation for stock in the new, on a basis of par value, the trial court permitted the respondent to show the par value of the stock in the new corporation, and that none of it had ever been sold for less than its par value. It is contended that, because the question at issue was the value of the stock in the old corporation, this evidence was inadmissible. But the evidence clearly had some tendency to show the value of the stock in the old corporation, and the trial court had the right, and this court would have the right, were the question before us, to consider it for that purpose.

[4] It is next contended that the evidence overwhelmingly shows that the first of the corporations was insolvent, and that its stock at the time of the transfers had no value whatsoever. But the appellants are concluded by the record from urging the question in this court. Prior to the preparation and settlement of the statement of facts, in order that the testimony introduced at the trial relating to the character and value of the property of the first corporation transferred to the later one might be omitted therefrom, the parties stipulated:

"Now therefore it is hereby stipulated and agreed by and between the appellant and respondent, through their respective attorneys, that if the Supreme Court shall hold that the plaintiff, or either or any of his assignors, is entitled to recover a money judgment against the appellant herein, then and in that event no question shall be raised by either party as to the amount of such money judgment as rendered by the trial court."

Since the amount and value of the property the corporation had on hand at the time of the transfer was a material element in determining the value of its stock at that time, the stipulation concludes an inquiry in this court as to its value.

[5] The final contention is that the respondent has no cause of action against the appellant in any event. The argument is this (we quote from the brief):

"If the respondents have a cause of action at all, whether for conversion or in contract, their right of action is against the individuals whose actions it is claimed were wrongful and illegal, and they are not entitled to a judgment of any kind against the appellant. The alleged conversion occurred before the appellant corporation was organized, and neither the corporation nor its stockholders were liable for wrongful acts committed by persons in their individual capacity. The same situation exists with respect to the alleged contract, as set forth in plaintiff's second amended complaint. If such an agreement was made, it was the act of the individual defendants, and not the act of the appellant corporation, which was not then in existence."

In explanation of some of the facts here asserted which might be otherwise obscure, it

may be stated that the stockholders and trustees of the first of the corporations, at the time they concluded to make the reorganization, transferred all of the property of the corporation to trustees, to hold the property pending the organization of the new corporation, and that the property was conveyed to the new corporation through the medium of these trustees. But the second corporation can claim no immunity based on these facts. The trustees acquired no interest by the transfer other than the bare legal title to the property, and the transaction, in so far as the rights of the respondent and his assignors are concerned, was equivalent to a direct transfer from the one corporation to the other. On the principal question, it is said by Fletcher in his *Cyclopedia Corporations*, vol. 7, § 4798, that—

“Where a sale of all corporate property is illegally made by corporate officers, without consent of the stockholders, a dissenting stockholder may pursue the purchasing company for the value of his stock.”

In *Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed. 577, 27 Fed. 625, 23 Blatchf. 517, one Villard organized a new corporation, purchased and caused to be transferred to it a majority of the stock of the Oregon Steam Navigation Company. Thereupon Villard and the new corporation elected, as directors of the Oregon Steam Navigation Company, the directors of the new corporation, and caused the directors to make a sale of the property of the old corporation to the new corporation at an inadequate price, and to dissolve the old corporation. At the suit of a minority stockholder in the old corporation, it was held that the directors, by their ownership of the majority of the stock and the exercise of the powers of the corporation, were trustees of the property, and that their sale of the property to the new corporation at an inadequate price was a breach of the trust, rendering them and the new corporation liable for the actual value of the interests of the plaintiff in the old corporation; and this notwithstanding the defendants had the right, under the existing statutes, to dissolve the corporation and distribute its assets, and notwithstanding they proceeded in so doing in compliance with the statutes. See, also, *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765, 75 C. C. A. 631; *Tanner v. Lindell Ry. Co.*, 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534.

The sale in this instance was made without even the forms of law, and the corporation is liable, because it was the beneficiary of the transaction, receiving property thereby to which it was not justly entitled.

The judgment is affirmed.

PARKER, C. J., and HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

(115 Wash. 644)

ROSTEIN v. HINES, Director General of Railroads (LAMKEN, Intervener),
(No. 16203.)

(Supreme Court of Washington. May 19, 1921.)

1. Estoppel ⇐94(1)—Participation in sale of rails by purchaser held to estop seller from claiming that purchaser could not convey title.

Where a purchaser of railroad rails from a railroad company participated in a sale of such rails to another before he himself had obtained possession thereof, he was estopped to claim that such other did not have power to convey title.

2. Sales ⇐191—Where sale for trade acceptances, title passed on execution of contract irrespective of bankable character of acceptances.

Where a sale of railroad rails was not for cash, but the price was to be paid and was paid by trade acceptances of a purchaser, falling due 30 and 60 days after the sale, title passed upon the execution of the contract and the acknowledgment therein of payment of the purchase price by receipt of the trade acceptances, irrespective of the bankable character of the acceptances.

3. Sales ⇐403—Evidence held to show value of rails was \$40 per ton.

In purchaser's action against seller to recover rails purchased, evidence held to show the value of the rails was \$40, not \$65, per ton.

Department 2.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by J. Rostein against Walker D. Hines, Director General of Railroads, wherein Victor Lamken intervenes. Judgment for the plaintiff, and intervener appeals. Reversed in part and remanded, with directions.

H. R. Lea, of Tacoma, for appellant.

Reynolds, Ballinger & Hutson, of Seattle, for respondent.

PARKER, C. J. By this action, as originally commenced in the superior court for King county, the plaintiff, Rostein, sought recovery from the United States Director General of Railroads, in charge of the lines of the Chicago, Milwaukee & St. Paul Railway Company, of five carloads of used railroad rails, which rails had been sold as scrap rails by the duly authorized representative of the Director General to Victor Lamken, who, in turn, as it is claimed, had sold the rails to his brother, Arthur Lamken, who in turn had sold the rails to the plaintiff; the rails not having been delivered by the Director General to Victor Lamken, though paid for by him, but being held by the Director General subject to the directions of Victor Lamken as to delivery under his purchase contract. The Director General, having been

paid for the rails by Victor Lamken, and considering the title thereto as having passed as between him and Victor Lamken, filed his answer to the plaintiff's complaint accordingly, praying, in substance, that Victor Lamken be required to intervene as a party defendant in the action, and that he, the Director General, be absolved from all liability with reference to the rails, other than that of a mere stakeholder as between the plaintiff and Victor Lamken. Pursuant to an order of the court made in that behalf, Victor Lamken filed his answer and complaint in intervention, claiming to be the owner of the rails. Thus the controversy became one between the plaintiff and Victor Lamken as to the ownership and right of possession, though the rails remained in the possession of the Director General, as custodian of the lines of the Chicago, Milwaukee & St. Paul Railway Company, subject to the order or final judgment of the court in this action. A trial before the court sitting without a jury resulted in findings and judgment, awarding recovery of the rails to the plaintiff, Rostein, as against the defendant Director General and the intervening defendant Victor Lamken, and also recovery of damages as against the intervening defendant Victor Lamken for the detention and withholding of possession of the rails from the plaintiff. From this disposition of the case by the superior court, the intervening defendant Victor Lamken has appealed to this court.

When we hereinafter refer to the railway company or its employees, we shall mean the Chicago, Milwaukee & St. Paul Railway Company and its lines, as in the custody of the Director General, and the employees of that company as acting for and by authority of the Director General. In November, 1918, the employees of the railway company had collected at Tacoma five carloads of railroad rails, which were inspected and classified by them as scrap rails unsuited for further use on its lines. They offered these rails for sale at \$34 per ton, the trial court finding that to be the then market price and the price fixed and determined by law and the regulations of the United States government for the sale of such rails. A few days prior to November 21, 1918, appellant Victor Lamken entered into an oral contract with the railway employees for the purchase of these five carloads of rails at \$34 per ton, the contract calling for the delivery of the rails to the order of appellant, at either Tacoma or Seattle, as he might elect, without further charge, and at the risk of the railway company until such delivery should be made. Appellant promptly paid the contract price as agreed. On November 21, 1918, appellant directed the railway employees to ship the rails to Seattle, and notify him upon their arrival there. On November 23, 1918, the rails not having then left Tacoma, appellant countermanded his

directions to ship them to Seattle, and directed the railway employees to hold the rails in Tacoma subject to his further directions. This the railway employees intended doing, but by mistake three of the cars were thereafter sent to Seattle. On November 21, 1921, appellant entered into an oral contract with his brother Arthur Lamken, doing business as the Milwaukee Junk Company, to sell the rails to him at an agreed price of \$37 a ton, cash on delivery. Appellant was never paid the purchase price so agreed upon, and because of that fact refused to deliver, or permit the railway employees to deliver, the rails to Arthur Lamken or respondent, Rostein. On November 21, 1918, the same day on which Arthur Lamken had entered into the contract with appellant, his brother, for the purchase of the rails, he entered into a contract for the sale of the rails to respondent, Rostein, at the agreed price of \$40 per ton. This contract is evidenced by a writing then executed as follows:

"Tacoma, Wash., Nov. 21, 1918.

"J. Rostein, Seattle, Wash., to Milwaukee Junk Co., Dr.

"Dealer in All Kinds of Junk,

"Buyers of Metal, Rubber, Manila Rope, Sacks, Scrap Iron, Machinery, Pipe, etc.

"315 Puyallup Avenue.

"Sold to J. Rostein 5 carloads of rails as follows:

C. M. & St. P. No. 62553	33800#
O. W. No. 50240 cars to be billed	75700#
P. L. No. 925007 for Seattle	63500#
P. L. No. 822339 the same date	76400#
P. L. No. 938759	69600#

Total 367600#
367600# f. o. b. Seattle at \$40.00 per gross ton \$6,564.28

"Payment in full received from J. Rostein with Alaska Junk Co.'s trade acceptances for 30 days and 60 days. Rails examined and accepted O. K. by Mr. J. Rostein for the Alaska Junk Co.

Milwaukee Junk Co.,

"A. Lamken.

"Accepted for Alaska Junk Co.

"J. Rostein."

While the language of this contract is somewhat involved, it nevertheless seems plainly sufficient upon its face to transfer the title to the rails from Arthur Lamken, doing business as the Milwaukee Junk Company, to respondent Rostein; that is, sufficient to so transfer whatever title Arthur Lamken then had in the rails. Touching the question of respondent thus acquiring title to the rails as against appellant, the trial court found as follows:

"That at said time the said A. Lamken, as the Milwaukee Junk Company, did not own said rails or have the same in his possession and never obtained title to them, but his brother, the intervenor, was fully cognizant of the negotiations between the Milwaukee Junk Company and J. Rostein, had participated in them and approved of the sale of said rails to plaintiff.

"That at the time of making said contract the plaintiff represented to the said Milwaukee Junk Company that he had power to examine, inspect, and accept the said rails in behalf of the Alaska Junk Company, a corporation of Seattle, Wash., whose trade acceptances were to be given for the amount specified in payment for the said rails. That both intervener and said A. Lamken had been to the Seattle office of the Alaska Junk Company and offered and agreed to take Alaska Junk Company trade acceptances in payment of the purchase price of said rails. That thereafter, and before concluding the sale, said Lamken brothers and plaintiff met in Tacoma, and intervener's bookkeeper prepared the contract of sale, which was executed by said A. Lamken and plaintiff, said A. Lamken having first consulted his banker and satisfying himself of the value of said trade acceptances.

"That in conformity with said agreement the trade acceptances mentioned in said agreement were delivered to the said Milwaukee Junk Company, and the said Milwaukee Junk Company thereupon sought to negotiate the same and to obtain cash to make payment for the said rails, and, the said Milwaukee Junk Company not being able to make payment to intervener for the said rails, the intervener thereupon ordered the employees of the said railway company to hold the said shipment as aforesaid subject to his order. That said Lamken brothers made investigations to find the status of said trade acceptances and the legality of their issuance. It was disclosed that the transaction on part of the Alaska Junk Company was not an accommodation to plaintiff, but a deal on a basis of even division of profits with plaintiff; that similar trade acceptances had on different occasions been received from the Alaska Junk Company by said Lamkens; that by reason of internal dissensions in the Alaska Junk Company the credit of the company had been impaired in the opinion of certain Tacoma banks, and its paper was not there bankable, but said company was fully solvent, and the banks of Seattle continued to accept the commercial paper of said company; that said A. Lamken, as the Milwaukee Junk Company, with knowledge and approval of intervener, informed plaintiff that he would not deliver said rails except upon payment of cash therefor, to the amount of said trade acceptances, less bank discount. That the Milwaukee Junk Company, with the knowledge and approval of intervener, has ever since November 21, 1918, been ready, able, and willing to deliver said rails upon payment to said company of the amount stipulated, if payable in cash, and has also been ready, able, but unwilling, to deliver the same upon the basis of the trade acceptances, as agreed in the contract of November 21, 1918, and the plaintiff has known and been informed of such fact at all times.

"That on the 26th day of November, 1918, the Milwaukee Junk Company, at the time it refused to make delivery of the rails above mentioned, returned to the plaintiff the trade acceptances mentioned in the contract aforesaid, and, upon the plaintiff returning them to it a few days later, again returned them to the plaintiff, with the definite refusal to again receive them, and plaintiff has had possession of

the said trade acceptances at all times since. That at no time have the said trade acceptances been paid, nor has any tender of payment been made, either by the plaintiff or the Alaska Junk Company, and neither the intervener nor the Milwaukee Junk Company have been paid the price or any part of the price of said rails."

At the time of the commencement of this action, which was on December 6, 1918, three of the cars of rails were in Seattle, having remained there still loaded upon the cars, since their shipment by mistake as above noticed. This seems to account for the bringing of the action in the superior court for King county. Indeed respondent, Rostein, in bringing the action, seems to have proceeded upon the assumption that all of the rails were then in Seattle, where he made demand upon the railway employees for possession of the rails, upon the refusal of which he commenced this action. There never was any seizure of the rails, by writ of replevin or otherwise, in this action; and they have at all times remained in the hands of the railway company, the three cars which were shipped to Seattle by mistake having been returned to Tacoma and all five of the cars there unloaded and the rails retained by the railway company in a separate pile for future disposition such as may be ordered by the court in this action. The trial court found:

"That at all times from said November 21, 1918, until the commencement of this suit, said rails were partly suitable relaying rails, and of the reasonable market value, f. o. b. cars at Seattle, of sixty-five dollars (\$65.00) per ton, and said rails were of the total market value of \$10,667.50."

The court rendered its alternative money judgment against both the defendant Director General and appellant Victor Lamken, and judgment against appellant for damages for withholding possession of the rails from respondent, accordingly.

[1] One of the principal questions here presented to us, as we understand this controversy, is, not whether title to the rails passed from appellant to his brother Arthur Lamken, as counsel for appellant seems to argue, but whether title to the rails passed from Arthur Lamken to respondent under such circumstances, with appellant's participation therein and approval thereof, that appellant is now estopped from asserting that Arthur Lamken did not have power to convey title to the rails, as he in form did by the contract of sale made by him as the Milwaukee Junk Company with the respondent. This, in its last analysis, presents little else than questions of fact. A careful reading of the record leads us to conclude that we cannot say that the trial court's findings touching that subject are not supported by the preponderance of the evidence. We conclude, therefore, that appellant, because of his participation in

and approval of the sale of the rails made by Arthur Lamken to the respondent, must now abide by that contract and sale as if made by appellant himself. It thus becomes of no consequence in our present inquiry whether title to the rails ever passed from appellant to his brother Arthur Lamken as between themselves because of failure of the payment of the purchase price under their oral sale contract.

Contention is made in appellant's behalf that in any event the sale of the rails to respondent was rescinded. We assume this contention means that the sale was rescinded by Arthur Lamken, since he was the one who made the sale contract, in form, with respondent. However, as we have seen, by the findings above quoted, both appellant and his brother Arthur Lamken equally participated in the consummation of the sale of the rails to respondent, including the agreement to receive, and the receiving of, full payment for the rails in trade acceptances of the Alaska Junk Company. It was after the sale to respondent was so consummated that the Lamkens conceived the idea of avoiding it. This claim of the Lamkens was rested upon what they conceived to be the want of financial responsibility of the Alaska Junk Company and their inability to discount trade acceptances of that company at a bank, and so realize cash thereon. The trouble with this contention is, as it seems to us, that we are unable to conclude from the evidence—as the trial court also seemed unable to do—that there was ever any agreement that the trade acceptances of the Alaska Junk Company to be given in payment for the rails should be bankable acceptances. The mere fact that such acceptances could not, after their issuance, be discounted and cash realized upon them at a bank, does not argue that the Alaska Junk Company is not bound to honor them when due and presented to that company for payment; and we see nothing in this record which to our minds seriously argues that these acceptances are not legal trade acceptances in so far as the liability of the Alaska Junk Company thereon is concerned. It seems to us that the sale of the rails from the Lamkens to respondent was in any event a sale upon credit, in so far as the ultimate realizing of payment of the purchase price in cash is concerned; and hence the title to the rails passed to respondent as against both of the Lamkens upon the execution of the sale contract by Arthur Lamken, above quoted, and the acknowledgment therein of payment of the purchase price by the receipt of the trade acceptances of the Alaska Junk Company.

[2] This was not a sale of goods the purchase price of which was agreed to be paid in cash at the time of making the sale and a check, immediately payable upon presentation, given therefor by the purchaser upon a

bank in which he had no funds to meet it; the seller being led to believe that the check would be immediately honored, as in *Quality Shingle Co. v. Old Oregon L. & S. Co.*, 110 Wash. 60, 187 Pac. 705, and *Getchell v. Northern Pac. R. Co.*, 110 Wash. 66, 187 Pac. 707, relied upon by counsel for appellant; but it was a sale the purchase price of which was to be paid, and was paid, by these trade acceptances as evidencing an obligation of the Alaska Junk Company falling due 30 and 60 days after the consummation of the sale. Indeed it is evident from the record before us that all parties contemplated the rails would be again sold by respondent, the purchaser, long before the acceptances would be due. These considerations we think lead to the conclusion that respondent was entitled to recover the rails, or, in the alternative, their value.

Other contentions made in appellant's behalf render it necessary to now notice the form of the judgment as originally entered and thereafter modified by the trial court. The judgment, as originally entered, following the usual formal recitals, reads:

"It is therefore hereby considered, ordered, and adjudged by the court as follows:

"(1) That plaintiff is the owner of the property described in the findings of fact herein, to wit, 367,600 pounds of steel rails.

"(2) That defendant and the intervenor herein forthwith, to wit, within 10 days from the date of the entry of this judgment, deliver said property to plaintiff f. o. b. cars at Seattle, Wash.

"(3) That in case such delivery cannot be had plaintiff recover of and from defendant and said intervenor and each of them, the value of said property as of the date of the commencement of this suit, to wit, the sum of \$10,667.50.

"(4) In case said property be forthwith delivered as hereinabove provided, to wit, within 10 days after the date of the entry of this judgment, that plaintiff have and recover of and from intervenor the damage by him sustained through the detention of said property from him, in a sum equal to the difference between the value of said property at the date of the commencement of this suit, to wit, the sum of \$10,667.50, and the market value of said property at the time of such delivery, which may be ascertained as follows: At any time within 30 days after the delivery of said property, if the same be delivered to plaintiff, plaintiff may sell said property at the highest market price which he may be able to obtain in Seattle, Wash., and thereafter may apply to this court for a judgment ascertaining and fixing the amount of his said damage, and the court hereby retains jurisdiction of this cause for the purpose of ascertaining and adjudicating the amount of said damage."

Thereafter, upon the hearing of and in denying appellant's motion for a new trial, the original judgment was modified in a supplemental judgment, reading in part as follows:

"(1) That paragraph 2 of the original judgment herein entered be, and the same hereby is,

modified by prescribing the delivery of the property therein referred to to plaintiff within 30 days from this date, rather than within 10 days from the date of entry of said judgment, as in said paragraph provided.

"(2) That paragraph 4 of the original judgment herein entered be, and the same hereby is, modified by prescribing the delivery of the property therein referred to to plaintiff within 30 days from this date, rather than within 10 days from the date of entry of said judgment, as in said paragraph provided.

"(3) It is further hereby adjudged and decreed by the court, by way of supplemental judgment, that at the time the steel rails mentioned in the original judgment entered herein are delivered to plaintiff, plaintiff shall deliver to Arthur Lamken trade acceptances of Alaska Junk Company, of Seattle, Wash., of the form and in the amounts of the trade acceptances referred to the findings of fact herein and now on file in this court, except in this: That said trade acceptances shall be dated the day of the delivery of said rails, and shall be payable, the one for \$3,000 30 days thereafter, and the one for \$3,567.85 being made payable 60 days thereafter."

It is contended in appellant's behalf that the original and supplemental judgments are both erroneous in form, in that the judgment should have been "that the defendants deliver the goods to the plaintiff upon the payment by the plaintiff to the intervener and the Milwaukee Junk Company of the purchase price agreed to be paid," the contention evidently meaning the payment of the purchase price in cash. What we have already said in pointing out that the sale contract was not a sale for cash we think is a sufficient answer to this contention. The passing of title did not depend on payment of the purchase price in cash.

[3] It is contended in appellant's behalf that the trial court erred in adjudging the market value of the rails between November 21, 1918, the date of the sale, and December 6, 1918, the date of the commencement of this action, to be \$65 per ton and of the total value of \$10,667.50, and in the making of that the amount of respondent's alternative money judgment in case the rails should not be delivered to him; and also in the making of the difference between that sum and the market value to be determined as directed, the amount of the damage judgment to be rendered against appellant for the withholding of the possession of the rails in case they were ultimately delivered to respondent. These contentions present questions of fact as to which we feel constrained to disagree with the conclusion reached by the trial judge. It may be conceded that the evidence shows the market value of relay rails, as distinguished from scrap rails, to have been \$65 per ton between November 21 and December 6, 1918; and that, had these rails been relay rails, their total market value would then have been \$10,667.50, as concluded by the trial

court. A critical reading of the findings above quoted suggests that the trial judge regarded only a part of the rails as relay rails. Just what the quantity was he so regarded is not made plain, yet he concludes that they were all worth \$65 per ton. The evidence, as we read it, plainly preponderates in support of the view that the rails were not relay rails, and were worth in no event more than \$40 per ton, the price at which respondent purchased them, between November 21 and December 6, 1918. Respondent testified that the rails were worth \$60 to \$75 per ton, and was of the opinion that they are relay and not scrap rails. Burke, the construction foreman of the port commission of Seattle, expressed the opinion in his testimony that as to two cars of them which he had examined they were worth \$60 per ton. As to other cars he was somewhat uncertain, but said:

"I guess the port would be willing to pay \$35 or \$40 for them to get them."

Dullen, secretary and manager of the Alaska Junk Company, testified that relay rails were worth \$65 per ton in the market, but seems not to express any opinion as to whether these were scrap or relay rails. This is the whole of the substance of the evidence as to the value and character of the rails, relied upon by counsel for respondent. Kroha, one of the railway employees, being storekeeper, having authority to sell these rails, testified that they were all scrap rails. Webb, one of the railway employees, being roadmaster and acquainted with these rails, testified in substance that they were all scrap rails. Hasburg, one of the railway employees, being rail inspector, testified in substance that these were all scrap rails. There is other evidence in the record showing that these rails were, by the railway employees authorized so to do, regularly inspected and classified as scrap rails, resulting in the regular authorization of their sale. We cannot escape the conclusion that the trial court was in error in finding that the rails in question were, between November 21 and December 6, 1918, of a greater market value than \$40 per ton, the price at which they were sold to respondent by appellant and his brother Arthur Lamken. Were it not for this purchase of the rails by respondent at \$40 per ton, we could hardly escape the conclusion that they were, during that period, worth not more than the \$34 per ton at which the employees of the railway company sold them to appellant. We conclude that the judgment and the modification thereof by supplemental judgment are erroneous in so far as they fix the market value of the rails during that period at a greater sum than \$40 per ton, or the total sum of \$6,564.25, and that the judgments must be modified accordingly.

It is contended in appellant's behalf that

the trial court erred in entering its supplemental judgment. Paragraphs 1 and 2 of the supplemental judgment, extending the time of delivery, could hardly be claimed to be prejudicial to the rights of appellant, since such extension of time was more favorable to him than to respondent. As to paragraph 3 of the supplemental judgment, relating to the furnishing and delivering to appellant of new trade acceptances of the Alaska Junk Company upon delivery of the rails, we think the judgment should be modified so that in lieu of such trade acceptances, should respondent fail to furnish them as directed, he shall pay to appellant the agreed purchase price in cash upon delivery of the rails, less an amount equal to the usual bank discount upon such trade acceptances. This is probably the legal effect of paragraph 3 of the supplemental judgment, but we make this observation to the end that it may be made certain in this respect. Whatever other errors may have been committed by the trial court, we feel quite satisfied they did not work to the prejudice of appellant.

We conclude that the judgment and supplemental judgment should be reversed in so far as they adjudge the value of the rails during the period from November 21 to December 6, 1918, to be \$65 per ton and of the total value of \$10,667.50; and that the value of the rails during that period should be adjudged to be \$40 per ton and of the total value of \$6,564.28, the price at which respondent purchased them; and that the amount of respondent's alternative money judgment, and his judgment for damages, should be limited and measured accordingly. We also conclude that the 30 days following the entry of the supplemental judgment for the return of the rails to respondent should again be extended to 30 days following the going down of the remittitur from this court to the superior court. The cause is remanded to the superior court for further proceedings consistent with the views herein expressed.

Appellant will recover his costs incurred in prosecuting his appeal in this court.

MOUNT, TOLMAN, MITCHELL, and MAIN, JJ., concur.

(115 Wash. 682)

STATE v. EYRES STORAGE & DISTRIBUTING CO. (No. 16244.)

(Supreme Court of Washington. May 23, 1921.)

1. Master and servant §361 — Occupation can be declared extrahazardous only where plainly within spirit of Compensation Act.

The provision of the Workmen's Compensation Act (Rem. Code 1915, § 6604-2, as amend-

ed by Laws 1919, c. 131), enumerating extrahazardous occupations, and empowering the Industrial Insurance Commission to declare any extrahazardous occupation or work not enumerated to be under the act, does not authorize the commission to declare an occupation to be extrahazardous, and as such within the act unless it is so plainly extrahazardous as to be plainly within the spirit of the act.

2. Master and servant §361—General storage and warehouse business not "extrahazardous" within Compensation Act.

A general storage and warehouse business held not so extrahazardous in character as to warrant the Industrial Insurance Commission to declare it to be such within the Workmen's Compensation Act, Rem. Code 1915, § 6604-2, as amended by Laws 1919, c. 131, authorizing the commission to declare a business not enumerated to be an extrahazardous business under the act.

[Ed. Note.—For other definitions, see Words and Phrases, Extrahazardous.]

3. Master and servant §416 — Invalidity of order declaring business within Compensation Act available to employer notwithstanding failure to appeal.

Employer, being sued by the Industrial Insurance Commission for contribution to the accident fund provided for in the Workmen's Compensation Act, could defend on the ground of the invalidity of the order of the commission, whereby the commission, in excess of its authority, declared the business in which the employer was engaged to be within the act, though the employer did not appeal from such order, since the invalidity of such order could be asserted at any time.

4. Appeal and error §1008(1) — Supreme Court bound by uncontested findings of fact.

The Supreme Court is bound by the trial court's uncontested findings of fact.

Department 2. Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Action by the State of Washington against the Eyres Storage & Distributing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Lindsay L. Thompson, Frank P. Christensen, and M. H. Wight, all of Olympia, for the State.

Henry J. Gorin, of Seattle, for respondent.

MITCHELL, J. This action was brought by the Industrial Insurance Commission in the superior court to recover from the defendant contribution to the accident fund provided for in the Workmen's Compensation Act, in the sum of \$56.25 for the period of January 1 to March 31, 1920. The trial without a jury resulted in a judgment for the defendant, from which the state has appealed.

No statement of facts has been supplied. The findings of fact made by the trial court

essential to a consideration of the case are substantially as follows: That on October 29, 1919, the Industrial Insurance Commission, after notice published as required by law and a hearing had, made an order and decision that the businesses of general storage and wholesale warehouse (except and excluding, however, warehouses operated by and in connection with any wholesale or retail mercantile establishment) are extrahazardous in character, and therefore within the provisions of the Workmen's Compensation law, and fixed in the order the specific rates of contribution to be made to the accident fund by all persons, firms, and corporations whose businesses were covered by the order; and that this respondent (then in business, and who was present at the hearing before the commission) did not appeal from the decision, although duly notified of the order and decision. The court further found that the respondent was engaged in operating a general storage and warehouse business, and that said business was not extrahazardous in character under the Workmen's Compensation Act of 1911 and amendments thereof; that the rate of contribution fixed by the order of the commission, computed upon the pay roll of the respondent for the period of time involved, amounted to \$45, upon which a penalty of \$11.25 was claimed by the state, all of which the respondent had refused to pay; and that, respondent's business being not extrahazardous in its nature, and therefore not within the operation of the law of 1911 and amendments thereof, the order of the Industrial Insurance Commission is null and void, and the respondent in no way indebted to the state, either in the principal sum of \$45 or the penal sum of \$11.25, or any portion thereof.

Upon its findings the court made and entered conclusions of law to the effect that respondent's business was not extrahazardous; that the act of 1911 does not describe the business respondent is engaged in as extrahazardous, nor give or delegate to the commission power to declare such business to be extrahazardous, and hence assess it for contribution to the accident fund; that the amendment of 1919 nowhere prescribes a standard by which the commission shall determine the hazards of business, nor cures defects in the act of 1911, nor gives or delegates to the commission any greater authority in such regard than it had under the act of 1911, and that the commission is without power to determine whether or not an industry not mentioned in the act of the Legislature is extrahazardous; that the respondent is not precluded by its failure to appeal from the decision of the commission within the time fixed by law for the taking of appeals from such orders; and that judgment should be for the respondent. No exception

was taken by the appellant to any finding or conclusion, or any part of either of them.

The state contends: (1) The commission had the power to and did bring the respondent under the Workmen's Compensation Act; and (2) the respondent, having failed to appeal from the order and decision of the commission, is precluded from asserting herein as a defense any lack of power on the part of the commission to make the order.

As to the first assignment, it must be admitted that, if the commission did have the power to place the business of the respondent under the act, its procedure therefor was effectual. Therefore the vital question is, Did it have that power?

The act of 1911 (section 6604—2, Rem. Code) reads:

"There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' wherever used in this act, to wit: * * * If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 6604—4."

It is to be noticed the Legislature did not give in the law any rule defining what shall be considered an extrahazardous employment, but contented itself with an enumeration of industrial employments, wisely chosen for that purpose, which it declared, as it had the right and power to do, are extrahazardous. The business in which the respondent was engaged is not within that enumeration.

The case of *State v. Powles & Co.*, 84 Wash. 410, 162 Pac. 569, arose under the act of 1911. It is strikingly like, and arose under circumstances similar to the present one. Acting under the last sentence commencing with the words "if there be or arise," in section 6604—2, Rem. Code, the commission, conceiving a grant of power therein and having formally concluded on May 3, 1915, that "it has been demonstrated and proven that the operation of mercantile and storage warehouses and the occupations of teamsters, truck drivers, handlers of freight, auto truck drivers and helpers are extrahazardous," adopted a resolution accordingly, and provided that thereafter all such employers should make contribution to the accident fund at rates specified in the resolution. *Powles & Co.* was engaged in the wholesale commission business in Se-

attle. It operated a warehouse or storage room for the holding of its goods for sale and distribution. Its goods were taken to its warehouse or storage room and delivered therefrom by its own teamsters to considerable extent. It was called upon by the commission to make contribution to the accident fund, which it refused to pay. The suit followed. This court construed adversely to the commission that portion of the statute the commission had supposed warranted its action. It was said:

"The Legislature, no doubt, has the power to determine directly, by its own enactment, what occupations are extrahazardous, as it has done by the specific enumeration in section 2 of the act. The Legislature may have the power to delegate such power to the commission, accompanied by some legislative prescribed standard by which such determination shall be made; but that it could constitutionally delegate such power to the commission without prescribing some such standard suggests, to say the least, grave doubt. We look in vain in this act for any prescribed standard by which the commission shall determine what occupation or work, other than those specifically enumerated, are extrahazardous."

Then, after discussing the possible far-reaching effect of the exercise of such power in taking away the common-law rights of employers and employees and suggesting the propriety of caution on the part of the courts to attribute to the Legislature an intention to delegate such power in the absence of express language to that effect, the opinion says:

"Assuming, but not deciding, that there may 'be or arise' extrahazardous occupations other than those specifically enumerated which the commission under the power given it may recognize as such, but adhering to our conclusion that in no event has the commission the power to so decide, and by such decision bring under the act, as the Legislature might do by its declaration, an occupation other than those specifically enumerated, we come to the question of whether or not appellant's employees are engaged in extrahazardous occupations within the meaning of the act so as to require it to contribute to the accident fund."

After the decision in the case of *State v. Powles*, the Legislature of 1919 (chapter 131 of the Session Laws) amended section 2 of the act of 1911 (section 6804—2, Rem. Code) by adding thereto the following paragraph:

"The commission shall have power, after hearing had upon its own motion or upon the application of any party interested, to declare any such extrahazardous occupation or work to be under this act. The commission shall fix the time and place of such hearing, and shall cause notice thereof to be published once at least ten days before the hearing in at least one daily newspaper of general circulation, published and circulated in each city of the first class in this state. No defect or inaccuracy in such notice or in the publication thereof shall invalidate

any order issued by the commission after hearing had. Any person affected shall have the right to appear and be heard at any such hearing. Any order, finding or decision of the commission made and entered under the foregoing provisions of this act shall be subject to review by the courts within the time and in the manner specified in section 6804—20, and not otherwise."

[1] It is contended that the Legislature, heeding the opinion in the *Powles* Case, by this amendment clothed the commission with power to do what it did in the present case. The contention does violence, in our opinion, to the express language of the amendment. It says:

"The commission shall have power * * * to declare any extrahazardous occupation or work to be under this act."

Hence the only additional power given by the amendment is "to declare any extrahazardous occupation or work to be under this act," which is vastly different from the power to declare an employment not enumerated in the act as extrahazardous to be extrahazardous. This distinction was clearly pointed out in the *Powles* Case as follows:

"We think there must be here recognized a distinction between the force and effect of such a determination and the force and effect of the fact that a given occupation or work is extrahazardous. We are not prepared to say but that 'there may be or arise' an extrahazardous occupation, other than those specifically enumerated, which may be so plainly within the spirit of the act that the commission should recognize it as such and determine the rate to be contributed therefor to the accident fund, and proceed with reference thereto as it is authorized to do with reference to those occupations and works specifically enumerated."

And then, immediately, speaking of the original law, it was said:

"This may suggest a difficult problem as to the practical workings of the law touching occupations other than those specifically enumerated, but we assume and concede, nevertheless, for the purpose of argument, that the commission does possess powers and duties to this extent."

Manifestly the purpose of the amendment of 1919 was to remove any such difficulty, and to place or establish the power in the commission to declare any such plainly extrahazardous occupation or work to be under the act, but not the power to declare or determine any employment not enumerated in the statute as extrahazardous, and not plainly extrahazardous, to be extrahazardous, in addition to the power to declare it to be under the act.

[2] That the kind of business the respondent was engaged in was not plainly extrahaz-

ardous within the purview of the assumption upon that subject-matter contained in the Powles Case, as well also within the field of what we conclude to be the limited additional power attempted to be conferred by the Legislature as shown by the express language of the amendment, is made manifest by the construction given the order by the commission itself, which through its attorneys argues in this court as follows:

"Surely, if an extrahazardous occupation comes within the act just by reason of the fact that it is extrahazardous, some method must be provided for the inclusion of such occupations within the act as are not plainly extrahazardous. This we maintain is exactly what the amendment quoted provides for."

But the answer to the argument is, as already stated, if such had been the purpose of the Legislature, its language should have been that the commission shall have power to determine any employment not plainly extrahazardous to be extrahazardous, in addition to the power to declare an extrahazardous work to be under the act. Such is the rule and reason of the Powles Case, and forces the conclusion that the amendment falls short of attempting to give the power the commission assumed to exercise.

[3] The second assignment of error is without merit also. Had the commission made an order within the power granted by the amendment, assuming, without deciding that such power could be granted, and no appeal had been taken from the order as provided in the amendment, a different question would be presented from the one here, wherein there is an attempted recovery upon an order the commission had no power to make. The order is void, and may be asserted to be so at any time by one who would wish to be free without it.

[4] Lastly, upon the subject if the business of the respondent, though not among those specifically enumerated in the act, was "so plainly within the spirit of the act that the commission should recognize it as such" and proceed accordingly, we are foreclosed by the uncontested findings of fact and conclusions of law made by the trial court to the effect that the business was not extrahazardous. Those findings support the judgment. O'Brien v. Industrial Insurance Dept., 100 Wash. 674, 171 Pac. 1018.

Judgment affirmed.

PARKER, C. J., and TOLMAN and MAIN, JJ., concur.

(113 Wash. 290)

STATE v. WINN & RUSSELL, Inc.
(No. 16245.)

(Supreme Court of Washington. May 23, 1921.)

Department 2.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Action by the State of Washington against Winn & Russell, Incorporated. Judgment for defendant, and plaintiff appeals. Affirmed.

Lindsay L. Thompson, Frank P. Christensen, and M. H. Wight, all of Olympia, for appellant. Henry J. Gorin, of Seattle, for respondent.

PER CURIAM. This is an appeal from a judgment of the superior court denying the state the right to recover a contribution from the respondent to the accident fund provided for in the Workmen's Compensation Act (Laws 1911, p. 345).

The case is controlled by our decision in the case of State of Washington v. Eyres Storage & Distributing Company, a Corporation, No. 16244, 112 Wash. —, 198 Pac. 390, of this court, and is therefore affirmed.

(112 Wash. 482)

MARTIN v. JANSEN. (No. 16120.)

(Supreme Court of Washington. June 1, 1921.)

En Banc.

Appeal from Superior Court, King County; D. F. Might, Judge.

On rehearing. Former opinion approved, and judgment affirmed.

For former opinion, see 193 Pac. 674.

Peterson & Macbride, of Seattle, for appellant.

Walter B. Allen and Robt. T. Hodge, both of Seattle, for respondent.

PER CURIAM. This cause was reargued before the court en banc on May 23, 1921, in pursuance of the granting of appellant's petition for rehearing. Deeming ourselves fully advised in the premises, we are of the opinion that the cause was correctly disposed of by the decision of Department 2, reported in 193 Pac. 674. For the reasons therein stated, the judgment is affirmed as in the department opinion directed.

(115 Wash. 693)

HARRIS v. SAUNDERS. (No. 16095.)

(Supreme Court of Washington. June 1, 1921.)

En Banc.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

On rehearing. Former opinion adhered to, and judgment affirmed.

For former opinion, see 194 Pac. 533.

C. H. Winders, of Seattle, for appellant.

Kelleran & Hannan, of Seattle, for respondent.

PER CURIAM. This cause was reargued before the court en banc on May 23, 1921, in pursuance of the granting of appellant's petition for rehearing. Deeming ourselves fully advised in the premises, we are of the

opinion that the cause was correctly disposed of by the decision of department 1, reported in 194 Pac. 533. For the reasons therein stated, the judgment is affirmed, as in the department opinion directed.

(115 Wash. 672)

McQUEEN v. KITTITAS COUNTY et al.
(No. 16279.)

(Supreme Court of Washington. May 23, 1921.)

1. Animals §4—Dog license tax law held constitutional.

It being within the police power of the state to license or regulate the keeping of dogs, though they are declared by Rem. Code 1915, § 2303, subd. 11, to be personal property, Laws 1919, p. 27, § 1, imposing a specific license tax upon dogs, is not violative of Const. art. 7, §§ 1 and 2, providing for uniform and equal taxation of property in proportion to its value.

2. Constitutional law §205(7)—Act imposing license tax on dogs, but exempting dogs in cities of certain classes, not unconstitutional.

Const. art. 1, § 12, prohibiting the granting to any citizen or class of citizens, privileges and immunities not belonging equally to all, was not violated by Laws 1919, p. 27, § 1, imposing a specific license tax upon dogs, but exempting from its provisions dogs in cities of the first and second classes, since, dogs being subject to the police power, the Legislature may make distinctions between the localities in which they are kept, and the purpose of the statute being to prevent injuries to persons and property, it was not unreasonable to say that dogs regulated by license in cities of the first and second class are less liable to do injury than unregulated ownership in other localities.

3. Constitutional law §206(1), 293—Act imposing specific license tax on dogs and providing for destruction of preying dogs and owner's liability for damages done by them, not in violation of due process of law and special immunity clauses of Constitution.

An act (Laws 1919, p. 27, § 1) imposing a specific license tax upon dogs, providing for the destruction of those on which the taxes were not paid, and those preying on domestic animals, and making the owner liable for the damages caused by the latter, does not violate the due process of law clauses and special immunities. Const. U. S. Amend. art. 14, § 1, and Const. Wash. art. 1, §§ 3 and 12.

4. Constitutional law §206(1), 287—Act applying moneys collected from certain taxes to special fund and certain purposes not unconstitutional.

An act (Laws 1919, p. 27, §§ 1, 2, and 5) imposing a specific license tax upon dogs, and providing that the owner or keeper of any dog shall be liable to the owner of any animal killed or injured by it, but that, if the owner or keeper is unknown, or the damages uncollectable, the county treasurer shall pay to the owner of

the animal killed, out of a special fund into which moneys collected from license taxes were to be paid, the amount of damages sustained, did not violate Const. U. S. Amend. art. 14, § 1, and Const. Wash. art. 1, §§ 3 and 12, with respect to due process of law, and the granting of immunities to one class of citizens.

5. Justices of the peace §32—Act authorizing justices of peace to determine and certify to county treasurer damages by killing of animals by dogs held constitutional.

An act (Laws 1919, p. 27, § 4) authorizing the owner of an animal killed or injured by a dog to present his claim to the nearest justice of the peace, the latter to determine and file with the county treasurer a certificate stating the amount of damages sustained, he to be paid a fee for so doing, was not in contravention of Const. art. 2, §§ 10 and 16, defining the jurisdiction of justices of the peace, the acts required of the officer being ministerial, rather than judicial, and in no way pertaining to his duties as justice of the peace.

6. Statutes §107(1)—Act relating to dogs held not to embrace more than one subject.

An act (Laws 1919, p. 27) imposing a specific license tax upon dogs, creating a special fund out of which the county treasurer should pay damages to owners of animals killed by dogs, where the owner of the dog is unknown or financially irresponsible, making it lawful for any person to kill a dog found killing or injuring domestic animals, or biting any person, and containing many other provisions with respect to the keeping of dogs and responsibility for damages caused by them, held not in violation of Const. art. 2, § 19, providing, that no act shall embrace more than one subject, which shall be expressed in the title, that provision not being intended to prevent the enactment of a complete law on a given subject, but only to prevent embracing in one act wholly unrelated subjects.

Department 1.

Appeal from Superior Court, Kittitas County; John B. Davidson, Judge.

Proceeding by James McQueen against Kittitas County and others, to compel payment of a claim against the county. Judgment for plaintiff, and defendants appeal. Affirmed.

Arthur McGuire, of Ellensburg, for appellants.

E. K. Brown, of Ellensburg, for respondents.

FULLERTON, J. The Legislature, at its biennial session of 1919, passed an act relating to dogs. Laws 1919, p. 27. By the first section of the act it is made the duty of the county assessor of each county, at the time of listing personal property for taxation, to list all dogs owned or kept within his county, giving the name of the owner or keeper, together with the breed, size, color, and sex of each dog, and to assess a license tax of \$1 upon each male dog and spayed female, and

\$2.50 on each female dog, and to make return of such lists and assessments to the county treasurer, the assessments to be collected as other taxes are collected. To the section were annexed the following provisos:

"Provided, that in cities of the first, second and third class the license tax collected on dogs shall be credited to the funds as provided by ordinance of such city, and no other tax shall be levied or collected on dogs in such cities: Provided, that said cities may authorize their humane societies to expend such license tax in defraying the expenses of any carrying out the purposes of such societies. All fees and fines collected as aforesaid over and above the amount of expenses required to be met by such society shall be turned over by it to the city from whence such fines or fees were obtained."

By section 2 of the act there is created in the county treasury of each county a special fund to be known as the "domestic animal protection fund," into which are to be paid all taxes collected under the provisions of the act. This section contains a proviso to the effect that if, at the end of any fiscal year, the amount to the credit of the fund named exceeds \$200, the board of county commissioners may transfer the excess amount into a wild animal bounty fund, to be used in payment of bounties on wild animals, pursuant to other provisions of the statute. Section 3 fixes the time when the assessments are due and payable, and provides for the destruction of all dogs on which the taxes are not paid. The next two succeeding sections read as follows:

"Sec. 4. Whenever any dog shall kill or injure any sheep, swine or domestic animal, the owner of such animal may present a claim for damages to the nearest justice of the peace and such justice shall investigate the facts and determine the value of such animal killed or the damages to such animal injured, and shall issue and file with the county treasurer a certificate stating the amount of damages sustained and shall be paid for making such investigation and filing such certificate out of the domestic animal protection fund a fee of three dollars (\$3.00).

"Sec. 5. The owner or keeper of any dog shall be liable to the owner of any animal killed or injured by such dog for the amount of damages sustained and costs of collection, and in case the owner or keeper of such dog is unknown or the damages cannot be collected, the person suffering damages may file a claim for the damages sustained with the county treasurer, and upon making proof to the satisfaction of the county treasurer by affidavit or otherwise, that the owner of the dog occasioning the damage is unknown or that the damages cannot be collected from such owner, the treasurer shall pay to the claimant out of the domestic animal protection fund the amount of damages sustained as certified by the justice of the peace. Any person who shall keep any dog or allow the same to be and remain upon his premises for a period of fifteen days

shall be deemed the owner of such dog for the purposes of this section."

Section 6 makes it lawful for any person to kill a dog found chasing, biting, or injuring or killing domestic animals out of the inclosure of the owner, or biting any child, or person, and provides that the owner of any dog which is found chasing, injuring or biting any domestic animal or biting or injuring any child or person, shall thereafter keep the dog in an inclosure or under leash. Section 7 makes it the duty of any person owning or keeping a dog found killing any domestic animal to kill the dog within 48 hours after being notified of the fact, and makes such owner or keeper guilty of a misdemeanor, and punishable by fine if he fails so to do. Section 8 provides:

"This act shall not apply to cities of the first or second class regulating the licensing of dogs by ordinance."

On the night and early morning of February 1 and 2 of 1920, in Kittitas county, two vicious dogs belonging to one F. C. Smith, then a resident of Ellensburg, in that county, attacked a band of blooded ewe sheep belonging to the respondent, McQueen, killing certain of them, and severely injuring certain others. McQueen proceeded under the statute to have his damages ascertained, and it was found by the justice of the peace to whom he made complaint that he had been damaged by the ravages of the dogs "in the full and just sum of \$1,215." He then filed a claim for the damages sustained with the county treasurer of Kittitas county, accompanying the claim with a showing to the satisfaction of the treasurer that the owner of the dogs was financially irresponsible, that the damages suffered could not be collected from him, and demanded payment from the fund named. Payment was refused, and he instituted this proceeding to compel payment. On the trial in the court below he recovered, and the county, and county officers named as defendants, appeal.

The sole question presented to this court is the constitutionality of the cited act. The appellants contend that the act is unconstitutional, for the reasons (we quote from their brief):

"(a) Because it imposes a specific tax on dogs in contravention of sections 1 and 2, art. 7, of the state Constitution.

"(b) Because it grants special rights to owners of domestic animals in contravention of section 12, art. 1, of the state Constitution.

"(c) Because it takes the property of one class of citizens without due process of law and grants immunities to one class of citizens, and is unequal in its application on all classes of citizens, in contravention of section 1, art. 14, of the Constitution of the United States, and sections 8 and 12, art. 1, of the state Constitution.

"(d) Because it grants jurisdiction to the justice of peace in contravention of sections 1, 8, and 10, art. 4, of the state Constitution.

"(e) Because the act embraces many subjects, and they are not expressed in the title, in contravention of section 19, art. 2, of the state Constitution."

[1] The sections of the Constitution cited in the first of the reasons stated relate to the taxation of property. In so far as they are material to the contentions made, they provide that all property in the state not exempt under the laws of the United States, or under the state Constitution, shall be taxed in proportion to its value, and that the Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property according to its value in money. The argument is that, since dogs in this state are expressly declared by statute to be personal property, they must be taxed under these provisions of the Constitution according to their value in money, as other personal property is taxed; hence any statute or ordinance which taxes them in arbitrary sums regardless of value is invalid. It is true that the Legislature, for the purposes of the criminal statutes, has declared dogs to be personal property (Rem. Code, § 2303, subd. 11); but, notwithstanding this, dogs do not stand on the same plane with horses, cattle, sheep, and other domesticated animals. There is in them, at best, but a qualified property, and the declaration of one Legislature that they are personal property will not prevent a subsequent Legislature from enacting statutes with reference to them inconsistent with the declaration.

It is the last act of the Legislature which authoritatively speaks, and all prior acts inconsistent therewith, whether expressly repealed or not, must give way thereto. On the general question, it is the almost universal current of authority that dogs are a subject of the police power of the state, and their keeping subject to any form of license and regulation, even to absolute prohibition. Within these principles it cannot be said that the license tax imposed by the present statute is inimical to any limitation of the taxing power prescribed by the Constitution.

[2] The section of the Constitution cited in the second of the reasons given prohibits granting by law to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which, under the same circumstances, shall not equally belong to all citizens and corporations. It is claimed that this provision of the Constitution is violated by the act, because dogs in cities of the first and second class which regulate the licensing of dogs by ordinance are exempted from the provisions. But, since dogs are a subject of the police power, we see no reason why the Legislature may not make distinctions between breeds, sizes, and the lo-

calities in which they are kept. The object of the statute is protection. The purpose is to prevent injuries to persons and property by dogs. Any distinction, founded upon reason, at least, is therefore valid, and we see no reason why the Legislature could not say that dogs regulated by license in cities of the first and second class are less liable to do injury than unregulated ownership in other localities.

[3] The third contention, that an act such as the one here in question violates the due process of law clause of the federal Constitution, was met and answered in the negative by the Supreme Court of the United States in *Sentell v. New Orleans, etc., Railway Co.*, 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169. The plaintiff there sued to recover the value of a dog run over and killed by a car of the railway company. The defense was that the owner had not complied with the state laws or city ordinances with respect to the keeping of dogs. In the lower court the plaintiff recovered. The judgment was reversed by the appellate court of the state, from whence it was taken to the Supreme Court of the United States on the question whether the statute or ordinances violated the Fourteenth Amendment to the federal Constitution. Mr. Justice Brown delivered the opinion of the court, and from his very interesting discussion we excerpt the following:

"By the common law, as well as by the law of most, if not all of the states, dogs are so far recognized as property that an action will lie for their conversion. * * * although, in the absence of a statute, they are not regarded as the subjects of larceny. * * * The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ* in which, until killed or subdued, there is no property, and domestic animals in which the right of property is perfect and complete. * * * Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the Legislature is necessary for the protection of its citizens. That a state, in the *bona fide* exercise of its police power may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. * * * It is true that under the Fourteenth Amendment no state can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive and harmless, it can only be condemned and destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due pro-

cess of law may authorize its summary destruction. * * * Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon.

"In Louisiana there is only a conditional property in dogs. If they are given in by the owner to the assessor, and placed upon the assessment rolls, they are entitled to the same legal guaranties as other personal property, though in actions for their death or injury the owner is limited in the amount of his recovery to the value fixed by himself in the last assessment. It is only under these restrictions that dogs are recognized as property. In addition to this, dogs are required by the municipal ordinance of New Orleans to be provided with a tag, obtained from the treasurer, for which the owner pays a license tax of two dollars. While these regulations are more than ordinarily stringent, and might be declared to be unconstitutional, if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. It is purely within the discretion of the Legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets. The statute really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them.

"There is nothing in this law that is not within the police power, or of which the plaintiff has a right to complain, and the judgment of the Court of Appeals is, therefore, affirmed."

See, also, cases collected in 8 A. L. R. 74.

[4] It is further argued, in connection with the clauses of the Constitution cited, that the act is invalid because the money collected as taxes is not applied to the general funds of the taxing power, but is kept separate, and applied to the payment of damages caused by the depredations of dogs, and other purposes not strictly public. But statutes of this sort have been sustained by the courts with substantial uniformity. See *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688, 17 L. R. A. (N. S.) 855; *Randall v. Patch*, 118 Me. 303, 108 Atl. 97, 8 A. L. R. 65.

The principle also received the sanction of this court in the case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. In that case the constitutionality of the Workmen's Compensation Act was involved. The act provided for the collection of a fund from the operators of certain businesses, denominated by the act as extrahazardous, and provided that the fund should be used in compensating workmen engaged in the business for injuries suffered while so engaged. It was held that the act did not, for that reason, violate any of the provisions of the Constitution above cited.

[5] The fourth objection is that the statute grants jurisdiction to justices of the peace in contravention of sections 16 and 10 of article 2 of the state Constitution. The argument in support of the contention assumes that the provision of the statute authorizing complaints of losses to be made to a justice of the peace, and authorizing that officer to ascertain and certify to the amount of damages suffered, vests in the officer judicial powers forbidden by these sections. We think the contention unfounded. The act required of the officer is ministerial, rather than judicial, and is one that might have been legally conferred on any other person or body of persons. The duty imposed is one which in no way pertains to the office of justice of the peace. It is a power conferred on the individual holding the office, not as a part of the duties of the office, but as something separate and apart therefrom. This, we are clear, was within the power of the Legislature.

[6] Finally, it is contended that the act embraces more than one subject, and is thus in violation of section 19 of article 2 of the Constitution, which provides:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

But this provision of the Constitution was intended to prevent the Legislature from embracing in one act wholly unrelated subjects; it was not intended to prevent the enactment of a complete law on a given subject, even though the provisions of the law may be numerous and varied. The question, then, always is, Does the act contain unrelated matters? Tested by the rule, we are unable to see that this act contains any provision not proper to be included in its subject as expressed by its title.

The judgment is affirmed.

PARKER, C. J., and HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

(185 Cal. 673)

HOPPIN v. MUNSEY. (L. A. 2845.)(Supreme Court of California. May 19, 1921.
Rehearing Denied June 16, 1921.)

1. Vendor and purchaser ⇨187—Acceptance of payments overdue extends time for balance only for reasonable time.

The acceptance by a vendor of payment of a portion of the overdue interest after the installments on the principal were all overdue does not eliminate the provisions of the contract that time was of its essence, that the purchaser's failure to make the payments should release the vendor from all obligation to convey, and that the payments already made should be forfeited by such failure, but its only effect as to the future was to give the purchaser a reasonable time after the payment within which to perform his part of the contract.

2. Appeal and error ⇨931(4)—Finding as to reasonable time for payment of balance due on contract implied.

What is a reasonable time within which a purchaser is required to pay the balance due on his contract after the vendor has accepted payment of a portion of the interest when all the principal was overdue depends on the particular circumstances in the case and is primarily a question of fact for determination by the trial court, and in support of a judgment for the vendor the Supreme Court must assume that the trial court had found such reasonable time had expired before the vendor refused to accept a subsequent payment.

3. Vendor and purchaser ⇨341(3)—Evidence held to warrant finding reasonable time for further payments had expired.

In a suit by the assignee of a purchaser to recover money paid by the purchaser upon a contract for the sale of land, evidence that less than one-sixth of the purchase price had been paid, and that all of the accrued interest had not been paid, and that the purchaser had never been put in possession of the premises, held to sustain the court's finding that a reasonable time for the payment had elapsed when the purchaser tendered a new payment four months after the last payment of a portion of the interest had been accepted.

4. Vendor and purchaser ⇨148—Tender of deed unnecessary if it would be fruitless.

Under Civ. Code, § 1511, subd. 3, providing that formal tender is excused when the person who should have made it is induced not to do so by an act of the other party naturally tending to have that effect, a tender of a deed of conveyance by the purchaser to the vendor is not necessary to entitle the vendor to forfeit the contract where the declarations of the purchaser indicate that such a tender would be fruitless.

5. Vendor and purchaser ⇨148 — Tender of deed held excused by purchaser's statement he could not pay.

Where the purchaser informed the vendor when the latter declined to accept a small payment upon the accrued interest and demanded a payment upon the principal that he could not

pay anything on the principal at that time, but hoped at the end of the season to be able to pay a small portion of it, the tender by the vendor of a deed of conveyance was unnecessary to entitle him to forfeit the purchaser's rights under the contract.

6. Vendor and purchaser ⇨95(2)—Payments held forfeited to vendor notwithstanding acceptance of partial payments after maturity.

Where a contract for the sale of land provided that on the purchaser's failure to complete the payments the amounts theretofore paid should be forfeited to the vendor, the acceptance by the vendor after all payments of the principal had become overdue of a portion of the accrued interest does not preclude his right to forfeit the payments made by the purchaser, especially where the purchaser did not tender payment of the balance until more than four months after the vendor had conveyed to another with the purchaser's knowledge.

7. Vendor and purchaser ⇨95(2), 101—Repeated acceptance of small overdue payments held not waiver of forfeiture requiring vendor to give notice of intention to forfeit.

The fact that the vendor had in the past repeatedly accepted small payments on the accrued interest, though it waived previous defaults, did not waive the condition of the contract for forfeiture of the payments made on the purchaser's failure to complete the payments, and does not require the vendor to give formal notice of intention to forfeit, especially where the purchaser had not been given possession and his conduct showed a disposition to postpone performance indefinitely for speculative purposes.

8. Appeal and error ⇨1056(3)—Exclusion of evidence as to an option held harmless where option could not give any rights.

In an action by the assignee of a purchaser for breach of a contract for the sale of land, the exclusion of evidence that, before the vendor had refused to accept further payments by the purchaser, he had given an option to another for the same property, was harmless, where the option does not appear to have been supported by any consideration, and there was no evidence that it was carried out before its expiration.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. I. Hoppin against Fred E. Munsey on a contract for the sale of real estate. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. McDill, of Los Angeles, for appellant.

Donald Barker, of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondent.

SHAW, J. This is an action by the assignee of a vendee to recover money paid by his assignor to the vendor upon a contract of sale of real estate, including certain taxes paid on the land. The defendant had judg-

ment in the court below, from which the plaintiff appeals.

The contract of sale was made between Munsey, the defendant, and one F. W. Abbott, assignor of plaintiff as aforesaid. The complaint alleges that on September 14, 1914, Munsey and Abbott executed an agreement whereby Munsey agreed to sell to Abbott certain real estate for \$1,600, payable as follows: \$250 in cash, then and there paid; \$675 on or before September 10, 1915, and \$675 on or before September 10, 1916, with interest on said installments from the date of the contract until paid at 7 per cent. per annum, payable quarterly; that he had from time to time made certain payments on the contract covering portions of the interest accruing thereon, amounting in all to \$152.68—the last payment being \$5 on March 31, 1917—and had also paid certain taxes upon the land amounting to \$45.85; that on August 20, 1917, Munsey, without having tendered to Abbott a deed of said property and without having demanded the payment of the remainder of the contract price from him, sold and conveyed the property to one Clara H. Mackey; that thereafter and before the commencement of this action Abbott tendered to Munsey the whole amount of principal and interest then due on said contract of sale and demanded of Munsey that he cause said property to be conveyed to Abbott; that Munsey refused the sum offered and refused to cause any conveyance of the property to be made to Abbott; and that after said demand and refusal Abbott assigned to the plaintiff all his rights and claims against Munsey. The prayer was for a judgment for the sum of \$448.51.

The answer admitted, by not denying, the allegation that Munsey had not tendered a deed to Abbott and the allegations that Abbott had tendered to Munsey the principal and interest due on the contract and had demanded a conveyance thereof from Munsey to him, which Munsey had refused to execute or cause to be executed. These allegations therefore stand as admitted for the purposes of the case.

The answer further alleged that the contract provided that time was of the essence thereof, and that on the failure of Abbott to comply with its terms Munsey should be released from all obligation in law and equity to convey the property, and that Abbott should thereupon forfeit all right thereto and to all moneys theretofore paid thereunder; that prior to said conveyance by Munsey to Mackey as alleged in the complaint Abbott was in default for failure to pay the principal and interest due on the contract price; that thereafter, and before said conveyance to Mackey, Munsey had demanded of Abbott the payment of all of the remainder of the principal and interest of the contract price, but said Abbott failed to pay the same; that because of said default and failure he

(Munsey) had declared a forfeiture of the rights of Abbott under the contract; and that defendant was thereby released from all obligation to convey to Abbott and was entitled to retain the money paid to him by Abbott.

The court found that Munsey conveyed the property to Mackey on August 21, 1917, but that before doing so, and after the maturity of the whole of the contract price, Munsey demanded from Abbott the payment of the principal thereof, and that he was at that time excused from tendering a deed of the property to Abbott by the fact that Abbott then and there declared that he was unable to pay the same and failed to comply with the demand for payment; that Abbott made no payment or offer of payment of the contract price or any part thereof between the time he declared himself unable to pay the price and the month of January, 1918; that the tender so made in 1918 was not made within a reasonable time after the acceptance of the last payment of \$5 on the overdue interest, which was on March 31, 1917; that the conduct of Abbott was such as to justify Munsey in acting on the belief that Abbott could not and did not intend to pay the price within a reasonable time after such waiver as resulted from the acceptance of said \$5. It also found that the contract was in the form alleged in the answer, and that Munsey had declared a forfeiture of the rights of Abbott before making the conveyance to Mackey and after having demanded of Abbott the payment of the balance owing upon the contract price, and that Munsey was justified in refusing the tender made in January, 1918. It thereupon concluded that the plaintiff was not entitled to recover any part of the money paid on the contract by Abbott and rendered judgment accordingly.

The facts admitted by the pleadings are to be taken in connection with the evidence in the case, so far as they may assist in determining the weight thereof and the inferences to be drawn therefrom. Since the findings were in favor of the defendant, the evidence must be considered in the light most favorable to the defendant, and the testimony of the defendant is to be considered as the truth, so far as it is inconsistent with the evidence offered in behalf of the plaintiff.

The plaintiff contends that these findings are contrary to the evidence, and, second, that, even if correct, they do not support the judgment.

The following facts appear from the evidence: The first installment of the price was due on September 10, 1915. Up to that time Abbott had made six payments, amounting in the aggregate to \$70.92, which was not sufficient to pay even the interest then accrued. Thereafter and prior to September 10, 1916, when the whole sum fell due, seven small sums were paid, amounting to \$54.76.

The default continued, and on February 12, 1917, nothing more having been paid, Munsey gave to Abbott a notice in writing, signed by Munsey, as follows:

"In reply to your note of the 10th, just to hand, I wish to notify you that unless you pay up the interest amounting to \$84 before the 10th of March, 1917, I will have to cancel deal with you on lot.

"I have waited long enough for payments past due, but will not wait longer on interest, which is a year now past due.

"Then when you catch up with interest I will expect some money paid on lot in a reasonable time.

"As I told you before I was willing to give you a chance as long as you kept interest paid up and am willing to still give you chance if you will keep interest paid, but now you are so far behind on interest I must insist on it being paid as per above notice."

Thereafter Abbott paid \$10 on March 5, 1917, \$12 on March 18, 1917, and \$5 on March 31, 1917. Nearly all of the payments had been made by checks sent to Munsey by mail. These payments lacked \$60 of paying the overdue interest. On July 31, 1917, Munsey received from Abbott through the mail a check for \$22. No offer of payment had been made in the meantime. The same day Munsey called on Abbott and returned the check, saying that he could not accept such a small amount. Abbott said that he was unable to pay any more; that if Munsey would wait until the summer season was over he might possibly pay up the interest. Munsey asked for a payment on the principal, to which Abbott replied that he could not make a payment on the principal nor pay the interest due at that time. The question was then asked of Munsey, "What else did you say to him as to your reason for declining the amount?" to which the answer was, "In the first place that he had gone a year and some months behind in his interest; that I had given him previous notice four months previous and I supposed that he had not been able to meet it, and was surprised to receive such sum, after four months had expired on this notice and that I needed the money and that I sold the lot." Abbott never was in possession of the property, and he had no right of possession thereof under the contract. Abbott's testimony was to the effect that Munsey demanded full payment, and that he (Abbott) said that he was unable to make payment, but that he was negotiating a loan and expected to pay up when he got the money. As the sale to Clara H. Mackey was for \$1,500, which was only about \$50 more than was due from Abbott, the court evidently doubted the good faith of Abbott's statement about the loan.

[1] It may be admitted that the acceptance by Munsey of the two small payments on March 18 and March 31, 1917, operated as a waiver of the demand contained in the notice

of February 12th and of any right to declare a forfeiture as of the date of March 10th fixed in said demand. It waived all past defaults in performance, but it did not alter the terms of the contract with regard to the future or eliminate as to future occurrences the three provisions that time was of its essence, that if Abbott failed to comply with its terms Munsey should be released from all obligation to convey, and that the payments already made should be forfeited by such failure. Its only effect as to the future was to give Abbott a reasonable time after the payment on March 31, 1917, within which to perform his part of the contract. Unquestionably it did not extend the time of payment further than that. It therefore follows that immediately upon the expiration of such reasonable time Munsey could have made tender of a deed and demanded full payment, and that upon the failure of Abbott to comply with the demand he could at once have begun an action against Abbott for specific performance, or to foreclose Abbott's rights, or for damages for breach of the contract. *Glock v. Howard*, 123 Cal. 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Keller v. Lewis*, 53 Cal. 118; *Fairchild v. Mullan*, 90 Cal. 194, 27 Pac. 201.

[2, 3] The question of what is a reasonable time depends in each case upon its own particular circumstances. It is primarily a question of fact for the determination of the trial court. In support of the findings and judgment this court must assume that the trial court decided that such reasonable time had expired before the refusal of Munsey to accept the payment of \$22 offered on July 31, 1917. Abbott had shown no desire to meet his obligation promptly during the long period of indulgence that had already elapsed and Munsey was under no obligation to continue that indulgence or tax his own patience further. Less than one-sixth of the purchase price had been paid in cash at the time of the making of the contract and no further part of the price had been paid or offered. The payments made on interest had not been sufficient to discharge that already accrued. The whole contract price was long past due and all the money was due immediately upon the acceptance of the \$5 on March 31st. Abbott had never taken possession. No circumstances appear which appeal to a court of equity as necessary grounds for a considerable extension of time. We think the conclusion that the reasonable time for performance implied by the principles of equity had elapsed prior to July 31, 1917, was warranted by the circumstances of the case.

The result is that on that day Munsey had the right to refuse further time, demand full performance then and there, and decline to accept any partial payments, and then to assert his right under the terms of the contract to declare it ended and the payments for-

feited to his use. He had that right on September 10, 1916, the day fixed for the final payment by the terms of the contract, and when the reasonable time expired after the payment of March 31, 1917, his rights were the same as if the contract had originally fixed the period of expiration of such reasonable time as the time for full payment.

[4] Furthermore, it may be noted that, while the tender of a deed by Munsey, or the existence of a lawful excuse, would ordinarily be necessary as a condition precedent to any right of Munsey to proceed in the enforcement of the contract by suit, as for specific performance, or for damages, he is not here seeking such relief, but is only contending that the contract could not be enforced against him after such default by the vendee. We need not determine whether or not for the latter purpose a tender is necessary, for we think the facts disclosed by the evidence were sufficient to excuse such tender, even if it were otherwise required. A tender is not necessary where the conduct or declarations of the vendee are such as to show that it would be unavailing.

"It is a maxim that the law does not require a man to do a vain and fruitless thing, so it has been held that a strict and formal tender is not necessary where it appears that if made it would have been vain and fruitless." 3 Elliott on Contracts, § 1972.

The want of a formal tender is excused when the person who should have made it is induced not to do so by any act of the other party "naturally tending to have that effect, done at or before the time at which such performance or offer may be made." Civ. Code, § 1511, subd. 8.

[5] On July 31, 1917, when Munsey declined a small payment on the interest and asked for a payment on the principal, Abbott informed him that he could not pay anything on the principal or interest at that time, but that, if he would wait until the summer season was over, he "might possibly" pay up the interest. This informed Munsey that Abbott was then unable to pay anything, and that the most he then hoped for was that at the end of the summer season he might be able to pay a very small portion of the price, all of which was at that moment long past due. In view of the past delays, Munsey could come to no other conclusion than that the tender of a deed at that time would be wholly vain and fruitless. This continued failure and these statements would naturally tend to induce him not to go through such an idle ceremony, but, on the contrary, to act in the case upon the theory that Abbott did not expect a tender and neither would nor could pay the money and accept the tender if it were made. Abbott's statements were an admission to that effect. The tender was excused, and Munsey's rights are the same as if he had then made a formal

tender and demand and had met with a failure and refusal.

[6] Under these circumstances Munsey had the right to treat the money paid as forfeited to him, to consider his obligation under the contract terminated, and to sell and convey the property to another person. The case was precisely the same as that existing in Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363, after the failure of the vendee there to pay the third installment of the price at the expiration of an extension of the time given therefor. The vendor thereupon elected to treat the contract as at an end and refused a subsequent offer of the balance of the price. The opinion, in referring to the contract, designates it as an option, but the contract is set forth, and from its terms it clearly appears that after the first payment of \$10,000 was made, if not before, it became a contract of sale, so framed as to make time of its essence, and the context of the opinion shows that it was so considered. The deed was deposited in escrow, to be delivered upon full payment of the price. The contract was essentially the same in effect as that in the present case. The suit was to recover the price paid, upon the theory that the vendee had the right to rescind upon the refusal by the vendor to accept the tender of the balance due on the price. The court said that—

"Under such a contract the refusal of the vendor to accept a tender made by a purchaser, in default, and to convey to the purchaser after such default, does not effect a rescission of the contract, nor entitle the vendee to recover the money paid. Neither will equity relieve such purchaser who has made an unexcused default and has not fulfilled conditions precedent to the vesting of his right of action." 162 Cal. 545, 123 Pac. 365.

So in *Oursler v. Thacher*, 152 Cal. 744, 93 Pac. 1009, the court quoted and approved the following passage from the opinion in *Glock v. Howard*, 123 Cal. 14, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17:

"While it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions.' Also: 'But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms.'"

The meaning of this, of course, is that the vendor in such a case is standing upon the terms of the contract by appropriating the money paid to his own use and is without liability for its return. In *Glock v. Howard* it is said further:

"It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under conditions precedent, as in this case, to make payment at a certain time. Failing to make payment, he would three months, six months, one year, or, as in this case, over three years, after the date of the failure, make an offer to perform, and if the land had risen in value, according to the theory of respondents here, could compel performance; but in every case he could recover the moneys paid."

In this case it is to be observed that Abbott did not make a tender of the purchase price until more than four months after the conveyance by Munsey to Mackey, of which sale he had knowledge. It follows from what has been said that the plaintiff had no right to recover any portion of the purchase money which Abbott had previously paid.

[7] The plaintiff seeks to avoid the effect of these principles by the claim that the repeated acceptance of payments, however small, upon the contract price, not only operated as a waiver of all previous defaults, but also constituted a waiver of the provisions of the contract declaring time of its essence, and that the purchase money should be forfeited upon a failure to pay at maturity. His position is that after such waiver the aforesaid provisions cannot be again asserted or enforced until the vendor shall have served the vendee with notice that at the expiration of a stated period, which must be a reasonable time, performance would again become due and would be demanded. In this he relies upon *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, and *Stevinson v. Joy*, 164 Cal. 279, 123 Pac. 751. These cases do not hold that such stipulation for forfeiture may not be restored and enforced by the vendor in any other manner than by giving a definite and specific notice of the intent to do so. There is a declaration to that effect in *Monson v. Bragdon*, 159 Ill. 66, 42 N. E. 383, which is quoted in *Boone v. Templeman*, but the quotation is given in support of the statement that from the facts alleged in the complaint "a court might infer a waiver of the conditions regarding forfeiture and time," and that because of such possible inference "they supported the general allegation of the complaint that Templeman had waived those conditions." The general allegation of waiver was attacked by a special demurrer for uncertainty. It is evidently this attack that was in mind when the court said that it was "supported" by the particular allegations showing such waiver. On general principles there can be no doubt that if, after such waiver as the law infers from acceptance of

partial payments after maturity, the conduct of the vendor and vendee in subsequent dealings is such as to justify the inference that both parties understood that the conditions regarding forfeiture were to be treated as restored and were in force, and that the vendee understood that he was then in default, the vendor may have the advantage of the forfeiture as completely as he may obtain it by a definite notice to the vendee, and when, in this situation, the vendor demands full payment, and the vendee admits his utter inability to comply, the rule that a tender of a deed by the vendor need not be made when it would obviously be unavailing becomes applicable, and he may treat the failure and inability of the vendee as an abandonment of the contract, declare the money paid forfeited, and resell the property to another, without liability to refund to the vendee the money paid. Especially is this true when the vendee has not been given possession and his conduct has shown a previous disposition to postpone performance indefinitely and has evidenced a design to keep up the relations solely for speculative purposes, as is indicated by his conduct here. Neither of the cases cited is contrary to this conclusion. The *Boone Case* was a suit by the vendee against the vendor for specific performance, and not for a recovery of money paid, as upon a rescission. *Stevinson v. Joy* was a suit by the vendor to quiet title. There was a trial, and the court found that the conditions as to forfeiture had been waived, and that the vendee had offered to pay the whole sum then due on the price. The vendee was in possession and had made valuable improvements on the land. The question above stated was not involved in either case. In the *Boone Case* the demurrer admitted all facts alleged, and in the *Stevinson Case* the findings were against the vendor's contention. They present the opposite condition so far as inferences are concerned to that here presented. In this connection it may be again remarked that Abbott made no offer to pay any money until January 9, 1918, and that before he attempted to do this he had discovered that Munsey had already conveyed the property to Clara H. Mackey, and undoubtedly knew that Munsey could not comply with the demand. Immediately upon his refusal to do so Abbott demanded a rescission of the contract and a return of the money paid. These facts are significant on the question of Abbott's good faith. In the present case the finding of the court is against the contention that at the time the forfeiture was declared and the property reconveyed by the vendor there was any waiver in force which enlarged or continued the rights of the vendee, and, as we have seen, the evidence supports this finding.

The plaintiff also relies upon the decision of *Hayt v. Bentel*, 164 Cal. 680, 130 Pac. 432. In that case there was an express allegation

and finding that the vendor had waived the delay in making payment under the contract. What is said about the effect of acceptance of payments after maturity must be understood to refer to the fact that the court had made all inferences which might arise from that fact in favor of the proposition that it constituted a waiver. These cases have no application where the finding is to the contrary and there is no uncontradicted proof of an express waiver. For these reasons the cases relied upon are inapplicable to the present case.

[8] It is claimed by the plaintiff that the court erred in refusing to allow proof that on July 30, 1917, the day before the conversation between Abbott and Munsey, Munsey had given an option to another person to buy the real property. We do not think this error, if it was one, was material. The contract was offered and it is set forth in the record. It does not appear to have been made upon any consideration and it expired on August 9th. There is no evidence that it was carried out, and, unless there was consideration, it was not binding. Apparently it did not in any respect bind Munsey to comply therewith or prejudice the rights of Abbott in the matter.

No other points are presented that deserve consideration.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

(185 Cal. 720)

ELLIS v. STEPHENS et al., State Board of Engineering. (Sac. 3141.)

(Supreme Court of California. May 20, 1921.)

Highways \Leftrightarrow 99¼, New, vol. 14 Key-No. Series—Engineering department must deposit federal aid in fund under their control, and could not deposit it in general fund to reimburse loss on sale of bonds.

St. 1917, pp. 692, 694, §§ 9, 13, relating to the construction of state highways, providing that unexpended moneys shall be under control of the engineering department, and shall be transferred to its credit, and that federal aid moneys shall be credited to such fund or funds as it may designate, and that all expenditures for highways shall be under its full charge, and that all moneys appropriated for such purpose shall be made payable on demand of said department, etc., was intended to authorize expenditure of federal aid for such highway purposes as it was authorized to expend the state funds, and to that end designate a fund under its control, and hence the advisory board of the department must cause federal aid fund to be deposited in some road fund under their control, and they could not cause it to be deposited in the general fund of the state to re-

imburse a contemplated loss on a resale at a discount of highway bonds purchased by the state board of control from surplus money, pursuant to Pol. Code, § 679, since this would violate the express prohibition of Const. art. 16, § 2, authorizing the issue of such bonds and sale thereof, subject to the control of St. 1915, p. 652, section 4 of which forbids sale at less than par, and St. 1913, p. 584, § 3, providing as to bonds purchased with surplus money, that they shall not be sold at a price resulting in a net loss to the state.

In Bank.

Application by W. R. Ellis for mandamus against W. D. Stephens and others, constituting the State Department of Engineering. A writ was denied by the District Court of Appeal of the Third District, and on petition therefor the matter was transferred to the Supreme Court for hearing. Writ granted.

Dunn & Brand, of Sacramento, for petitioner.

U. S. Webb, of San Francisco, and R. T. McKisick, of Sacramento, for respondents.

WILBUR, J. Petitioner prays for a writ of mandamus directing the members of the department of engineering of the state of California to make a proper order indicating to the state treasurer the highway fund to which to credit the proceeds of certain checks on the treasurer of the United States aggregating \$329,011.82, now in his possession. These checks were issued in payment of the obligation of the United States to the state of California under a contract entered into between the state highway commission and the Secretary of Agriculture of the United States, whereby the United States agreed to pay a portion of the costs of the construction of certain state highways therein designated under plans thereby approved and adopted. This contract for government aid to the state in building these highways was authorized by act of Congress, approved July 11, 1916 (39 Stats. at Large, 355), whereby certain moneys were appropriated for the purpose of aiding the various states in the construction of such highways as were approved by the Secretary of Agriculture. A writ of mandate was denied by the District Court of Appeal of the Third District, and upon petition for transfer to this court, the matter was transferred to this court for hearing. It appears from the answer of the defendants that they have ordered the proceeds of said checks to be credited to the "surplus of the general fund" of the state to make up a contemplated deficiency due to a loss expected to be suffered by the purchase and sale of \$3,000,000 par value of the "third state highway bonds" of 1919, being a portion of the \$40,000,000 bond issue authorized by the amendment to the Constitution in that year. Const. art. 16, § 2 (see St. 1919, p. 1518). It is proposed by the state board of control,

acting in concert with defendants, to purchase the \$3,000,000 of the third state highway bonds at par, and to sell them at the market discount of 6.4138 per cent., thereby suffering a loss of \$192,414.

The petitioner contends that this procedure is in violation of law, and that it is the duty of the state officer to deposit this fund in the proper highway fund. It is alleged by the defendants that the proposed procedure was adopted by the state board of control, acting in concert with the defendants because of the fact that state bonds bearing 4½ per cent. interest per annum could not be sold for more than 93.5862 per cent. of such par value, and that it is the purpose of the defendants and state board of control to cover this loss by the application of the funds coming from the United States government to that difference.

The United States statute in question makes it clear that the fund derived from the United States government under the above-mentioned act to aid the state in the construction of "rural post roads" represents the amounts paid by the federal government as its share of the cost of construction. These amounts may be paid either upon completion of the work, or if so arranged, during the progress of the work. The federal statute directs (section 6 [Comp. St. § 7477f]) that after the approval of the plans for the highway—

"The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this act on account of such project, which shall not exceed 50 per centum of the total estimated cost thereof. No payment of any money apportioned under this act shall be made on any project until such statement of the project, and the plans, specifications, and estimates therefor, shall have been submitted to and approved by the Secretary of Agriculture. * * * The Secretary of Agriculture and the state highway department of each state may jointly determine at what times, and in what amounts, payments, as work progresses, shall be made under this act. Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture, to such official, or officials, or depository, as may be designated by the state highway department and authorized under the laws of the state to receive public funds of the state or county."

The United States statute authorizes the treasurer of the United States to pay not exceeding 50 per cent. of the cost of work by paying that amount to the state instead of paying it directly to the contractor or others doing the work.

As the voters of the state have provided for certain funds in connection with the financing of the acquisition and construction of highways known as the "third state highway fund," "third state highway interest and sinking fund," "third state highway revolving fund," and "third state highway sinking

fund" (Const. art. 16, § 2), and as the money was advanced by the state to pay the one-half of the cost of the highways agreed to be paid by the United States government, it would seem that the logical destination of the aid from the United States would be in the fund depleted by such payment.

In this particular instance, a contract having been entered into between the authorized officers of the state and of the United States by which it was agreed in advance that the United States should pay certain amounts to the state in connection with the improvement of certain highways to be constructed by the state of California, the substance of such an arrangement is that the state of California pays for only such portion of the highway as is not covered by the appropriation from the federal government; that is to say, its one-half of the cost. The amount paid to the state is a reimbursement of the state and of the particular funds used by the state in the progress of the work.

So far as the United States government is concerned, the payment of the funds to the proper state officer terminates its interest in the fund. In no instance is the fund payable by the United States government until the work for which it is apportioned has been actually performed. As the money thus paid by the United States government belongs to the state of California, it is subject to the control of the state, acting through its appropriate officials. The duty of the state and its officers to the United States government has been fully performed when the highway approved by the Secretary of Agriculture had been constructed by the state in accordance with the contract. It is no concern of the government of the United States what is done by the state with the funds turned over to it. The control of such funds so paid is one entirely for the determination of the state Legislature, or, if there-to authorized by Constitution or statute, by such other officers of the state as are given control of the funds.

We will turn now to a consideration of the law of the state bearing upon the question. Section 13 of the act relating to the construction of state highways (Stats. 1917, p. 694) provides that all co-operative engineering work now existing or to be engaged in by the state with the United States government shall be placed under the department of engineering; that the advisory board shall have full power to determine the kind, quality, and extent of such work under co-operation with said government before entering into agreement with said government for such work. It further provides:

"All unexpended moneys provided for by law on the aforesaid co-operative basis shall be expressly placed under the full control of the department of engineering and the state controller shall transfer such funds to the credit of the said department. * * * All moneys received

by the state treasurer from the United States government under project agreements relating to federal aid road work shall be credited by the state controller to such fund or funds as the state department of engineering shall designate."

The question here involved is whether the advisory board of the state engineering department must cause funds received from the United States government to be deposited in some road fund under their control, or whether they can cause it to be deposited in the surplus of the general fund of the state for the purpose of reimbursing those funds for loss caused by the sale of the state highway bonds by the board of control on the market at a discount.

While the authority of the advisory board, as above stated, is in terms broad enough to authorize them to deposit the money in question in any fund in the state treasury designated by them, that general authority must be read in the light of their powers, and the purpose of the legislation. By section 9 of the act (Stats. 1917, p. 692) the department of engineering is given full possession and control of all roads and highways which have been declared and adopted as "state roads" and "state highways" and all "state roads" and "state highways" which may hereafter be acquired and constructed. It is provided that—

"All expenditures by the state for highway purposes, except as otherwise hereafter provided by law, shall be under the full charge of the department of engineering, and all moneys appropriated for such purpose shall be made payable upon the proper demand of said department when approved and audited by the state board of control."

It is also provided that—

"Said California highway commission shall have the supervision and direction of all state roads and state highways now existing and the improvement, maintenance, repair and protection thereof, and have charge of and perform all other duties relating to state roads and state highways which may be imposed upon said commission by said advisory board."

It is apparent from this legislation that when the Legislature authorized the advisory board to designate the fund or funds into which payments from the federal government should be made it was intended that such payments should be made into funds under the control of the advisory board. It could not have been the intention, for instance, to delegate to the engineering advisory board the power to place these moneys in funds created to build state prisons, reform schools, insane asylums, or in the fund for the purchase of land for some then existing or contemplated state institution, or in the fund for state aid to orphans, half-orphans, and abandoned children. It is clear from the

scope and purpose of the act creating the advisory board and the state engineering department, and from the duties and powers of such department, that the purpose and intent of the Legislature was to authorize the expenditure of this federal aid by the state engineering department for such purposes in connection with public highways as it was authorized to expend the funds of the state, and to that end to designate to the state treasurer and controller some appropriate fund under its control in the state treasury. Respondent board contends that, this being true, their appropriation of the money for the purpose of paying a deficiency in funds caused by the inability to sell state highway bonds at par, as required by the Constitution, is a proper exercise of the powers vested in them.

It is manifest that if such an appropriation of public money violates an express provision of the law it is not authorized by implication arising from the power of the board to designate the fund in which the money must be carried on the books of the treasurer and controller.

An examination of the Constitution and statutes on the subject makes it clear that such a use of public moneys is expressly prohibited by law. The constitutional amendment approved July 1, 1919 (Const. art. 16, § 2; Stats. 1919, p. 1518), authorizing issuance of the \$40,000,000 bond issue, provides that the state highway act of 1915 (Stats. 1915, pp. 650, 652, § 4) relative to the advertising and sale of bonds shall control in the disposition of the bonds thereby authorized. This statute provides that the state treasurer shall sell the bonds to the highest bidder for cash at public sale, and shall not accept any bid which is less than the par value of the bonds plus accrued interest. It is for this reason that the state board of control proposes to purchase the bonds at par. Their authority to purchase bonds is found in section 679 of the Political Code, which authorizes the board of control to purchase state bonds when they have "surplus money" at their disposal for that purpose, and directs that the treasurer shall make appropriate transfers of funds upon his books in the event of such purchase from the surplus fund to the bond fund. "Surplus money," under this statute, is money agreed upon by the state treasurer and the members of the state board of control as not necessary for immediate use. Such amount so designated can be used for the purchase of bonds as therein authorized. *Stephens v. State Treas.*, 195 Pac. 651. It is also provided in the same act (Stats. 1913, p. 564), section 8:

"Any bonds purchased or held under the provisions of this act may be sold or exchanged for other bonds of any of the classes described in section 1 of this act, and the money received from any such sale may be reinvested by the state board of control in the purchase of any

such bonds; provided, that no such sale or exchange shall be made *at a price which will result in a net loss to the state*; and provided, further, that any interest or premium collected or received by the state from any bonds purchased or held under the provisions of this act shall be credited by the state treasury to the fund to be known as the 'bond investment fund,' which fund is hereby established. The state treasury shall semi-annually, on the last days of June and December, transfer one-half of the amount then in said fund to the general fund, and shall transfer one-half of the amount then in said fund to the state school land fund." (Italics ours.)

This legislation, like the constitutional amendment, and most legislation regulating the sale of state and municipal bonds, is predicated upon the theory that there will be purchasers found for the bonds at not less than par. Nor is any provision made in the law for a sale of bonds purchased by the state board of control which cannot be sold except at a loss. On the contrary, this constitutional amendment expressly prohibits a sale of bonds for less than par, and the statute authorizing the purchase of the bonds of the state by the state board of control expressly prohibits a sale thereof at a net loss. Thus it would be the duty of the state board of control to hold all bonds purchased by it until authorized by the Legislature to dispose of them at a loss, if such loss is a necessary incident of a sale. So far as the purchase of state bonds by the state board of control is concerned, the transaction is essentially a bookkeeping one by which surplus funds of the state, that is, funds not immediately necessary for the purpose to which they are appropriated, may be transferred to the fund which the bonds were intended to create, thus making such funds immediately available pending the actual sale of the bonds to private parties. When so sold, the money derived therefrom would replenish the surplus fund of the general fund, and be distributed therefrom when needed to the appropriate fund from which the money was originally diverted.

As the state treasurer is prohibited from selling the highway bonds at less than par, it is clear that the state board of control, in purchasing such bonds, must bid par and accrued interest. That board is in turn prohibited from selling said bonds "at a price which will result in a net loss to the state." Stats. 1913, p. 564, *supra*. The state board of control proposed to buy bonds at par, and, in pursuance of an understanding theretofore had with a syndicate of bond buyers, to resell to them at 93.5862 per cent. It is clear that this will result in a loss to the state of the difference between the par value of the bonds and the percentage paid by the syndicate, and it is immaterial whether that loss takes the form of an allowance to the bond buyers as commissions or what the form of such loss may be, the fact will still re-

main that the state, by such purchase and sale, has suffered a loss to the extent that the par value of the bonds is depreciated. The phrase "net loss to the state" relates to the difference between the purchase price of bonds paid by the state board of control, and the net returns from the sale of such bonds by them. If the net returns of the sale are less than the purchase price of the bonds, there is a net loss, and this is prohibited. The purpose of the Legislature in prohibiting a sale of bonds at a "net loss" was to prevent a loss in the several funds established by law, and temporarily transferred to the surplus fund of the general fund.

If the statute authorizing the state board of control to purchase and resell state highway bonds issued under the constitutional amendment of 1919 should be construed according to defendants' contention, so that sale could be made by such board of control at a discount below par, the statute so construed would be clearly unconstitutional, as violating the provisions of article 16, section 2, authorizing and requiring the sale of said bonds for not less than par. The fact that the Legislature has authorized the state board of control to purchase the bonds at par and sell at a discount, if we so construe the law, would not justify the sale of these bonds in violation of the constitutional requirement that they be sold at or above par. The plain intent of the constitutional requirement is that the state shall receive the par value of the bonds, and any legislation which would justify a purchase and sale by officers of the state as a means of ultimately disposing of the bonds at less than par would be clearly unconstitutional. If, therefore, the legislative provision authorizing the state board of control to purchase and sell bonds is construed as contended for by the defendants, the law would be unconstitutional so far as applied to the third state highway bond issue.

But we do not so construe the statute. It is clear that the people, in adopting the constitutional amendment, and the Legislature, in authorizing the purchase and sale of bonds by the state board of control, did not intend that these bonds should be sold at a discount either by the treasurer or by the state board of control. It is no doubt true, as suggested by the Attorney General, that no one anticipated the situation that subsequently arose because of the war, whereby state and municipal bonds bearing $4\frac{1}{2}$ per cent. interest were salable on the market only when offered for less than par. On the other hand, the very purpose of the constitutional requirement that the bonds should not be sold for less than par was to anticipate such a situation by prohibiting such a sale at all, for, if there was no danger of the bonds being sold for less than par, there was no reason for making the requirement that they must be sold at par.

The defendants' answer is framed upon the theory that there will be no net loss to the state by reason of the sale of the bonds as contemplated, because, if the bonds are not sold, highway work must be suspended, and great loss will result therefrom to the state. The loss prevented by securing funds for the continuance of the work is not to be added to the selling price of the bonds to ascertain whether there has been a net loss to the state. The gain to be derived by the state from the use of the money is not an element that enters into the question of whether there has been a net loss. In determining that loss only two items are to be considered, the cost of the purchase of the state bonds by the state board of control, and the net returns from the sale thereof. If the latter are not equal to or greater than the former, the sale is not authorized. Let it be observed that we are considering only the case of state bonds, so bought and sold.

It is clear from the foregoing that the defendants have no authority to direct the payment of this money into the surplus of the general fund for the purpose of paying the difference between the par and selling value of the bonds, whether in the form of commission or otherwise. It is also clear that the legislation authorizing the respondent board to designate the fund into which this money should be paid contemplated that it should be paid into funds which, under the statute organizing said board, are under the control of that board for the creation, maintenance, and repair of state highways.

It is ordered that a peremptory writ of mandate be issued directing the defendants to designate to the treasurer and controller the fund into which this money shall be paid, which fund shall be one already existing by law for the construction, maintenance, or repair of state highways, or one created or designated by the respondent board for that purpose.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

(185 Cal. 700)

IN RE ANDERSON'S ESTATE. (S. F. 9071.)

(Supreme Court of California. May 20, 1921.
Rehearing Denied June 16, 1921.)

1. Wills §155(3)—Arguments or entreaties not enough to constitute "undue influence."

That a testator has been influenced by the arguments or entreaties is not enough to make the influence undue, there being no "undue influence" unless the pressure has reached the point where the mind of the testator gives way before it so that his will does not represent his conviction or desire, but that of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

2. Wills §166(1)—Evidence to show undue influence on testator of normal mind and body must be very strong.

Evidence to justify setting aside a will for undue influence, consisting simply in the pressure of importunity and entreaty, must be very strong in the case of a testator of normal strength of mind, in the full possession of his faculties, unimpaired by infirmity.

3. Wills §166(12)—Evidence of undue influence must prove circumstances inconsistent with spontaneity of testator's act.

Evidence of undue influence upon a testator must show that pressure was brought to bear directly upon the testamentary act, and, though it may be circumstantial, it must do more than raise a suspicion, but must amount to proof of circumstances, inconsistent with the spontaneous character of the testator's act.

4. Wills §166(5)—Will, considering amount of testatrix's estate, held not unnatural.

Where testatrix, after making her will, received considerable property from her husband, that she gave all her estate to her aunt instead of to her husband, if no child survived her, or that she gave one-half to her aunt instead of all to her child if one survived her, were not so unnatural, as to be inconsistent with the claim that the will was her spontaneous act, considering the small amount of the estate at the time of making the will the validity of which must be determined by the situation at the time it was executed.

5. Wills §166(5)—Testamentary request that testatrix's aunt be made guardian of child, not unnatural.

A provision of a will, requesting that testatrix's aunt, the beneficiary of her will, be made guardian of her child, instead of her husband, was not so unnatural as to be inconsistent with the claim that the will was testatrix's spontaneous act, considering the old age of testatrix's husband and the sex of the husband and aunt.

6. Wills §166(2)—Evidence held insufficient to show undue influence of aunt, made beneficiary of niece's will.

Where the relations existing between a testatrix and her aunt, the sole beneficiary of her will, were as close as those usually existing between a mother and daughter, and the aunt accompanied the testatrix to the office of the attorney, who drafted the will, but remained outside the room while testatrix conferred with him, and there was no evidence of the aunt importuning or otherwise exercising any pressure upon testatrix to make a will in her favor, and thereafter testatrix and her husband moved elsewhere where they lived together apart from the aunt for some time, the evidence was insufficient to show the exercise of undue influence by the aunt.

7. Wills §163(2)—No presumption of undue influence from intimate relation between testatrix and beneficiary.

That an intimate and affectionate relation existed between a testatrix and her aunt, sole beneficiary under her will, did not give rise to a presumption of undue influence.

8. Wills \Leftarrow 163(5)—Acts of beneficiary held not such activity in procurement of will as to create presumption of undue influence.

The activity of testatrix's aunt, in the procurement of a will making her the beneficiary, was not such as to raise a presumption of undue influence, where she obtained a letter of introduction to the lawyer who prepared the draft of the will, and went with the testatrix to his office, where she remained in an outer room during testatrix's interview with him, as the activity necessary to give rise to such a presumption must be in the use of the relation between the beneficiary and testatrix for the overcoming of the will of the latter.

9. Wills \Leftarrow 53(2) — Declarations indicating mental state at time of utterance inadmissible, where such mental state not germane.

Declarations, indicating declarant's intention, feeling, or other mental state being competent only when they indicate such mental state at the time of their utterance, are not admissible when declarant's mental state at that time is not germane to the issue.

10. Wills \Leftarrow 165(2)—Declarations of testatrix some time after execution of will inadmissible, facts shown being immaterial and prejudicial, on issue of undue influence.

In the contest of a will on the ground of undue influence, testimony of a nurse in attendance on testatrix some months after the making of the will that she heard decedent praying God to forgive her sin and help make it right with her husband, and testimony of her husband that she several times requested him to get an attorney to draw some papers undoing an unjust act toward him, which her aunt and uncle caused her to do, were inadmissible, being hearsay, and indicating only that testatrix had changed her mind and regretted the will she had made; such facts being prejudicial and immaterial on the issue of undue influence at the time of the execution of the will.

11. Wills \Leftarrow 165(4)—On issue of undue influence testatrix's letter to beneficiary, stating will had been made at latter's request, inadmissible.

On an issue as to undue influence, a letter by testatrix to her aunt, the beneficiary under the will, to the effect that the will had been made at the latter's request, was not admissible, being merely a declaration as to a past event, and not indicative of the condition of mind of the testatrix at the time she made the will.

12. Wills \Leftarrow 165(4)—On issue of undue influence testatrix's request that husband protect her against her aunt, the beneficiary, held admissible.

In the contest of a will on the ground of undue influence, a request by testatrix of her husband that he protect her against her aunt, sole beneficiary under the will, was admissible, though hearsay, it indicating her then state of mind toward her aunt, which was material, having a reasonably direct bearing on what her mental attitude may have been when she executed the will not long before.

In Bank.

Appeal from Superior Court, Sonoma County; George H. Cabaniss, Judge.

Proceeding by Cora T. Jenkins, to probate the olographic will of Hazel Anderson, deceased. From an order in favor of contestant, Henry Anderson, refusing the admission to probate of the will, proponent appeals. Reversed.

R. L. Thompson and R. M. Barrett, both of Santa Rosa, for appellant.

J. R. Leppo and Kellogg & Kyle, all of Santa Rosa, and Roy W. Stoddard, of Reno, Nev., for respondent.

OLNEY, J. This is an appeal from an order refusing the admission to probate of a certain olographic instrument purporting to be the will of Hazel Anderson, deceased. The order was made after formal contest and jury trial. The authenticity of the instrument was not questioned, and the grounds of contest assigned were that it had been executed under the undue influence of the proponent, who was the sole beneficiary and is the appellant here, that it had been executed when the testatrix was of unsound mind, and that it had been revoked. At the trial a nonsuit was granted as to the two latter grounds, and the cause submitted to the jury upon the single issue as to undue influence. Upon this issue the jury found against the instrument, and upon their verdict the order appealed from was made. Of the grounds urged for reversal but two require consideration. They are (1) that the verdict is not supported by the evidence, and (2) errors in the admission of evidence. The first of these grounds necessitates a review of the evidence.

The proponent of the will is an aunt of the decedent, and the contestant is the decedent's husband. The decedent had been left an orphan when very young and had been brought up in the family of her aunt. The very closest relations existed between them, fully as close as those usually existing between a mother and an affectionate and tractable daughter, and they regarded each other as if that were in fact their relation. The deceased was a woman of education, intelligence, and individuality, and there is not present in the case any element of the control or domination of a weak or subnormal mind by a stronger or more vigorous personality. There was some testimony as to occasions when the deceased and her aunt had differed about minor matters, some of them purely personal to the deceased, such as matters of dress, and the deceased had given way to her aunt. But there was nothing more shown than the deference which, as between mother and daughter, the younger woman might very reasonably and properly show to the opinions of the older. The case is but

one of a close and intimate relation, as of mother and grown daughter, with no more of subservency on the part of one to the other than may naturally and properly exist in such a relation.

At the time of the decedent's marriage the parties were living in Reno, Nev. The aunt's husband was managing a general store there, assisted by his wife, and the niece was employed in the store. There she met the contestant, who was one of the principal stockholders of the corporation owning the store, and married him. He was very much older than she, he being 67 at the time and she 27. He had been married previously, and had a family of grown children. He was also a man of wealth, while she had nothing.

Something over a year after the marriage, the deceased became pregnant, and in February, 1918, she and her aunt came to San Francisco to make purchases in preparation for the expected child and to attend to some other matters. It had been planned that the husband should accompany them, but his wife informed him that her aunt preferred that they should go alone, and he permitted them to do so. While the two women were thus alone in San Francisco, the instrument in question was executed. The decedent's mother had died in childbirth, and the decedent greatly feared the same fate for herself, and the will was undoubtedly made by her because of her approaching confinement and the danger incident to it. Her only estate at the time consisted in some personal belongings and shares of stock of the value of about \$8,000 in the corporation owning the store at Reno managed by her aunt's husband, all of which the decedent's husband had given her from time to time after their marriage.

The will made by the decedent under the foregoing circumstances gave one half of her estate to her aunt, and the other half to any child or children that might survive her. If no child survived her, the whole estate was to go to her aunt. The will also named the aunt as executrix, and expressed the wish that she be appointed the guardian of the estate of any child who might survive the decedent. The will also stated that the decedent made no provision for her husband for the reason that he had ample means of his own and needed no provision from her separate estate.

There is no evidence of the aunt importuning the decedent or otherwise exercising any pressure upon her either to make a will or to make one in her aunt's favor. All that appears is that the decedent before coming to San Francisco had expressed a wish to make a will, and had told her aunt that she wished her to have what she had when she died. The sole witness as to the immediate circumstances under which the will was executed was the aunt, who was called for the purpose of testifying upon the point by the contestant

himself. He is, of course, not bound by her testimony (section 2049, Code Civ. Proc.), and the jury were at liberty to reject any of it that did not seem to them worthy of belief, but, rejecting it, there is no evidence to take its place, and, as was said of a similar case in *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762, the case is without evidence upon the point. The circumstances as testified to by the aunt, were that shortly after the arrival of the two women in San Francisco, at the suggestion of the niece, the aunt made inquiry of a woman, with whom they had business, as to a competent lawyer. The woman recommended a Mr. Clark, a reputable attorney, and gave the aunt a letter of introduction to him. The aunt and the niece presented this letter together, the aunt asked him about some matters of her own, and then retired from the room while the niece consulted him about her will. The aunt remained without the room during the interview between the lawyer and the niece, except that at one time she was called in by the niece, who wished to inquire about a date. When the ladies left, the lawyer was to prepare a draft of a will which would express the wishes of the niece as told to him by her. This he did, and the ladies later returned, and the niece obtained the draft. From this draft she prepared the will in question here, writing it in her room one afternoon when the aunt was out, and putting it in her aunt's suit case in a sealed envelope. On her aunt's return she told her what she had done, and asked her to put the will in the safe of the store at Reno. The aunt kept the will until her return to Reno, and then placed it in the safe as requested.

There was also considerable evidence as to events occurring subsequent to the execution of the will, but for the most part this evidence is wholly immaterial upon the issue of undue influence, and yet is of a character to influence the jury strongly against the will, since it indicates that the decedent immediately before her death had changed her intention as to the disposition of her property and desired to revoke the will, a desire which her untimely death alone prevented her from carrying into effect. It seems that at the end of their stay in San Francisco the two ladies went to Sacramento, where they were met by the decedent's husband. From there the aunt returned to Reno, and the niece and her husband went to Santa Rosa pursuant to a plan they had to settle in California, if they found a place agreeable to them. They found Santa Rosa agreeable, and the husband purchased a home and a farm there at an aggregate cost of about \$18,000. These he had conveyed to his wife, so that at her death her estate consisted of this property as well as of the \$8,000 in stock and the personal belongings which she had at the time she made the will. The husband and wife remained at Santa Rosa, the aunt visiting the niece but once and then for but a few

days, and at the suggestion of the husband, in order that some one might be with his wife while he was away on business. Some three months after the making of the will, the expected child was born, but born dead. The mother was able to be about within a few days, but blood poisoning then came on, and she died on the eighth or the ninth day after the birth.

A nurse who was in attendance testified over the objection of the proponent of the will that some days after the birth she found the decedent by the side of her bed praying and repeating over and over, "Dear God, just now forgive my sin, and help me to make it right with Mr. Anderson."

The contestant, over the objection of the proponent, was permitted to testify to a number of conversations with his wife occurring after her confinement. According to his testimony, she several times requested him to get an attorney who might draw some papers undoing an unjust act that she had done toward him, and which her aunt and uncle were the cause of her doing. He put her off, saying that they could go to Reno and fix the matter directly with the aunt and uncle. In reply to this suggestion she asked that in case they went to Reno he protect her, as her aunt and uncle would be very cruel to her. Two days before her death she prepared a preliminary draft of a letter to her aunt and also a letter. The letter was mailed by her husband at her insistence, but was not received until after her death, and on its receipt was destroyed by her uncle. The preliminary draft read:

"June 13—1918, Santa Rosa, Cal.

"Dear Auntie: Will you kindly forward the original will which you witnessed in San Francisco when we were down there. I have not been able to sleep at night and feel when I get these papers here and get that ignoble act undone.

"Hope you and children are well.

"Hazel Lenore Anderson."

The letter itself, according to the contestant's testimony, read:

"Santa Rosa, California, June 13, 1918.

"Dear Auntie: Will you kindly forward those papers, which at your request was drawn up in San Francisco. I wish to revoke that ignoble act done, and forward same to me immediately. I have not been able to sleep since you left me.

"Hazel Lenore Anderson."

Although the decedent had expressed her wish to her husband to undo an "ignoble" act which she had done toward him, and although the husband read both the foregoing preliminary draft and the letter itself before the letter was mailed, and the matter was the subject of more than one conversation between them, the fact, according to his testimony, is that he did not know that his wife had reference to a will she had made,

and did not know until after her death that she had made a will.

[1-3] The foregoing being the facts and circumstances of the case as shown by the evidence, the question presented by the appellant's first contention is, Are they sufficient to prove affirmatively, as a conclusion fairly to be drawn from them, that it was actually the fact that in executing the will the mind and will of the testatrix were overpowered by her aunt? Viewing the question purely as one of fact to be determined from the facts and circumstances shown in evidence, it would seem plain enough that the evidence is sufficient to raise only a suspicion, if even that, that the mind of the testatrix may have been overpowered, and is not sufficient to justify as the basis for judicial determination and action the definite conclusion that it was in fact overpowered. It is no easy thing to overpower the mind of a normal person in full possession of his senses by the mere pressure of importunities and entreaties, and there is certainly not even a suspicion in the present case that any more drastic or compelling form of pressure was used. The mere fact that one person has been influenced by the arguments or entreaties of another is not enough to make the influence an undue one. It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it—so that the action of such person, taken in response to the pressure, does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another. As was said in *Estate of Donovan*, 140 Cal. 390, 394, 73 Pac. 1081, quoting from Chaplin:

"The true test of undue influence is that it overcomes the will without convincing the judgment."

This can happen but rarely in cases of persons of normal strength of mind in the full possession of their faculties, unimpaired by infirmity. The evidence which would justify the conclusion that it had occurred in any particular case of that character would have to be very strong indeed. This, of course, is not true where the mind of the person subjected to the pressure is naturally weak or is impaired by sickness, extreme physical weakness, or some other cause, and it will be found upon examination that in nearly every case where a will has been set aside as the result of undue influence consisting simply in the pressure of importunity and entreaty, there has existed the element of a mind and will weak or for some reason impaired. That element is not present here, and it is simply incredible, upon the facts presented in the case before us, that the mind of the testatrix, a woman of mature years and of at least normal strength of mind, intelligent, in the full possession of her faculties, and in good health, was overcome by

the pressure of importunities and entreaties on the part of her aunt. There is in fact no evidence that such pressure was exerted. The outstanding features of the case are simply: That the testatrix was a mature and intelligent woman of sound mind; that she was married to a man of wealth very much older than herself; that she was devotedly attached to her aunt, whom she regarded as her mother; that she had a little property of her own, given her by her husband, consisting almost entirely of stock in the corporation managed by her aunt's husband; that she was expecting a child, and was fearful of the result of her confinement; that she wished to make provision as to the disposition of her estate and the care of her possible child in case she should die; that under the circumstances she made a will after consultation with a lawyer, and when she and the aunt were away from their home together; and that the will provided for the division of her estate between the aunt and her child, if there should be one, and otherwise for its all going to the aunt, requested that the aunt be appointed guardian of the child, and stated that no provision was made for her husband, as he had ample means of his own.

It is doubtful if these circumstances would justly raise even a suspicion. Much less do they come up to the test prescribed in *Re McDevitt*, 95 Cal. 17, 30 Pac. 101, a test which has been reiterated and reapplied in numerous subsequent decisions by this court. It was there said at page 33 of 95 Cal. at page 106 of 30 Pac.:

"Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here."

[4, 5] Applying this test, What one of the circumstances in this case is there which is "inconsistent with the claim that the will was the spontaneous act of the alleged testatrix?" The only one upon which stress is laid is the provisions of the will itself, and in particular that it should give the estate to the decedent's aunt instead of to her husband, from whom she had received it all. But when we consider the small amount of the estate she was disposing of, consisting as it did when she made the will only of personal belongings and stock in the store corporation to the amount of \$6,000, and the fact that her husband, as she says, had ample means, it was not unnatural that she should wish her little to go to her aunt and foster mother. This situation was considerably changed by the subsequent very substantial gifts to her

of the home and farm at Santa Rosa, and it may well be that it was due in some part to this that she subsequently desired to revoke the will. But the validity of the will must be determined by the situation as it existed at the very time it was executed, and the situation then was that she was disposing of a comparatively small amount. Stress is also laid on the provision of the will requesting that the aunt be made guardian of her child. This also is a not unnatural provision, when we consider the ages and sexes of the parties. The husband was 69, and a man, and the aunt was 47 and a woman. It was not unnatural that the testatrix should expect and hope that it would be the latter who would have the bringing up of her infant child in case she herself should pass away. The only feature of the will whose naturalness can be at all justly questioned is not that it gives the testatrix's estate to her aunt instead of to her husband, but that it gives one-half to her aunt if the child survives, instead of giving it all to the child. But here again, when we consider the small amount that would be left to the aunt in such a case, some \$3,000, and the burden that would be assumed by the aunt, if the raising of the child were intrusted to her, any unnaturalness of the will in this respect largely, if not entirely, disappears.

[6] The circumstances of this case are not dissimilar from those in numerous other cases which have from time to time been presented to this court, and so far as we are aware it has been held without exception that such circumstances are insufficient to justify a finding of undue influence. In the very case from which we have just quoted of *In re McDevitt*, the facts were that the testator was an old man, an invalid suffering from cancer, from which he finally died, a bachelor living with a brother, that his will was executed at the house of this brother, and left everything to him and to his children to the exclusion of the children of two deceased brothers living in the same city, and with whom the testator was on friendly terms. There was also evidence that the brother, who was the beneficiary, had abused the testator, and that the latter was very much afraid of him. The only particular in which the facts in the case differ from those before us in a respect favorable to the contestant here is that the brother was not present, even outside the room, when the testator was consulting his lawyer and the will was executed. The jury found that the will was executed under the undue influence of the brother, and on appeal the verdict was set aside as not supported by the evidence. Among other things pertinent to the present discussion contained in the opinion is the following:

"General influence, not brought to bear upon the testamentary act, however strong or controlling, is not undue influence. There must be proof that the influence was used directly

to procure the will, except in those cases where the beneficiaries or parties instrumental in having the will executed sustained a confidential relation to the testator. This case is not within the exception."

In *Re Langford*, 108 Cal. 608, 41 Pac. 701, the testator left the bulk of his estate to a second wife to the practical exclusion of his children by a former marriage. The jury found that the will was executed under the undue influence of the wife, and on appeal the verdict was set aside as not supported by the evidence. There was evidence that the testator habitually deferred to the wishes of his wife, that he appeared to be afraid of her, and that he declared on several occasions that his children should have his property when he died. The court said of the case, as might be said of the present one:

"This is not the case where a man makes a will upon his deathbed, surrounded by those who turn out to be his devisees; nor is it a case where a weak person at the time of the execution of his will is teased and tormented by the importunities of relatives who do not allow him to be out of their sight, or to have any opportunity for quiet thought or independent advice."

The single particular in which the facts were less favorable to the contestant than those appearing here is that the will was executed at the office of the testator's lawyer, where he had gone alone. This, of course, is an important feature, but its importance is much reduced in the present case by the fact that for the whole period of three months between the execution of the will and the confinement of the testatrix she was, except for a few days, with her husband and away from her aunt, and was not even intending to return to live near her aunt. Any element of undue influence must have been removed; she had ample time to change the disposition she had made, and yet there is no suggestion that such change was desired by her until after her confinement. As was said in the *Langford* Case:

"He had ample opportunity to fully and freely think out what he wanted to do, and to change any conclusion he might have arrived at, if he so desired."

In *Estate of Calef*, 139 Cal. 673, 73 Pac. 539, the testatrix had made a will giving a substantial legacy to the contestant and making only a small contingent provision for one Mabel Tickell. Thereafter she made a codicil, giving Mrs. Tickell a substantial amount and correspondingly reducing the legacy to the contestant. Both will and codicil were offered for probate, and the contestant contested the validity of the codicil on the grounds that it had been executed under the undue influence of Mrs. Tickell, and that the testatrix was of unsound mind at the time. The jury found against the codicil on both

grounds. It appeared that the testatrix was a widow without children. Her husband, however, had had three children by a former marriage, one of whom was the mother of Mrs. Tickell. The testatrix always had great affection for this stepdaughter and her daughter, and called them her daughter and granddaughter, and treated them as such. About 2 years after making the will she suffered an attack of paralysis, from which she finally died. Immediately after suffering this attack she went to live at the home of her stepdaughter, the mother of Mrs. Tickell, and remained there until her death. Shortly before going there she had told her lawyer to prepare a draft of the codicil in question and send it to her at her stepdaughter's home. This the lawyer did, and upon receipt of the draft the testatrix made a copy of it in her own hand as an olographic instrument. At the time she did this Mrs. Tickell was with her, and, the eyesight of the testatrix being bad, read the draft to her. There was also evidence of unsoundness of mind, although how substantial the evidence was does not appear. About a year after the making of this codicil the testatrix died. It must be evident that in nearly every particular the circumstances of this case were more favorable to the contestant than those of the present case, but, nevertheless, the court held that they were insufficient to justify the verdict of undue influence.

In *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6, the testator had made a will substantially preferring one son to his other children. The evidence for the contestants showed that the will was executed on the day preceding the testator's death, that he was a man of advanced years, in poor health, and greatly weakened mentally, and that the testator reposed great confidence in the son who was preferred, and the latter had from time to time importuned his father to settle his affairs. The will was executed by the testator at his home after consultation with a lawyer. The son accompanied the lawyer to the house when he went there for the purpose of having the will executed, but was not in the room either at the preliminary consultation or at the time of execution. It was held that the evidence did not justify a finding that the will had been executed under the undue influence of the son.

In *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915, the testator, a man of advanced years, had made a will leaving the bulk of his estate to two daughters to the exclusion of a son to whom he was much attached and of two other daughters. The will was attacked as made under the undue influence of one of the daughters benefited, and the jury found against the will. It appeared that the testator had made a second and very unhappy marriage; that the will was made when he was in serious trouble with his wife and greatly perturbed because of it; that he plac-

ed the utmost confidence in the daughter who was claimed to have unduly influenced him; that immediately prior to the making of the will he had transferred to her a large part, if not practically all, of his estate, to hold as trustee for him; that she suggested at the time of this transfer that he should make a will, and he immediately consulted a lawyer for that purpose and did so, and that the daughter exerted great influence over her father and boasted of it. It was held that the evidence was no more than sufficient to raise a suspicion, and did not amount to proof of undue influence, and the verdict of the jury was set aside. It is to be noted that in the particular that the daughter not only occupied a relation of affection and great confidence toward her father, but was as well an actual trustee for him for a considerable portion of his estate, the facts were stronger in favor of the contestant than in the present case. On the other hand, it should be said that the will was executed wholly without the presence of the daughter, and importance is attached in the opinion of the court to that fact. It did appear, however, that the daughter had gone with him to the trust company, whose attorney prepared the will on the occasion when he consulted that attorney in regard to making a will.

In *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733, the testatrix left her entire estate to her husband to the exclusion of her daughter by another man. The jury found that the will had been executed under the undue influence of the husband, who not only lived with the testatrix on terms of affection and confidence, but who had been intrusted by her with her business affairs, she being ignorant and illiterate. Of the details of the case in general, it is necessary to say only that they were no less favorable to the contestant than the circumstances of the present case. There is one particular, however, that is worthy of note, and that is the important particular of the circumstances immediately surrounding the execution of the will. It is worthy of note because those circumstances closely resemble those surrounding the execution of the present will and to the extent to which they differ are more favorable to the contestant. The circumstances were that the testatrix's husband not only went with her when she went to the office of their lawyer for the purpose of making a will, but, unlike the aunt in this case, he actually remained in the room with her when she gave instructions as to the provisions she desired, and executed the will drawn in accord with those instructions. The court, nevertheless, set aside the verdict of undue influence as not justified by the evidence.

In this immediate connection, the decision in *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932, should be noted. There a widow of advanced years, ill and about to undergo a severe operation, made a will in favor of her

husband's brother and sister and her housekeeper to the exclusion of her heirs. The estate was large, and the will was contested on the grounds of unsoundness of mind and of undue influence on the part of the three beneficiaries, particularly on the part of the brother-in-law. The contestants were nonsuited, and on appeal the order of nonsuit was upheld. The physician of the testatrix testified that her mind was somewhat impaired by age, and there was also the evidence of acquaintances that in their opinion she was of unsound mind. It also appeared that the brother-in-law had been her business adviser and manager ever since the death of her husband, so that a fiduciary relation was involved as well. The circumstances surrounding the execution of the will closely resemble those now before us. A lawyer was summoned to the house of the testatrix by the brother-in-law, and, going there, was taken to the room of the testatrix, where there was also present one of the other beneficiaries. The lawyer and the testatrix were, however, left alone while she gave him instructions about the will she desired. The next morning she went to the lawyer's office to execute the will, accompanied by the brother-in-law, who, however, was not present in the inner office when the will was executed. If a nonsuit were proper in the case of a will executed under these circumstances in favor of a fiduciary agent by an ill woman of advanced years, whose mind was somewhat impaired by age, certainly a nonsuit would have been proper in the present case.

In *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872, the will involved was one whereby the testator left his entire estate to his wife to the exclusion of his sister. It appeared that the testator at the time of his marriage was a man of 60, while his wife was only 22, and even at that youthful age had had such a varied matrimonial career that the testator was her third husband; that he had been married before, and had been devotedly attached to his first wife, with whom he had lived happily for 30 years, and had married the second wife within a year after her death and upon a short acquaintance; that he had numerous sick spells, for relief from which he was accustomed to take morphine; that the second wife secured the will within a few hours after its execution, inquired of one of the witnesses to it if he had in fact witnessed it, and then placed it in her safe deposit box, and that within seven weeks after the execution of the will the testator died. It also appeared that while the will had been executed without the presence of the wife and at the office of a notary public where the testator had gone for the purpose, the testator returned to the office of the notary within a few minutes in a state approaching nervous collapse, and, referring to the will and to the

fact that he had required the notary to acknowledge its execution as well as to witness it, said:

"But I had to do it. I had to do it right or hell would pop at home; I could not stay there."

Certainly these circumstances and such evidence go much further to justify a suspicion at least of undue influence than those of the present case, but it was held that they were insufficient to have justified a finding of undue influence by the second wife.

It would serve no useful purpose to discuss the comparatively few decisions of this court in which an order setting aside a will for undue influence has been upheld. Suffice it to say that in practically all of them there entered either the element of a weak, unsound, or impaired mind, including a mind impaired by great physical weakness, or the element of a will procured by one who occupied a fiduciary relation to the decedent, who was not a natural object of the decedent's testamentary bounty, and who yet benefited substantially by the will. Examples of the first class of cases are *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598; *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307, and *Estate of Jones*, 166 Cal. 108, 135 Pac. 288. An example of the second class is *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785. Not infrequently both elements are present, as was true in *Estate of Nutt*, 181 Cal. 522, 185 Pac. 393. Not infrequently there enters also the element of some fraud or deceit practiced by one occupying a confidential relation. None of these elements is present in the case at bar.

[7] The contestant contends that because of the intimate and affectionate relation which existed between the decedent and her aunt there arises a presumption of undue influence. This feature was present in most, if not all, of the cases which we have just reviewed at length, and it is apparent that if there be such a presumption here and it is controlling, it was likewise present in those cases, and should have been there held to be controlling, and a different result reached. In many of them, furthermore, the same contention as to a presumption was made and was discussed and overruled. See, for example, *Estate of Langford*, 108 Cal. 608, 622, 41 Pac. 701. It has also been presented in a number of cases we have not referred to. *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532, is an example. There, a mother made a will giving her property to two sons to the exclusion of a third. The relation between one of the sons who was a beneficiary and his widowed mother was not only the close relation which naturally exists between mother and son, but the son had also had charge for years of all her business affairs. There was no evidence whatever as to the circumstances under which the will was executed and the con-

testant, the disinherited son, contended that because of the relations between his mother and his brother a presumption of undue influence arose which the latter had to overcome. The jury found against the will, and on appeal the verdict was set aside, the court saying, at page 461 of 160 Cal., at page 536 of 117 Pac., in regard to the claim that a presumption of undue influence existed:

"But no warrant is given to a jury to find that undue influence was exerted at the time the will was made from proof merely of such relation alone. Undoubtedly the relation between respondent and his mother was affectionate and confidential and that [sic] he would have a general influence over his mother proceeding from such relation. But the existence of such relation and this general influence raises no presumption that undue advantage was taken of it by respondent. There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making the will. The confidential relation and the opportunity afforded therefrom to exercise undue influence may, of course, always be taken into consideration with other evidence, when the question of undue influence is in issue. But the relation itself, and opportunity, are not sufficient alone to warrant a finding that undue influence was actually exerted. Proof, merely, that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation, at the time the will was made, overcoming the free will and desire of the testator, in order to invalidate the testament."

See, also, *Estate of Baird*, 176 Cal. 381, 168 Pac. 561.

[8] It is also claimed, however, that there was present in the case at bar the element of activity on the part of the aunt in the procurement of the will. The only evidence of such activity is that she obtained a letter of introduction to the lawyer who prepared the draft of the will, and went with the testatrix to his office and there remained in an outer room during the interview between the testatrix and the lawyer. But this is not the activity in the procurement of the will which is necessary in order to give rise to a presumption of undue influence. The activity must be in the use of the relation for the overcoming of the will of the testator. As was said in *Estate of Ricks* (to quote again):

"There must be some proof, in addition to the relation, of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament."

It is also worthy of note in this connection that in *Estate of Morcel*, 162 Cal. 188, 121

Pac. 733, heretofore referred to, where the husband was accused of procuring the will of his wife by undue influence, the same activity as that shown here appeared, that is, the husband went with the wife to the lawyer's office when the will was drawn and executed (in fact he remained in the room during the whole time), the same contention as to a presumption arising was made as is made here, and the contention is directly overruled. Other cases of well-nigh identical facts where the same contention was made are *Estate of Latour*, 140 Cal. 414, 423, 73 Pac. 1070, 74 Pac. 441; *Estate of Calef*, 139 Cal. 673, 73 Pac. 539; and *Estate of Purcell*, 184 Cal. 300, 128 Pac. 932.

Our conclusion then is that the evidence is insufficient to sustain the verdict of undue influence.

[9] As to the declarations of the decedent admitted over the objection of the proponent, the contention that their admission was error must also be sustained as to some. Such declarations were hearsay, pure and simple. The only exception to the rule against hearsay within which they could come is the exception which admits declarations indicative of the declarant's intention, feeling, or other mental state, including his bodily feelings. But such declarations are competent only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of showing that mental state. It follows from this that unless his mental state at that time is material to the issue under investigation, the declarations are not admissible, even though they do show his mental state at that time, not because they are not competent for that purpose, but because that purpose is not germane to the issue. These general propositions are settled by a multitude of authorities, including some where the issue was one as to undue influence in the making of a will. See *In re Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598; *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532; *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872; *Estate of Jones*, 166 Cal. 108, 135 Pac. 288. Now the declarations of the testatrix admitted in the present case were admitted on the theory that they were competent only to show her state of mind when uttered, and the jury were so charged. But although admitted for this purpose alone, most of the declarations do not come within the exception to the hearsay rule. As may be seen from the foregoing statement of the exception, in order that a declaration be within it, two things are requisite: (a) The declaration must be indicative of the mental state of the declarant at the very time of utterance, and (b) his or her mental state at that time must be material to an issue in the

cause, i. e., have a reasonable evidentiary bearing upon such issue.

[10] The declarations in the present case are of three sorts: First, there are the declarations indicative simply of the fact that at the time they were made, some three months after the execution of the will, the testatrix had changed her mind in regard to the disposition she wished to make of her property, and regretted the will she had made. If that change of mind and regret had been material, evidence of the declarations would have been competent. The point is that the fact that she had changed her mind and regretted what she had done was not material. It made no difference whether she had or not. The only evidentiary bearing of the fact on the issue before the jury, that of undue influence at the time of the execution of the will, lay in the possibility of reasoning from the fact that the testatrix had changed her mind and regretted what she had done that she had possibly acted only under undue pressure in the first instance. But this bearing is exceedingly slight and remote, or, in other words, the probative value of the fact that she had changed her mind as showing that she had not acted freely in the first instance, is almost, if not quite, nil. On the other hand, the fact that the testatrix had changed her mind was one which, if put before the jury, would almost certainly affect them greatly, and would in and of itself be given great weight by them, regardless of what its bearing on the real issue before them might or might not be. Under such circumstances, where the true evidentiary bearing of the evidence is at best slight and remote, and yet the evidence is of a nature such as to make it very prejudicial to the party against whom it is offered, the evidence should be excluded. See *Adkins v. Brett*, 193 Pac. 251.

[11] The second sort of declaration is the one contained in the letter by the testatrix to her aunt to the effect that the will had been made at the latter's request. This was not properly admissible for a reason just the converse of that applicable to declarations of the first sort. The fact declared, that the will was made at the request of the aunt, did have a very direct bearing on the issue in the case, and was quite material. But the declaration of this fact was not admissible because it was merely a declaration as to a past event, and was not indicative of the condition of mind of the testatrix at the time she made it. It was therefore not within the exception to the hearsay rule. *Estate of Jones*, 166 Cal. 108, 117, 135 Pac. 288.

[12] The third sort of declaration is the request by the testatrix of her husband that if they returned to Reno he protect her against her aunt and uncle, as they would be cruel toward her. This is the only declaration

which meets both requirements necessary in order to bring a declaration within the exception. It (a) indicated her then state of mind toward her aunt, and (b) her then state of mind as so indicated was material, since the fact that she then feared her aunt had a reasonably direct bearing on what her mental attitude toward her aunt may have been at a previous and not far distant time, when she executed the will. Order reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; LAWLOR, J.

(52 Cal. App. 207)

BOOLE v. UNION MARINE INS. CO., Limited, et al. (Civ. 3784.)

(District Court of Appeal, First District, Division 1, California. April 11, 1921. Hearing Denied by Supreme Court June 9, 1921.)

1. Insurance ⇨147(4)—Policy may incorporate law of foreign state.

A contract by an insurance company made in one state and executed elsewhere may, by its terms, incorporate the law of another state and make its provisions controlling upon both the insurer and the insured.

2. Insurance ⇨147(4)—Policy may stipulate that it be governed by foreign law.

The general rule is that, in the absence of statutory prohibition, the parties may stipulate that the policy shall be construed and governed by the laws, usages, and customs of a foreign state, and such laws, usages, and customs as are applicable shall be deemed to be a part of the written contract.

3. Insurance ⇨147(4) — Stipulation making marine policy subject to English law not contrary to public policy.

A marine policy stipulation that the English law should govern in determining what should constitute a constructive total loss under the policy held not violative of public policy, notwithstanding the provisions of Civ. Code, §§ 2706, 2717, as to what constitutes a constructive total loss, such provisions not being mandatory upon the parties.

4. Contracts ⇨167—Provisions of Code as to contract rights may be waived.

Generally, under Civ. Code, § 3268, except where otherwise declared, the provisions of the Civil Code, with respect to the rights and obligations under contracts, are subordinate to the parties' expressed intention, and the benefit of such provision may be waived by any party entitled thereto, unless such waiver would contravene public policy.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by W. A. Boole against the Union Marine Insurance Company, Limited, and another. From judgment for less relief

than demanded, and an order denying plaintiff's motion for new trial, plaintiff appeals. Appeal from order denying new trial dismissed, and judgment affirmed.

Samuel Knight, F. Eldred Boland, and C. Irving Wright, all of San Francisco, for appellant.

Farnham P. Griffiths and McCutchen, Willard, Mannon & Greene, all of San Francisco, for respondents.

WASTE, P. J. Plaintiff sought to recover under two policies of insurance issued by the defendants, covering chartered freight on the oil barge Pinta, which was sunk in San Francisco Bay. The jury found that the barge was not such a constructive total loss as to entitle the plaintiff to recover under the terms of the policies, and returned a verdict in his favor for expenses incurred by him in raising the barge, but against him for the other sums asked. Judgment was duly entered. A motion for a new trial was made by plaintiff, and denied.

The judgment on the verdict was entered June 19, 1914. Appeal therefrom was not taken until October 15, 1919. On the same day there was taken an appeal from the order denying the motion for a new trial, which was made on September 15, 1919.

In this court the parties have proceeded upon the theory that the proper appeal to be considered is that taken from the order denying the motion for a new trial. We think not. The case falls squarely within the ruling of a recent decision of the Supreme Court, wherein it was held on facts identical with those presented in the case at bar that the only appeal to be considered was the appeal from the judgment. On the authority of that case, the appeal from the order denying the motion for a new trial is dismissed. *Wilcox v. Hardisty*, 177 Cal. 752, 171 Pac. 947.

The policies of insurance issued by the defendants to the plaintiff provide that all claims for loss shall be adjusted according to the English law and practice, and that the settlement thereof shall be made in conformity with the laws and customs of England. Conceiving these clauses of the policies to govern the adjustment of the loss in this case, the court instructed the jury that the question of plaintiff's right to recover under his claim of a constructive total loss must be determined by the laws and customs of England, and that under such law there is a constructive total loss of a ship only when the cost of repairs exceeds the value of the vessel when repaired. It was stipulated that this was a correct statement of the English law, which differs from the California law, which provides that a constructive total loss of a vessel occurs when the cost of repairs would exceed one-half the

value of the vessel. Sections 2705 and 2717, Civ. Code. It was admitted at the trial that the Pinta was not a constructive total loss under the English law, which was the basis of the court's instruction, and the resulting judgment for the defendants.

Appellant contends, in the first place, that the clauses of the insurance policies requiring that all claims for loss shall be adjusted in conformity with the English law and practice, and that all settlements thereof must be made in conformity with the laws and customs of England, do not, either expressly or by implication, exclude the California Code provisions as to what constitutes a constructive total loss; but that the claims arising under such policies shall be settled in accordance with the laws and customs of England only when such laws and customs are not in conflict with the provisions of the Code sections, which, he contends, are part of the insurance contracts. If the court shall conclude that, upon a fair construction of the contracts of insurance, the clauses of the policies referred to exclude the California statute law, it is appellant's contention in the second place that these clauses are void, as being in contravention of the domestic policy of the state expressed in the Code sections.

[1, 2] Contracts of insurance are not different from other contracts. In the absence of statutory provisions to the contrary, insurance companies have the same right as an individual to limit their liability, and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. 14 R. O. L. pp. 928-930. In cases of contract, it is well settled that the parties, by their own act and will, may agree to be bound by the law of a foreign jurisdiction, and such law will be enforced in the forum where the parties reside. *Pritchard v. Norton*, 106 U. S. 124, 129, 1 Sup. Ct. 102, 27 L. Ed. 104. A contract by an insurance company made in one state and executed elsewhere may, by its terms, incorporate the law of another state and make its provisions controlling upon both the insurer and the insured. *Mutual Life Insurance Co. of New York v. Cohen*, 179 U. S. 262, 267, 21 Sup. Ct. 106, 45 L. Ed. 181.

The general rule is that, in the absence of statutory prohibition, the parties may stipulate that the policy shall be construed and governed by the laws, usages, and customs of a foreign state, and such laws, usages, and customs as are applicable shall be deemed

to be a part of the written contract. 1 *Joyce on Insurance*, § 231d, p. 617; *New York Life Ins. Co. v. Orlopp*, 25 Tex. Civ. App. 284, 61 S. W. 336; 6 *Cooley's Briefs on the Law of Insurance*, para. 652, 653.

[3, 4] We do not think the authorities relied upon by the appellant removed this case from the application of the general rule. *Progreso S. S. Co. v. Marine Ins. Co.*, 146 Cal. 279, 79 Pac. 967, has no application, for the facts are different. In other cases the courts were construing the terms of insurance policies prohibited by express legislative enactments. In *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116, and in *Equitable Life Ins. Soc. v. Pettus*, 140 U. S. 228, 11 Sup. Ct. 822, 35 L. Ed. 497, the statute of the state of Missouri was being considered, which provided that no policy of insurance issued by any life insurance company authorized to do business in that state, should, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of such premiums, but should be subject to certain rules of commutation. As pointed out by the Supreme Court of the United States in the case last cited, the Missouri statute was mandatory and controlling. We find nothing in our own laws making the provisions of the Code defining a constructive total loss, in the case of marine insurance, mandatory upon the parties. Appellant has cited no cases so holding. We are not aware of any legislative declaration that would prohibit the parties to such an insurance policy from contracting that the law of England shall govern in the determination of what shall constitute a constructive total loss under such policy. It is the general rule in this state that, except where it is otherwise declared, the provisions of the Civil Code, with respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties when ascertained in the manner prescribed by the laws relating to the interpretation of contracts. The benefit of such provision may be waived by any party entitled thereto, unless such waiver would be contrary to public policy. Section 3268, Civ. Code; *Griffith v. N. Y. Life Ins. Co.*, 101 Cal. 627, 640, 36 Pac. 113, 40 Am. St. Rep. 96.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(52 Cal. App. 278)

PEOPLE v. STOCK. (Cr. 747.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1921.)

Criminal law \S 850—**Mere leaving of jury by bailiff not ground for new trial.**

It is not ground for new trial that the bailiff, in whose charge the jury were placed on retiring, left them for a moment in another's charge, neither he nor any one else conversing with nor approaching them in such time, so that no injury resulted to defendant.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

P. R. Stock was convicted of forgery, denied a new trial, and appeals. Affirmed.

Dick Foye Harding, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch and John W. Maltman, both of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was convicted of forgery. From a judgment upon such conviction and an order denying a new trial he has appealed.

Upon retiring to deliberate upon their verdict, which was at the noon hour, the jurors were taken to lunch by the bailiff, into whose custody they had been ordered by the court. The bailiff was duly sworn to keep the jurors together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself unless ordered by the court, or to ask them whether they had agreed upon a verdict. The jurors, in charge of the bailiff, together with defendant, who also was in custody of the bailiff, descended the stairs leading from the courtroom to the lobby of the courthouse. When they reached the courthouse lobby the bailiff, wishing to deliver his prisoner to the jailer at the county jail, asked a deputy county clerk, who was near by, to watch the jurors and see that no one talked to them while he took his prisoner to the county jail. The bailiff and his prisoner were gone about a minute and a half, when the former, returning, again assumed personal charge of the jurors at or near the corner of the courthouse grounds. Meanwhile, as shown by the testimony of both the deputy clerk and the bailiff, the jurors marched in double file from the lobby of the courthouse to the place where the bailiff rejoined them. The deputy clerk stood off at one side during all this time, watching the jurors, but holding no conversation with them. Not for an instant were the jurors separated; no one approached them; no one spoke to or conversed with them. They were in plain sight of the bailiff from the time he came out of the county jail after delivering the prisoner to the jailer.

Though there doubtless was a technical violation of the court's instruction to the bailiff to take charge of the jury, we cannot say that there was such misconduct as to justify setting aside the verdict. The ultimate purpose of the court's instruction to an officer to take charge of the jurors is to prevent them from having improper intercourse with others. Their being placed in charge of the officer is merely a means of accomplishing that purpose. Therefore the mere fact that the direction of the court is violated does not of itself give the defendant the right to have the verdict set aside, for it is possible that the jurors may not be affected by the irregularity. And though the officer who disregards his oath, or the court's instruction to take charge of the jury, falls in performance of his duty, and his conduct, if not explained so as to show that the defendant was not prejudiced thereby, is an irregularity that may be ground for a new trial, nevertheless, where, as here, it appears that no injury to the prisoner has followed from the irregularity, the verdict will not be disturbed. *People v. Symonds*, 22 Cal. 352; *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. Cord*, 157 Cal. 562, 571, 108 Pac. 511. It was clearly and affirmatively shown, by the very witnesses whom defendant called to prove the conduct of which he complains, that the jurors were not affected thereby.

We do not think it necessary to discuss the claim that the uncorroborated testimony given by the complaining witness was not sufficient to identify appellant as the one who committed the crime. The credibility of the witness and the weight of his testimony were questions for the jury, and its decision thereon is final.

Upon a review of the whole case we find no error or irregularity entitling defendant to a new trial.

The judgment and order are affirmed.

We concur: **WORKS, J.**; **CRAIG, J.**

(52 Cal. App. 181)

WEAVERING v. SCHNEIDER. (Civ. 3664.)

(District Court of Appeal, First District, Division 1, California. April 6, 1921.)

1. Judgment \S 271—**May not be entered by clerk on report of referee where reference is only for court's information.**

While under Code Civ. Proc. §§ 639, 644, if reference be to try the whole issue, the clerk, on the filing of the referee's finding, may thereon enter judgment, not so where referee is to merely examine and report for the court's information on an issue.

2. Appeal and error \S 873(1)—**Complaint may not be made of judgment other than that appealed from.**

The appeal being solely from an unauthorized judgment entered by the clerk on a ref-

eree's report, appellant is not in a position to raise the point of a subsequent judgment of the court having been entered prematurely.

3. Appeal and error ¶781(6)—Settlement by parties ground for dismissal of appeal.

It is ground for dismissal of appeal in action for dissolution of partnership and an accounting that it appears that the parties have agreed on an adjustment and settlement of the accounts and assets.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frederick Weavering against Fred Schneider. From an adverse judgment, defendant appeals. Appeal dismissed.

W. H. Barrows, of San Francisco, for appellant.

A. M. More, of San Francisco (E. B. Merling, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an action brought to dissolve a copartnership, and to obtain a settlement of the partnership accounts.

The record is in a confused condition. Briefly, it appears that the case was tried upon issues framed by the complaint and the answer and counterclaim of the defendant. On those issues, with one or two unimportant exceptions, the court found in favor of the plaintiff. One of its findings was to the effect that before a final judgment could be entered in the action it was necessary, for the information of the court, that an account be taken of the dealings and transactions between the parties, and a referee was appointed for that purpose. Thereafter, the referee, being in doubt—or assuming that the reference was general—prepared and filed findings of fact and conclusions of law, according to which the clerk of the court entered judgment in favor of the plaintiff and against the defendant in the sum of \$4,012.79; but the next day the court itself adopted the findings and conclusions of the referee and rendered judgment thereon, which also was duly entered. Several months thereafter the defendant appealed from the judgment entered by the clerk upon the report of the referee, claiming that the court had no power to vest the referee with authority to make findings of fact and conclusions of law upon which a judgment might be entered by the clerk, and, secondly, that, if it can be said that the judgment in question was in fact rendered by the court, nevertheless, the court itself at the time of its rendition was without jurisdiction to render a final judgment, for the reason that at that stage the partnership property had not been sold, or the assets marshaled and applied as the law directs.

[1] There is no merit in either of these

contentions. If the order appointing the referee may be regarded as general, and unlimited, vesting him with power to try the whole issue as to the accounts, then it was the plain duty of the referee to make and file findings of fact and conclusions of law, upon which judgment would follow immediately, and the decision would stand as that of the court, subject to exception and review as if the action had been tried by the court. Code Civ. Proc. §§ 639, 644; *Peabody v. Phelps*, 9 Cal. 213; *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189. But here the order of reference merely authorized the referee to examine and report for the information of the court on the issue as to the account between the parties, so as to enable the court to pass on that issue, and so regarding the report a judgment was rendered by the court, which judgment we think was the only proper one in the case.

[2] The second objection of the appellant is directed to the jurisdiction of the court to enter a final judgment before the property of the copartnership has been sold and the assets marshaled; but he is in no position to raise this point, since his appeal is taken from the so-called judgment entered by the clerk in the first instance without the direction of the court. This is not the judgment in the case, and the appeal taken by the defendant is directed exclusively to it.

[3] Finally, it appears from an authenticated copy of a stipulation filed in this court that the parties have agreed upon an adjustment and settlement of the account and assets of the copartnership. From all of the foregoing, it follows that the appeal should be dismissed. It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

(52 Cal. App. 219)

THRESHER v. LOPEZ. (Civ. 3104.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1921. Rehearing Denied May 1, 1921. Hearing Denied by Supreme Court June 9, 1921.)

1. Appeal and error ¶1010(1)—Findings supported by evidence not disturbed.

Fact findings of the trial court supported by the evidence will not be disturbed.

2. Payment ¶89(1)—Money paid upon mistake of fact may be recovered under count of money received.

Money paid upon mistake of fact may be recovered under the common count as money had and received.

3. Payment ¶85(7)—Negligence of plaintiff is no defense unless it altered defendant's position.

Where plaintiff overpaid defendant, he may recover in an action for money received, regardless of his negligence, where defendant did not alter his position to his prejudice.

4. Payment \S 85(1)—Overpayment under mistake of fact not voluntary.

Where plaintiff overpaid defendant under mistake of fact, recovery of the payment cannot be defeated on the theory that such payment was voluntary; it further appearing that defendant did not as a result of overpayment, change his position to his detriment.

5. Payment \S 89(4)—Averment held a sufficient allegation of demand for repayment.

In an action for money had and received, it appearing that as a result of mistake plaintiff overpaid defendant, an averment that, although often requested so to do, defendant neglected and refused to pay plaintiff, is a sufficient allegation of demand for repayment.

6. Appeal and error \S 107(1)—Judgment will not be reversed for insufficiency of finding where if made it must have been adverse to appellant.

A judgment will not be reversed for an insufficiency in the finding, where, if a sufficient finding had been made, it would have been adverse to the appellant.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by George P. Thresher against P. L. Lopez. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles H. Mattingly, of Los Angeles, for appellant.

H. W. Kidd, of Los Angeles, for respondent.

CRAIG, J. This is an appeal from a judgment against the defendant for the sum of \$780.44 and plaintiff's costs.

[1] The complaint alleges three causes of action. One is for money had and received, one for a balance due on a mutual open and current account, and one for the recovery of an alleged overpayment of money upon the ground that it was obtained upon false and fraudulent representations. The findings are applicable to support the first cause of action, and the evidence sustains those findings which concern the first cause of action. It is true that there is a substantial conflict in the evidence, but, under such circumstances, it is elementary that the judgment of the trial court will not be reversed.

[2] The plaintiff employed the defendant to perform certain work, and paid therefor \$3,126.85. The trial court found this to be an overpayment of \$780.44. Finding 4 is to the effect that the plaintiff believed that the amount which he paid was owing and payable from him to the defendant, and that he did not know that he was overpaying the defendant—

"but that on or about July 17, 1918, plaintiff learned for the first time that he had overpaid defendant by mistake for the doing of said work and labor; that within a short time after so learning for the first time of said over-

payment, plaintiff demanded of defendant that he repay to plaintiff the sums so overpaid by the latter, but that defendant refused, and has ever since refused, to repay said overpayment to plaintiff, or any part thereof."

The evidence amply supports this finding. Money paid upon a mistake of fact may be recovered under the common count of money had and received. *West v. Houston*, 4 Har. (Del.) 170; *West Frankfort Bank & Trust Co. v. Baretti et al.*, 206 Ill. App. 261; *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 33 L. R. A. 670, 55 Am. St. Rep. 878; *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

[3] The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment. *National Bank of California v. Miner*, 167 Cal. 532, 140 Pac. 27.

[4] The cases cited by appellant to support his contention "that money voluntarily paid with full knowledge of all the facts and without fraud or coercion, cannot be recovered" support that position, but are not in point here because the court found, and the evidence shows, that the plaintiff acted without knowledge of the facts and through a mistake. There is nothing to indicate that the act of Thresher in having overpaid Lopez has placed the latter in a position where a detriment would result by reason of his being required to refund. Under such circumstances it is inequitable and dishonest for defendant to retain the money.

[5] Appellant makes the claim that there is neither an allegation or finding that a demand was made for repayment before the commencement of the suit. The complaint alleges that element of the cause of action in the ordinary language of an action upon the common count of money had and received, "that although often requested so to do, the said defendant has neglected, failed, and refused to pay the plaintiff the said sum," etc. We think this is a sufficient allegation of demand. The finding reads:

"Within a short time after so learning for the first time of said overpayment, plaintiff demanded of defendant that he repay to plaintiff the sums so overpaid by the latter, but that defendant refused, and has ever since refused to repay said overpayment to plaintiff, or any part thereof."

[6] Conceding that this is somewhat indefinite as to the date on which demand was made, the evidence shows that demand was made before the action was commenced, and the judgment will not be reversed for an insufficient finding, where, if a finding had been made, it must have been adverse to the appellant. *Haight v. Costanich*, 31 Cal. App. Dec. 237.¹ Counsel for appellant persists in the assertion that the findings were to the

¹ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

² For opinion of Supreme Court, see 194 Pac. 26.

effect "that respondent, on March 4, 1918, knew the exact status of his account with appellant." There is no finding to this effect.

Judgment is affirmed.

We concur: FINLAYSON, P. J., and McCORMICK, Judge pro tem.

(52 Cal. App. 188)

DANIELS v. McGUIRE. (Civ. 3781.)

(District Court of Appeal, First District, Division 1, California. April 7, 1921, as Amended April 25, 1921.)

1. Appeal and error ⇨1068(1,5)—Errors in instructions prejudicial to defendant are cured by a verdict for him.

Errors in the giving and refusing of instructions to the prejudice of defendant are cured by the verdict for defendant, and do not entitle him to a reversal of an order granting plaintiff a new trial.

2. Appeal and error ⇨933(4)—Presumed to have been granted for insufficiency of the evidence.

Where the motion for new trial was made and granted before Code Civ. Proc. § 657, was amended, in 1919 (St. 1919, p. 141), the appellate court may presume that the motion, which was based upon insufficiency of the evidence to sustain the verdict for defendant and on alleged errors occurring during the trial, was granted on the insufficiency of the evidence, in the absence of any other cause appearing in the record, especially where defendant on appeal asserted it was granted on that ground.

3. Appeal and error ⇨979(1)—New trial for insufficiency of evidence conclusive, unless discretion abused.

The trial court has a wide discretion in granting or denying a new trial on the sufficiency of the evidence, and its action in that regard is conclusive in the appellate court unless there has been an abuse of discretion.

4. Appeal and error ⇨979(2)—Abuse of discretion in granting new trial not shown, where there is substantial conflict in the evidence.

If there is substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion in granting a new trial because the verdict is against the weight of the evidence.

5. Malicious prosecution ⇨21(2)—Advice of counsel after full disclosure defense.

In an action for malicious prosecution, defendant can rely on advice of counsel as establishing probable cause for the prosecution only where he shows that, before receiving the advice of counsel, he made a full, fair, and honest statement of the facts then known to him.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Roderick V. Daniels against Thomas F. McGuire. From an order granting plaintiff's motion for a new trial after verdict for defendant, defendant appeals. Affirmed.

Arthur L. Shannon, of San Francisco, for appellant.

Aitken, Glensor, Clewe & Van Dine and Aitken & Aitken, all of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought this action to recover damages from the defendant on account of alleged malicious prosecution. He averred that he was wrongfully accused by the defendant of opening, secreting, and embezzling letters transmitted through the United States mail, in violation of certain federal statutes. Two trials with jury have been had. The first resulted in a disagreement. On the second trial, the present case, the jury returned a verdict for the defendant. Plaintiff made a motion for a new trial, which was granted, and from which order the defendant appeals.

The motion for a new trial was made on three grounds: Insufficiency of the evidence to justify the verdict; that the verdict was against law; and errors in law occurring at the trial and excepted to by plaintiff. While counsel for appellant asserts that the first of these grounds was the only one urged and considered at the hearing of the motion, the order granting the motion was general in its terms. It must therefore be affirmed if it could properly have been granted on any one of the grounds assigned.

[1] Alleged errors on the part of the trial court in giving instructions prejudicial to the appellant, and its refusal to give others requested by appellant, were cured by the verdict in appellant's favor, as he admits, and do not avail on this appeal.

[2] The motion was made and granted before section 657 of the Code of Civil Procedure, relating to new trials, was amended in 1919 (St. 1919, p. 141). Therefore, aside from appellant's assertion that the insufficiency of the evidence to justify the verdict was the only matter urged in support of the motion for a new trial, we may presume it was granted on that ground in the absence of any other cause appearing in the record. *Gordon v. Roberts*, 162 Cal. 506, 508, 123 Pac. 288.

[3] The courts have frequently commented upon the wide extent of discretion of the trial court in granting or denying a new trial on sufficiency of the evidence. Its action in this regard is conclusive in the appellate court, unless there has been an abuse of discretion.

[4] And, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the find-

ings are against the weight of the evidence, and that there should be a new trial. *Gordon v. Roberts*, supra, 162 Cal. 509, 123 Pac. 288; *Morgan v. Los Angeles Pacific Co.*, 13 Cal. App. 12, 14, 108 Pac. 735.

[5] We think that on the main questions in controversy in this case there was sufficient conflict in the evidence to justify the court in concluding, as it must be deemed to have concluded, that justice would be promoted by a new trial. The decisive issues relate to the questions, whether defendant had probable cause for making the charge against plaintiff in the first instance, and whether defendant was guilty of malice in making the charge in the next. The appellant sought to maintain the existence of probable cause in law in making the charges against the respondent by proving that he acted on the advice of counsel. From our reading of the testimony we can well understand how the trial court may have entertained a doubt as to whether appellant made to his counsel, before receiving his advice, a full, fair, and honest statement of the facts then known to him, bearing upon the alleged guilt of the respondent. If he did not do so, he was not entitled to rely upon the defense of probable cause. *Stone v. Wolfe*, 168 Cal. 261, 262, 141 Pac. 1190. There is other evidence from which the trial court may well have concluded that appellant was not free from malice in making the charges against the respondent.

The order granting the motion for a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(52 Cal. App. 190)

BESSING v. PRINCE. (Civ. 3496.)

(District Court of Appeal, Second District, Division 1, California. April 8, 1921.)

1. Sales ¶7—Contract held a sales, and not an agency contract.

A contract whereby one party appointed the second party his "direct and exclusive representative and agent" for certain territory for the sale of the first party's goods therein, and whereby the second party agreed to pay first party a specified royalty for each article manufactured by first party and sold by second party within such territory, *held* a contract whereby the first party agreed to sell goods to second party at specified price, and not a contract of agency.

2. Principal and agent ¶89(5)—Complaint held insufficient to state cause of action for reimbursement for expenses incurred in endeavoring to make sales as agent.

In dealer's action against manufacturer for breach of contract to deliver to dealer articles to be sold by him in certain territory, complaint *held* insufficient to state cause of action for reimbursement for expenses incurred

in endeavoring to make sales, in that it did not show that the contract was one of agency, not of sale.

3. Sales ¶411—Complaint held insufficient to warrant recovery of profits for future sales.

In an action against a manufacturer for breach of a contract to sell vibrators to plaintiff to be sold by plaintiff in certain territory, complaint *held* insufficient for recovery of profits of future sales, in that it did not state what number of vibrators plaintiff could have sold, or the price at which they could have been sold by him, or that plaintiff ever ordered or demanded delivery of any vibrators other than those delivered.

4. Sales ¶411—Complaint against manufacturer of defective goods held to state cause of action for profits plaintiff would have realized if vibrators had been fit for resale.

In dealer's action against manufacturer for breach of contract to deliver to dealer vibrators of merchantable quality to be sold by the dealer in certain territory, the complaint alleging that the manufacturer delivered a certain number of vibrators that could not be sold because of defects in the manufacture thereof, and that plaintiff had complied with the terms of the contract to be performed on his part, *held* to state a cause of action for recovery of profits which plaintiff would have realized by selling the vibrators if they had been fit for resale.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Theodore Bessing against James Prince. Judgment of dismissal, and plaintiff appeals. Reversed.

Duke Stone, of Los Angeles, for appellant. Griffith Jones and John J. Craig, both of Los Angeles, for respondent.

CONREY, P. J. On the 26th day of July, 1918, a contract in writing was entered into between Bessing, as party of the first part, and Prince, as party of the second part, which contained the following terms: It was stated therein that Prince appointed Bessing as his "direct and exclusive representative and agent" for certain western states for a period of one year from the date of the contract. In consideration of Bessing's selling the Prince vibrator for printing presses, and all improvements thereon, during the period of 12 months from that date, "according to price agreed upon by both parties hereinafter mentioned the gross amount of \$10,000.00" for the described territory, the contract was to renew itself automatically. Prince agreed to furnish to Bessing "each of the three sizes of the Prince vibrator for printing presses at \$10 per vibrator complete for service and shipment in Los Angeles, California." It was further agreed that "should party of the second part fail to produce the vibrators in sufficient quantity to fill his orders, then the party of the first part shall have the right

to manufacture in sufficient quantity to fill the contract made, and paying the party of the second part five dollars (\$5.00) as royalty for each vibrator so made and sold." Bessing brought this action to recover damages for breach of the contract.

The second amended complaint alleged:

"That at no time has the defendant furnished to the plaintiff any vibrator or vibrators complete for service and shipment in Los Angeles, though plaintiff has continuously since the execution of said contract demanded them, but, on the other hand, has furnished to this plaintiff about 50 vibrators which were not complete for service or shipment, and which were not merchantable or usable or salable, and which would not perform the purpose for which they were made, and for which they were to be sold by the plaintiff, in that the same were defectively manufactured and would not perform the work required of them on a printing press, by reason of all of which the vibrators sold by the plaintiff and which were furnished to the plaintiff by the defendant under said contract were wholly unfit for the purpose for which they were sold; and that defendant has at all times since the execution of said contract failed and refused after demand to furnish to plaintiff vibrators complete for service and shipment; that in endeavoring to sell said vibrators under the agreement hereinbefore mentioned, the plaintiff was put to the actual and reasonable expense of \$316.70, the same being the actual expenses reasonably and necessarily incurred by plaintiff in an effort to sell said vibrators; and that the profit on the 50 vibrators furnished to the plaintiff by the defendant, and which could have been sold, and plaintiff's profit thereon realized, if the said vibrators had been usable, merchantable, or salable, would have been at least the sum of \$500; that by reason of defendant's failure to furnish plaintiff vibrators complete for service and shipment, as aforesaid, the plaintiff was unable to sell any of said vibrators, and unable to realize any profit on the same, or on any of the said 50 vibrators so furnished, and was deprived of the profits of future sales; and that in truth and in fact, if said vibrators had been complete for service and shipment as required by said contract, the plaintiff 'would have realized at least \$2,500 on sales'; that the defendant at all times knew that the plaintiff was incurring said expense, which was reasonable and necessary, in an honest effort to sell said vibrators; and, further, that the profits to the plaintiff if the vibrators had been complete for service and delivery would have been at least the sum of \$2,500, and that solely for said reasons plaintiff was unable to make and complete sales thereof to the damage of the plaintiff in the sum of \$2,500, all of which was known to the defendant; and that it was well known to the defendant at the time of the execution of said contract and at all times since, that the purpose of said vibrators so to be furnished the plaintiff was for sale to persons operating printing presses; and that the quality of the vibrators so furnished was not such as to make them merchantable or usable in any way; and that defendant has at all times since the making of said contract refused to furnish to this plaintiff any vibrators except those that were not merchantable or usable as above specified."

To this complaint the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiff, having failed to further amend, judgment was entered, dismissing the action. From this judgment the plaintiff appeals.

[1-3] Although the contract began with the statement that respondent appointed appellant as his agent, the contract as a whole shows that it was not a contract of agency, but, on the contrary, was a contract whereby respondent agreed to sell the vibrators to appellant at the price of \$10 for each vibrator. It was specified in the terms, which we have quoted, that appellant should sell the articles at a price agreed upon by both parties. The complaint does not state what this agreed price was, or that the parties ever arrived at an agreement fixing the price at which the articles were to be sold. The complaint nowhere states the price at which they could have been sold by appellant if they had been furnished by respondent of a kind and quality fit for sale. Since the contract was not a contract of agency, the facts alleged in the complaint are not sufficient to establish the existence of any obligation on the part of respondent to reimburse appellant for the expenses incurred by appellant in endeavoring to make sales. The complaint does not state what number of vibrators appellant could have sold, or at what price they could have been sold by him, or that appellant ever ordered or demanded delivery of any number of vibrators other than the 50 which were delivered. Therefore, no basis is shown for the recovery of "profits of future sales."

[4] From the facts above stated it seems clear that no cause of action for any damages has been stated, unless it be for loss of profits on the 50 vibrators which were ordered and delivered, and which, as stated in the complaint, were not complete for service and were not merchantable or usable, and which would not "perform the purpose" for which they were made, in that they were defectively manufactured and would not perform the work required of them on the printing press. Since appellant, in his complaint, has not sought to recover any money paid by him for these vibrators, it might be inferred that he has never paid for them, although apparently they are still in his possession. But this inference is prevented by the general allegation that the plaintiff has complied with each and all of the terms of the contract on his part to be performed. This being true, he has a valid claim against respondent to recover damages equivalent to the amount of profits which he would have realized by selling the vibrators if they had been fit for resale.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(52 Cal. App. 194)

HARLAN v. WILLARD et al. (Civ. 3489.)

(District Court of Appeal, Second District, Division 1, California. April 8, 1921.)

1. Equity §85(2)—Doctrine that one guilty of attempt to consummate a fraud will not be heard in equity held not applicable to plaintiff.

Where plaintiff, seeking to recover on a contract whereby decedent was to will her one-half of his estate in return for her being his housekeeper, had previously applied for letters of administration, and sought, as decedent's wife, to acquire one-half of his property at suggestion of decedent's son that it would keep down scandal, and the court found that she did not have any intent to defraud the estate, the doctrine that one guilty of attempt to consummate a fraud will not be heard in court of equity is not applicable to her.

2. Frauds, statute of §75—Oral contract to become decedent's housekeeper, in return for which he was to will her property; held not obnoxious to statute.

Oral contract made in 1901, by which plaintiff was to become decedent's housekeeper, in return for which he was to will her one-half of his property, held not obnoxious to the statute as then existing.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Mamie E. Harlan against Edgar H. Willard and another individually and against the Title Insurance & Trust Company, as administrator of the estate of C. A. Willard, deceased. Judgment for plaintiff, and defendants appeal. Affirmed.

Turnbull, Heffron & Kelley and R. W. Pontious, all of Los Angeles, for appellants. Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

JAMES, J. Plaintiff by the judgment herein was determined to be the owner of one-half of the property of the estate of C. A. Willard, deceased. It was decreed that defendants held the same in trust for her benefit. From that judgment this appeal is taken.

In 1901 the plaintiff was employed as a waitress in a restaurant, and was then 20 years of age. C. A. Willard was then of the age of 41 years. Prior to his acquaintanceship with the plaintiff he had been married and divorced, and there were two children of that marriage, to wit, Edgar H. Willard and Dorothea Laura Blodgett, appellants here. According to a statement made by Willard to the plaintiff (as to the correctness of which no dispute is shown in the record), Willard's first wife had remarried, and Laura Blodgett, the daughter, had been adopted by her stepfather when about the age of 10 years. After forming the acquaintance with the plaintiff, Willard began

to pay particular attention to her and frequently took her to places of amusement. Sometimes a married sister of the plaintiff accompanied the two; at other times they went alone. About a month after the acquaintanceship began, Willard, according to the testimony of the plaintiff, made a proposal to the plaintiff which is best shown by presenting a narrative of her testimony on that point:

"Q. Did you ever have a conversation with Mr. Willard about becoming his housekeeper? A. I did. We were dining out, but I do not remember where. He wanted to know if I would be willing to come and keep house for him; be his housekeeper. He told me if I would come and be his housekeeper and help him and stay as long as he lived; that he would furnish me a home and my clothing, and take care of me in case of illness, and at his death he would leave me half of anything that he had. Q. What did you say at that time, if anything? A. Well, I would not give any definite answer. I wanted to think it over. Q. Did you ever discuss the matter at a further time? A. Often after that. Q. Give as nearly as possible these conversations and your replies. A. Well, they were all practically the same. He wanted that I should keep house for him and do what any housekeeper would do. There was nothing more than I told you. He wanted me to do what any housekeeper is supposed to do in keeping house; to cook, wash dishes, sweep and dust, and take care of him, if he was sick, but there was nothing else mentioned."

Plaintiff testified further that, after considering the proposal for some time, she accepted the offer. For a while the three, Willard, plaintiff, and her sister, jointly occupied a set of apartments, Willard making use of one bedroom, the two women another, and all having their meals together. The housework was attended to by plaintiff and her sister. Later on, the plaintiff resided with Willard in one of a set of flats owned by him, and continued to perform the household duties agreed upon, and continued to so perform them for 17 years and up to the time of Willard's death; she bestowed much personal attention and painstaking care upon the latter, who was at times addicted to the excessive use of intoxicating liquors. Willard's business was that of a saloonkeeper. From about the year 1910 on the couple lived in a house toward the building of which plaintiff contributed some money which she had received from the sale of a lot. Plaintiff testified to repeated statements made by Willard of his intention to fulfill his agreement to divide his property equally between her and his son Edgar. She testified that he had said because his daughter Dorothea had been adopted by her stepfather, she was no longer his child, and that he did not want her to have anything of his. Other witnesses testified to having heard Willard assert that he intended to

leave to the plaintiff one-half of his property, and Mrs. Scott, the sister of the plaintiff, testified to having been present when Willard made the original proposal to her sister in the terms already stated. It is not argued, and upon the evidence the case admits of no such contention, that the finding of the court as to the making of the contract in the manner and upon the conditions described by the plaintiff is not abundantly supported. The fact that plaintiff admitted that she had during the years mentioned lived with Willard as his wife is made the ground for the claim that the contract as made was against good morals, and therefore illegal. The contract, as found by the court to have been made and as testified to by the plaintiff, contained no condition that the agreement of Willard depended upon the relation of a mistress being assumed by the plaintiff. Under such a condition of the evidence and findings, the question suggested is entitled to little consideration. It is proper to state, however, as pertinent to the consideration of certain later acts of the plaintiff, that she had during the 17 years been introduced by Willard as his wife, and had been understood by friends and acquaintances to occupy that relation toward him. As a matter of fact, at the time plaintiff accepted the proposal of Willard she was married to a man named Harlan, and, so far as we are able to determine from the record presented, was never divorced from the latter. At the time first referred to, however, she was living apart from her husband, and never thereafter resumed marital relations with him. After the death of C. A. Willard, the son Edgar went to an attorney at law (this according to the testimony of the attorney), where he represented that plaintiff was the widow of his father, and that he and the widow were the only heirs. He also made the statement to the attorney of his knowledge as to his father's intention to leave one-half of his estate to the plaintiff, and that he (Edgar) intended to carry out those wishes. It was upon the statement of alleged facts as given by the son Edgar that the attorney drew an application for letters of administration on behalf of the plaintiff and later an application for an allowance to be made to the plaintiff as widow. Both of these applications were presented to the court with the knowledge of the plaintiff, and she testified in verification of the alleged facts therein set forth. Later, however, upon the facts being presented as to plaintiff not being the legal wife of Willard, these proceedings in her behalf were abandoned, and no money or property was appropriated by her under any order made therein. Plaintiff testified that she had allowed these proceedings to be taken, affirming her alleged status as the widow of Willard, because of the solicitations of the son Edgar, who per-

sued her that everything was all right, that she had always been known as his father's wife, and that it would save any scandal to have the proceedings gone through with in that way; that she was influenced further in so doing because of Willard's statement to her that Dorothea was not to receive any part of his property, and that she was innocent of any intent to secure anything from the estate to which she was not entitled. The court made findings upon this matter favorable to the plaintiff in the following terms:

"She believed that she and Edgar H. Willard were the sole persons entitled to share in the estate of Charles A. Willard, and believed that by doing said acts and things in said estate she would receive only that portion of the estate to which she was entitled under the contract set forth in plaintiff's complaint; that the defendant Edgar H. Willard, for a long period of time prior to the death of said Charles A. Willard, had known * * * of the existence of the contract alleged in plaintiff's complaint between plaintiff and said Charles A. Willard; that the said Edgar H. Willard advised the plaintiff to apply for letters of administration in said estate, and assisted her in making said application, and advised plaintiff that it was proper and for the best interests of said estate that she apply for letters of administration as the widow of said Charles A. Willard, and that such action by said plaintiff would prevent unnecessary scandal; that this plaintiff had no intention of deceiving the court in the matter of said estate, and had no intention of defrauding said estate or securing a wrong or unlawful advantage against said estate or the heirs of said Charles A. Willard; that plaintiff at no time attempted to secure a larger portion of said estate than one-half thereof, and believed that in said proceedings in relation to the probate of said estate she was securing only that part or portion of the estate to which she was legally entitled; that no money was paid to this plaintiff under the order for family allowance; and that she at no time received any money or value under said order for family allowance; that it is not true that the said Mamie E. Harlan was the widow of the said Charles A. Willard, but that this court find that the said representations were not made by the said plaintiff with the express or any purpose or intention of imposing upon the court or for the purpose of gaining for herself an interest in the estate or the assets thereof."

[1, 2] Appellants cite a number of cases to the point of their contention, to wit, that where a party has been guilty of an attempt to consummate a fraud, he will not be heard in a court of equity in any matter concerning the same subject to secure relief favorable to himself. Without taking up these cases for the purpose of particular analysis, it may be conceded that they all hold in agreement with a sound doctrine of equitable practice. The distinction important to be drawn between these cases and this is that here, as the evidence showed and the court found, the plaintiff in filing the petition for

letters of administration and her application for a family allowance, based upon the claim that she was the widow of Willard, did so without the intent to defraud the estate, or the heirs, of anything. The excuse perhaps showed no legal justification, but even though that be true, the lack of a fraudulent purpose to get something to which she was not legally entitled takes the case without the rule as insisted for by appellant. The contract of 1901 was not obnoxious to the statute of frauds as then existing. The trial judge made a particular finding regarding the agreement under which plaintiff advanced money with which to purchase the lot or build the house occupied by the plaintiff and Willard, in 1910, but we cannot see how that finding affects the judgment, which is based upon the contract asserted by the plaintiff, to wit, that made in the year 1901. The findings of the court as to the material matters involved in the pleadings seem to be within the issues and to sufficiently determine all of these. No error appears requiring that the judgment should be reversed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(52 Cal. App. 211)

LEWIS v. FARMERS' GRAIN & MILLING CO. (Civ. 3000.)

(District Court of Appeal, Second District, Division 2, California. April 12, 1921.)

1. Sales \S 201(4)—Delivery through carrier not complete until vendor gives notice shipment is ready.

Where shipment is made by common carrier, delivery is not completed until the seller has relinquished his control over the car which he is loading, and given notice to the carrier that it is ready for shipment.

2. Sales \S 201(4)—On sale f. o. b. point of shipment, title remains in seller until goods placed on car.

Where goods are sold f. o. b. point of shipment, title does not pass from the seller until goods are placed on the cars by the seller.

3. Sales \S 218½—When title passes by delivery to carrier held for court.

While the question whether the parties intended delivery to the carrier to vest title in the purchaser is one of fact, if the facts are not in dispute, it is a question of law for the court.

4. Sales \S 187 — Seller entitled to interest from time of delivery.

Seller held entitled to interest from the date purchaser received delivery of grain.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by George E. Lewis against the Farmers' Grain & Milling Company. From judgment for plaintiff, defendant appeals. Modified and affirmed.

Benjamin W. Shipman, of Los Angeles (Henry O. Wackerbarth, Jos. A. Adair, and Henry E. Carter, all of Los Angeles, of counsel), for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

CRAIG, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant for the sum of \$1,328.55 and costs. Defendant admits a principal indebtedness of \$569.11. The action is upon an express contract for the purchase of quantity of grain. On the 28th day of August, 1914, the plaintiff granted the defendant the following option:

"Los Angeles, Cal. Aug. 28, 1914. In consideration for one (1) dollar to me in hand paid, I hereby give an option to the Farmers' Grain & Milling Co. to buy my crop of Light Seed oats, consisting of about 1,600 sacks at a price of \$1.25 per hundred pounds, free on board cars at Owensmouth. This option is to be in force until Sept. 6, 1914, and if not exercised by the Farmers' Grain & Milling Co. before noon of that date it shall be null and void. Geo. Lewis."

On the 31st day of August the defendant exercised the option by letter and asked confirmation by return mail. Instead of writing, plaintiff went to the office of the defendant, and confirmed the exercise of the option verbally. Thereafter the plaintiff ordered a car from the Southern Pacific Railway Company at Owensmouth for the purpose of loading it with the oats. The railway company's agent spotted the car, and the plaintiff placed therein 541 or 542 sacks of oats as contracted. While the car was not completely loaded it, together with the oats, burned. No bill of lading had been issued by the railroad company, and no notice had been given to the agent of the railroad company that the car was ready for shipment.

[1-3] The defendant insists that at the time the oats were burned they still remained the property of Lewis. Both sides agree that the risk of loss followed title. Upon this appeal it is necessary to determine who owned the oats at the time they were destroyed. The answer to this question involves a construction of the contract composed of the option agreement and the letter exercising the option with the view to determining whether this entire contract thus constituted was executory or executed. If it be regarded as an executory contract, title could not be said to have passed, for where shipment is made by common carrier it is held that delivery is not completed until the vendor has relinquished his control over

the car and given notice to the carrier that it is ready for shipment. *Hutchinson on Carriers*, c. 4 (3d Ed.) § 125; *Basnight v. Atlantic Ry. Co.*, 111 N. C. 593, 16 S. E. 323; *Schouler on Bailments and Carriers*, c. 3; *Tate v. Yazoo, etc., Ry. Co.*, 78 Miss. 842, 29 South. 392, 84 Am. St. Rep. 649; *Ill. Cent. Ry. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301. If delivery to the railway company were to be regarded as constituting delivery to the defendant, it must be upon the theory that the railway company became the agent of the consignee. Therefore, if no delivery was made to the railway company, none was made to the defendant. The contract in the case at bar contains a provision not found in any of the cases cited by the respondent, for in none of them did the vendor agree to deliver the property on board the means of transportation at the point named in the contract. It is true that in the great majority of cases where litigation has arisen concerning the contracts providing for f. o. b. delivery of goods no question has existed as to risks. Such cases usually involve a dispute concerning expenses of delivery, and in cases of that character it is held that the term f. o. b. means "free on board." The question is frequently raised as to whether under a provision for delivery of goods "f. o. b." such a delivery is one sufficient to pass the title and risk of transportation to the vendee. If the point specified for delivery f. o. b. is the initial point of shipment, title is passed to the vendee, and he assumes the risks of transportation by delivery at that point. If the provision is for delivery, f. o. b. at the final point of destination, the vendor retains the title and also the risk of transportation to the point named in the contract (note to *Lawder & Sons v. Mackie Grocery Co.*, 97 Md. 1, 54 Atl. 634, 62 L. R. A. 798, and cases there cited), and title passes upon such delivery to the vendee, who thereupon assumes risks of loss or destruction. *Lord v. Edward*, 148 Mass. 476, 20 N. E. 161, 2 L. R. A. 519, 12 Am. St. Rep. 581. But in no case of which we are aware has it been held that under a contract for delivery of goods free on board cars title passed to the vendee before delivery at some point. In *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 289, it is said that authorities generally hold that "a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage in transitu." The necessary implication from this and other similar decisions is that until so placed title re-

mains in the seller, and the property is wholly at his risk. *Williston on Sales*, § 280, states the rule to be that where the contract provides for the delivery of goods f. o. b. at the point of shipment it is presumed that the title then passes, but if required to be delivered at the point of destination the property does not pass until such delivery. In the case at bar there is nothing in the contract or the record outside of it to overcome this presumption. While the question as to whether or not the parties intended delivery to the carrier to vest title in the purchaser is one of fact (*Dannemiller et al. v. Kirkpatrick et al.*, 201 Pa. 218, 50 Atl. 928), if, as in this case, the facts are not in dispute, it is a question of law for the court.

[4] The judgment is modified by reducing it to the sum of \$569.11, with interest thereon at the rate of 7 per cent. per annum from the 21st day of October, 1914, this being the date on which the defendant received the delivery of the grain, etc., not in dispute upon this appeal, and as so modified it is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(52 Cal. App. 184)

McNEELY v. HILL. (Civ. 3486.)

(District Court of Appeal, Second District, Division 1, California. April 7, 1921. Hearing Denied by Supreme Court June 6, 1921.)

1. New trial ⇐137—Notice stating motion will be made on the records equivalent to saying it will be on the minutes.

Requirement of Code Civ. Proc. § 659, that notice state whether motion for new trial will be on affidavits or the minutes of the court or both, is substantially complied with by statement that it will be on the records; the minutes being part of the records.

2. New trial ⇐163(2)—Order on ground of contributory negligence in effect for insufficient evidence.

An order granting, on the ground of plaintiff's contributory negligence, defendant's motion for new trial, in effect grants it on the ground of insufficiency of evidence to justify the implied finding of plaintiff's freedom from contributory negligence.

3. Appeal and error ⇐854(6)—Order granting new trial if general sustained if authorized by facts in record on any of the grounds of motion.

If the statement in the court's minutes that motion for new trial was granted on the ground alone of plaintiff's contributory negligence be excluded, there remains a general order granting the motion, entitling defendant to the benefit of it, if the facts in the record would authorize it on any of the grounds of the motion.

4. New trial ⇐68—On motion for insufficiency of evidence court may draw inferences different from those on the trial.

The trial court, on a motion for new trial for insufficiency of the evidence, may draw in-

ferences from the evidence opposed to those drawn by it on the trial, provided they are not unreasonable.

5. Appeal and error §=1015(2)—Interference with granting of new trial for insufficiency of evidence held justified by conflicting evidence as to contributory negligence.

Evidence as to contributory negligence of motorcycle rider who rode into excavation on having his light too low held conflicting, so that granting of new trial on the ground of insufficiency of evidence to sustain an implied finding of absence of contributory negligence cannot be interfered with; it being impossible to say that there was a clear abuse of discretion, and that the trial court was not reasonably justified in granting the motion.

6. Appeal and error §=1144—On affirmance of general order for new trial, trial will not be limited to a single issue.

New trial having been granted generally, though on the ground of insufficiency of evidence to show absence of contributory negligence, the court on affirmance of the order will not interfere with its terms, so as to limit the trial to the single issue of contributory negligence.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Robert McNeely against James Hill. Verdict and judgment for plaintiff. From an order granting a new trial to defendant, plaintiff appeals. Affirmed.

W. A. Alderson and K. A. Miller, both of Los Angeles, for appellant.

G. F. McCulloch, of Los Angeles, for respondent.

CONREY, P. J. The defendant was employed by one Connell, the owner of a lot in the city of Los Angeles, to make an excavation therein preliminary to the erection of a building. The lot was located at the north end of Santee street. For a long time prior to the time when the excavation was made there had been a roadway across this lot by which the public had commonly and usually traveled between Santee street and other lands leading to Los Angeles street. Of this the plaintiff and the defendant had full knowledge. The defendant at the time stated maintained said excavation and an incline running into the north end thereof, without any barriers, lights, or other warning to prevent persons from falling into said incline or excavation. On the night of April 15, 1917, the plaintiff, while traveling to his place of employment, and while attempting to pass from the north end of Santee street across said lot, fell into the excavation and was injured thereby. He brought this action to recover damages for said injuries alleged to have been suffered by defendant's negligence. The defendant, in addition to denying any negligence on his own part, pleaded

the affirmative defense of contributory negligence on the part of the plaintiff. A verdict and judgment having been entered in favor of the plaintiff, the defendant moved for a new trial, which motion, according to the minutes of the court, was granted "on the ground alone of plaintiff's contributory negligence." The plaintiff appeals from that order.

[1] The notice of intention to move for a new trial stated that the motion would be made upon certain stated grounds "and upon the records, papers, and files in said action." Appellant contends that the notice was insufficient to authorize the court to hear the motion, because it did not comply with the requirements of section 659 of the Code of Civil Procedure, which provides that the notice shall designate the grounds upon which the motion shall be made "and whether the same will be made upon affidavits or the minutes of the court or both." We think that the statement, although formally defective, did in substance comply with the rule. This is so because the minutes of the court are a part of the records of the court. Therefore a motion made upon the records is a motion made upon the minutes of the court.

[2, 3] Appellant next contends that the order purports to have been made for one sole reason which is not among the statutory grounds upon which a motion for a new trial may be granted. The grounds for the motion as presented to the court included that of insufficiency of the evidence to justify the verdict. When, upon the foundation of such motion, the court granted it on account of plaintiff's contributory negligence, this in effect was an order granting the motion upon the ground that the evidence was insufficient to justify the implied finding of the jury that the plaintiff was not guilty of negligence which caused or contributed proximately to the accident and injury. It may further be suggested that, if this limitation of the reasons for the order be excluded, there still remains a general order granting the motion, and respondent would be entitled to the benefit thereof if the facts contained in the record would authorize the motion to be granted upon any ground upon which he relied in presenting his motion. However, it is our opinion that the motion was granted upon the ground of insufficiency of the evidence to justify the verdict, and for the particular reason above stated.

[4, 5] We come now to the principal question in the case. It is claimed by appellant that the evidence as to the alleged contributory negligence of plaintiff is not conflicting, and affirmatively shows that the plaintiff was not guilty of such negligence. The rule is conceded that an order granting a motion for a new trial on the ground of insufficiency of the evidence will not be reversed on appeal unless

an abuse of discretion appears. In considering the evidence upon such motion, the trial court "has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable." *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 451, 458, 168 Pac. 1033, 1035. The accident in question here occurred at about 2 o'clock in the morning. The plaintiff testified that he was riding on a motorcycle at a speed of about 15 or 20 miles an hour; that his motorcycle had a headlight; that he first saw the excavation when he was about 20 feet from it; that it was because of the headlight that he saw the excavation. He further stated:

"When I have got my light on the motorcycle I generally turn it down, so I can keep out of tacks and glass and so on. When I have got it up I can see better. When you have got it down, you can't see over 20 or 25 feet."

Describing what he did when he saw the excavation he said:

"I turned to my right, shut off my engine, shut off my gas, and of course I worked my brake with my foot. I done all that at the same time."

From this evidence the jury might have determined that the plaintiff, by turning down his light, had voluntarily shortened the distance wherein he could see objects in front of him to such an extent that he was unable to stop his machine within the lighted area while moving at the speed at which he was traveling, and that in so doing he was guilty of negligence which was the direct and proximate cause of his fall into the excavation. Conceding that there was some evidence tending to exonerate the plaintiff from the charge of negligence, it results that the evidence upon that point was conflicting to such a degree that on appeal the decision of the lower court, either in granting or in refusing a new trial, should not be reversed. Where the evidence is thus conflicting, a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court. With its decision thereof interference is unwarranted unless there clearly appears an abuse of such discretion. We cannot say that the court was not reasonably justified in granting the motion in this case.

[8] Finally, it is suggested by appellant that, if this action is to be tried a third time, the trial should be limited to the single issue of plaintiff's contributory negligence. It has long been settled that a court of appeal, in reversing and remanding a cause, may direct on what issues it shall be retried. *Robinson v. Muir*, 151 Cal. 118, 125, 90 Pac. 521. In this instance, however, since the order is to be affirmed, we deem it inappropriate to in-

terfere with its terms as entered by the court below.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

(52 Cal. App. 200)

ILFELD v. PORTER. (Civ. 3398.)

(District Court of Appeal, Second District, Division 1, California. April 9, 1921.)

Bills and notes \Leftrightarrow 94(2)—Settlement of disputed claim held good consideration for check.

Where there was basis for the claim of lessor of sheep at the expiration of the lease that the lessee was then obligated to return to lessor the full number of sheep received, and could not account for the admitted deficiency merely by paying \$5 per head, and the lessee threatened to have such number of sheep seized from lessee's flock, there was a bona fide dispute, the compromise of which was good consideration for lessee's check to lessor.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Louis Ilfeld against Burr W. Porter. From a judgment for defendant, plaintiff appeals. Reversed.

Chas. L. Childers, of El Centro, and Marron & Wood, of Albuquerque, N. M., for appellant.

Clarence H. Jordan, and Julia M. Braam, both of Los Angeles, and J. S. Larew, of El Centro, for respondent.

CONREY, P. J. On the 19th day of November, 1914, by agreement in writing, appellant, Louis Ilfeld, leased to respondent, Burr W. Porter, and to J. El Porter 2,500 "well-improved white ewes" for a period of 4 years from that date. The lessees agreed, among other things:

"That they will, at the expiration, or sooner termination, of this contract, return and deliver to the party of the first part a like number of sheep of the same class of improved quality and description as hereinbefore described, of the following ages and numbers of each, as follows, to wit: 625 ewe lambs; 625 ewes of 1½ years; 625 ewes of 2½ years; 625 ewes of 3½ years; same to be delivered at or near the ranch of Burr W. Porter near Navajo, Ariz.; that they will mark and brand all the increase of said sheep during the existence of this contract in the same mark and brand of the parties of the second part."

On the first day of July of each year the lessees were to pay to the lessor as rent the sum of \$1,250, with interest at the rate of 8 per cent. per annum from maturity, if not paid when due. It was further agreed that—

"The parties of the second part hereby agree and bind themselves to return and deliver to

the party of the first part, between the 1st day of November and the 19th day of November, 1918, the full number of sheep herein acknowledged to be received, and of like quality and ages as follows, to wit: 625 ewe lambs; 625 ewes 1½ years; 625 ewes of 2½ years; 625 ewes of 3½ years, to be of the raising of the sheep of the parties of the second part in as good condition, and with as much wool thereon, as the sheep they herein acknowledge to have received."

It was further agreed that—

"If the said parties of the second part shall neglect or refuse to keep or perform any of the provisions and covenants of this contract on their part to be performed, then and in that event the party of the first part may, at his option, retake possession of all of the said sheep and the increase thereof, and declare this contract terminated; and there shall be a settlement by the parties hereto in the same manner and with the same effect as if this contract had been terminated by the expiration of its term. The title of said sheep, however, to remain in the name of the party of the first part."

It was further agreed:

"It is expressly agreed between the parties hereto that the said parties of the second part may have the right to sell the wool and all wether lambs, wethers, and old ewes which are not fit for further breeding."

It was further agreed:

"If by reason of any unavoidable accident or circumstance not due to the act or fault of the parties of the second part, they should be unable to return the entire number of sheep, or of the ages or condition above stated, then, in that event, they covenant and agree to pay to the party of the first part the sum of \$5 per head for each sheep that shall be lacking to make up the said full number of 2,500 as hereinabove specified, and the parties agree that the said sum of \$5 per head is hereby fixed upon and agreed between them as the value of said sheep in the event of their failure to return the same to the first party as herein specified, and that the value of any sheep not so returned or redelivered to the first party shall be as herein specified, and shall bear interest at the rate of 8 per cent. per annum from the time when such delivery shall be due."

It was further agreed:

"Said parties of the second part shall retain enough ewe lambs each year during the term of this contract out of the increase of the sheep herein acknowledged to be received, so as to be able to deliver the full number of sheep of the ages hereinbefore specified, at the termination of this contract."

On the 13th day of November, 1918, respondent made and delivered to the plaintiff his check on the Holbrook State Bank of Holbrook, Ariz., drawn in favor of appellant for the sum of \$1,859.63. This check was duly presented to the bank for payment, but pay-

ment was refused for the reason that respondent had directed said bank not to pay same. Appellant brought this action to recover judgment for the amount of the check, with interest from its date. Answering the complaint, respondent alleged that he received no consideration for the check (except as later stated in the answer), and that the same was procured by fraud and misrepresentation on the part of the plaintiff and by reason of mistake on the part of defendant; and denied that the whole amount of said check, or any part thereof, remained due from the defendant to plaintiff except the sum of \$51.96. The answer then set out the agreement of lease first hereinabove mentioned, and alleged:

1. That, pursuant to said agreement, the lessees took charge of the sheep and properly cared for them during the entire term of the agreement, and fully and faithfully performed all of the conditions of the agreement on their part.

2. That at the expiration of the term, the lessees returned to the plaintiff all of the sheep delivered to them under the agreement, together with all of the increase thereof then living, but that, by reason of unavoidable circumstances not due to the act or fault of the lessees, they were unable to return the entire number of sheep received by them from the plaintiff pursuant to said agreement at the termination thereof, 307 ewes and 304 lambs of said flock having died.

The answer further alleged that, pursuant to said agreement, the defendant paid to the plaintiff the sum of \$3,000 in cash, and the sum of \$3.04 in services in weighing sheep—a total of \$3,003.04—leaving a balance due plaintiff on account of the loss of said 307 ewes and 304 lambs at \$5 per head, in the sum of \$51.96; that, at the time the said sheep were returned to plaintiff, and the said payment made, the defendant owned a flock of sheep in the same vicinity exceeding in number the aggregate of the sheep and lambs lost from the flock that had been delivered to the lessees under said agreement, said sheep so owned by defendant being of a value at least equal to that of the sheep of said flock received from the plaintiff under said agreement; that, at the time of the return of said sheep to the plaintiff, as aforesaid, he represented that he had a contract to sell the ewes of said flock for the sum of \$10 per head, and the lambs for the sum of \$5.90 per head, and thereupon plaintiff demanded of said defendant that he pay the sum of \$10 per head for all of said ewes lost as aforesaid, being the further sum of \$5 per head, and also that defendant pay the sum of \$5.90 per head for all lambs lost as aforesaid, being the further sum of \$.90 per head, and represented to defendant that, unless he acceded to said demand and paid to plaintiff the further sum of \$1,859.63, the plaintiff could and would

seize from defendant's said flock a number of ewes and lambs, respectively, equal to the number lost from said flock as aforesaid, and threatened so to do; that at the time defendant did not have said contract before him, and was without legal advice, and believed that unless he made the payment demanded by plaintiff the said plaintiff could and would carry into execution his threat to seize defendant's sheep as aforesaid, and under such belief defendant executed and delivered to plaintiff the check herein sued upon; that thereafter, on the same day that said check was executed and delivered as aforesaid, defendant examined said contract, and received advice from counsel, and thereupon became convinced that he did not owe plaintiff the said sum of \$1,859.63, or any sum in excess of \$51.96, and was under no obligation to pay the same, and defendant thereupon notified the said Holbrook State Bank not to pay said check; that defendant admits an indebtedness to plaintiff in the sum of \$51.96, said amount being included in the said check for \$1,859.63 herein sued upon, and defendant hereby offers to allow plaintiff to take judgment for the said sum of \$51.96 and the costs of this action heretofore accrued.

The action having been tried upon the issues thus presented, the court made findings of fact which are in agreement with the averments of the answer, and further found that the flock of sheep owned by respondent in the same vicinity were "not of the descendants of the said sheep delivered to the defendant and the said J. E. Porter by plaintiff, and not principally of the raising of said defendant and said J. E. Porter." Judgment was rendered for the amount admitted by the answer, to wit, \$51.96, with costs incurred by plaintiff up to the date of filing said answer; defendant being awarded his costs thereafter incurred. From this judgment the plaintiff appeals.

The finding to the effect that, in connection with plaintiff's demand for a final payment of \$1,859.63, he represented to the defendant that he could and would seize from defendant's flock the number of ewes and lambs mentioned in the findings, and threatened so to do, if construed as referring to any intended seizure without process of law, is not sustained by the evidence. The finding that the defendant did not have said agreement before him at the time when said demand was made and the check given, if construed as meaning that defendant did not have the contract in his possession or that he did not know the contents thereof, is not sustained by the evidence. Before the check was given, appellant's agent made two visits to respondent, about two weeks apart, in connection with the return of the sheep. The question concerning appellant's right to get sheep from respondent, whether raised out of the sheep delivered by appellant or out of other sheep

owned by respondent, was discussed at the time of the first interview. Respondent admitted in his testimony that, before the agent came the second time, he was advised that appellant was making the contention that he was entitled under the contract to sheep out of respondent's flock; that he had the contract there; that there was a dispute between them as to the construction of the contract; that he had read the contract after this contention was made, and was not deceived as to the language contained therein. Respondent further testified that from the representation made to him by appellant's agent that he could and would seize respondent's sheep, he understood that it would be by law.

It does not appear from the evidence that there was any threat to use any force other than that incidental to process of law. Respondent admitted that in their discussion the dispute related to the construction of the contract solely on the question whether respondent had the right to return such of the descendants of appellant's sheep as he had, and pay him \$5 a head for those deficient, or whether he was under obligation to supply the sheep from his other flock. The compromise which resulted in the giving of the check occurred after appellant's agent had been there two or three days, and just as the sheep were being loaded on the cars. Appellant testified that, while he was not entirely satisfied with the construction of the contract, he understood that he had settled the matter on the terms which resulted in his giving the check. We agree with appellant that neither the findings nor the evidence establish the fact that defendant did not have sheep of his own raising out of which he could have returned to the plaintiff the full number of sheep of the classes required by his contract. Respondent gave the following testimony:

"Q. What was the class and grade of sheep you bought from Mr. Clark? A. They are Rambouillet-Merino sheep.

"Q. Would they also be described as well-improved white ewes? A. Yes, sir; they would be classed as that.

"Q. They were free from blemish, and recently dipped, according to the other provisions of the contract? Those that you got from Mr. Ilfeld were quite largely also of the Rambouillet blood? A. They sheared a little more than half as much as the other sheep.

"Q. But they were apparently Rambouillet blood? A. Yes, sir; they were fair."

He further testified:

"Q. You had other sheep of your own raising; other lambs? A. Yes, sir.

"Q. You had them at the time and place of delivery, a sufficient number of sheep and of the proper ages, of your own raising, to have complied with this contract? A. I had on the range, but not at the place of delivery.

"Q. It was near or adjacent to the place of delivery? A. Yes, sir."

The increase from both flocks were from the same bucks.

[1] From the undisputed facts of the case, which we think have now been sufficiently stated, it reasonably may be concluded that respondent was under obligation to return to appellant the full number of sheep received by him, of the specified ages and classes, and was not entitled to account for the admitted deficiency merely by paying the sum of \$5 per head. At all events, these facts fully sustain the contention of appellant that the transaction between the parties which resulted in the delivery of the check was a voluntary compromise and settlement of a bona fide dispute, and was not induced by fraud or duress. There was therefore a valid and binding consideration of the check.

"It cannot, of course, be successfully disputed that the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not. * * * Union Collection Co. v. Buckman, 150 Cal. 159, 163, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609.

The case here presented is wholly outside the scope of those decisions which hold that a compromise of a claim is without consideration for a new promise where the claim is wholly without foundation, and known to the claimant to be so. Appellant's claim was made in good faith, and on probable cause. The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(70 Colo. 184)

HEARNE v. MILLIKEN et al. (No. 9853.)

(Supreme Court of Colorado. May 2, 1921.
Rehearing Denied June 6, 1921.)

1. Vendor and purchaser ⇨ 231(16)—Recorded instrument held contract of sale giving notice.

An instrument, dated, signed and recorded, reading, "Received from M., one dollar, for which I promised her a deed to our home known as — street," was a contract of sale, and notice of the rights of M. as against a subsequent accruing judgment.

2. Judgment ⇨ 780(3)—Executory contract not impaired by subsequent accruing judgment lien.

The rights of a vendee under an executory contract for the sale of land are not displaced or impaired by a subsequent accruing judgment lien against the vendor.

Department 1.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Controversy as to surplus in foreclosure proceeding between Maude P. and William B. Milliken and Robert G. Hearne. Judgment in favor of Maude P. and William B. Milliken, and Hearne brings error. Affirmed.

Edmund J. Churchill and Henry E. Lutz, both of Denver, for plaintiff in error.

Arthur R. Morrison, of Denver, for Maude P. Milliken.

ALLEN, J. This is an action which began as one for the foreclosure of a mortgage upon lots 11 and 12, block 59, Brewer's Park place, in the city and county of Denver, Colo., also known as 1133 Race street, which at the time of the execution of the mortgage, October 8, 1917, was owned in fee by William B. Milliken. The controversy is now between two of the defendants below, Robert G. Hearne and Maude P. Milliken. They each concede the lien priority of the mortgage above mentioned, but each claims to be entitled, in preference to the other, to any surplus arising at the foreclosure sale. Hearne is the holder of a judgment lien, and Maude P. Milliken is the purchaser under a contract of sale, as will more fully appear hereinafter. The judgment, as to the case between these two defendants, was for Milliken, and Hearne brings the cause here for review.

[1, 2] The ultimate question to be determined is whether the judgment lien of the plaintiff in error, Hearne, is superior to the claim of defendant in error Maude P. Milliken, to the real estate involved in this case. Hearne obtained a judgment in the United States District Court against William B. Milliken on June 1, 1918. He recorded a transcript of the judgment in the city and county of Denver on June 5, 1918, and the judgment then became a lien on real estate, or interest in real estate, then held by William B. Milliken in the city and county of Denver. At the time the transcript of judgment was recorded, there was already on record, affecting the same property, the following instrument, which had been recorded March 9, 1918:

"February 3, 1917.

"Received from Maude P. Milliken, one dollar, for which I promised her a deed to our home known as 1133 Race street.

"W. B. Milliken."

This instrument is treated, both by the plaintiff in error and by the defendant in error, as a contract of sale, wherein Maude P. Milliken is the purchaser and William B. Milliken is the vendor of the real estate. There is no serious claim that the instrument last above quoted does not constitute notice of the claims of Maude P. Milliken. Under the facts thus far stated, the judgment below is right under the rule, stated in 23 Cyc. 1382, as follows:

"The rights of the vendee under an executory contract for the sale of land are not displaced or impaired by the subsequent accruing of a judgment lien against the vendor."

See, also, 39 Cyc. 1304.

The only reason advanced by plaintiff in error why the instrument in question is not effective as against him is that it is too indefinite to be enforced by a suit for specific performance, but we hold that it is William B. Milliken, the party to be held under the contract, and not plaintiff in error, or any other third person, who can raise this question.

The principal attack upon the judgment is upon the ground that the contract to convey to Maude P. Milliken, who was the wife of William B. Milliken, was with intent to defraud the husband's creditors. Upon the question of fraudulent intent, the court found against the plaintiff in error. The circumstances shown in evidence are sufficient to justify that finding.

The judgment is affirmed.

TELLER, Acting Chief Justice, and WHITFORD, J., concur.

(45 Nev. 106)

WALKER v. WALKER. (No. 2482.)

(Supreme Court of Nevada. June 6, 1921.)

1. Divorce \S 64—Residence for sole purpose of obtaining divorce insufficient, unless bona fide intention of remaining appears.

Residence in the state for the statutory period of six months solely for the purpose of obtaining a divorce is not sufficient to give jurisdiction, but a bona fide residence with the intention of remaining must appear, and plaintiffs must bring themselves clearly and affirmatively within the jurisdiction of the court.

2. Divorce \S 64—If intention is to remain in state permanently, mere fact of going there to obtain divorce will not prevent decree.

The mere fact that the main purpose of one in going to another state is to obtain a divorce will not prevent a divorce there if it is his or her purpose to remain permanently.

3. Divorce \S 147—Plaintiff's residence a question of fact for trial court.

The question of plaintiff's residence in a divorce action is one of fact to be determined by the trial court.

4. Divorce \S 184(10)—Court's finding as to residence will not be disturbed on appeal where supported.

Where the bona fides of plaintiff's residence in a divorce suit is attacked by a spouse charged with cruelty, a personal element is injected into the issue of residence, and where the trial court finds upon a substantial conflict in the evidence in favor of plaintiff, and assumes jurisdiction, its finding imports that the residence

was in good faith and such finding when supported by evidence cannot be disturbed on appeal.

5. Divorce \S 64—No law prevents change of domicile to obtain divorce.

There is no rule of law which prevents one from changing his domicile in order to facilitate his obtaining a divorce, or to secure other advantages he may think the law of the new domicile may afford him, but the change must be a bona fide one to be effective.

Appeal from District Court, Clark County; Wm. E. Orr, Judge.

Suit by Emily Hartley Walker against Orlando F. Walker. From a decree for complainant, defendant appeals. Affirmed.

Breeze & Hinman, of Las Vegas, for appellant.

A. W. Ham and Stevens & Henderson, all of Las Vegas, for respondent.

SANDERS, O. J. This appeal is taken by the husband from a decree of divorce granted his wife upon the ground of extreme cruelty inflicted upon her during the coverture. We are asked to reverse the decree upon the grounds: First, that the court was without jurisdiction of the subject-matter of the action, for the reason that the wife came from her home in Rockford, Ill., to the state of Nevada for the sole purpose of obtaining a divorce, and with the intention of returning when she had accomplished her purpose; and, second, that the charges of cruelty are not sustained by the evidence.

Referring to these questions in their order, and to the parties as they stood in the court below, it appears that the plaintiff is a woman 58 years of age, of independent means, without issue of the marriage, whose main purpose in leaving Illinois and establishing a residence in Nevada was to obtain a divorce. The question for determination is, Has the plaintiff met the residential qualifications of the Nevada statute?

[1, 2] Residence in this state for the statutory period of six months solely for the purpose of obtaining a divorce is not sufficient to give jurisdiction, but a bona fide residence with the intention of remaining must appear. Where residence is made the basis of jurisdiction, parties who invoke the power of the court to relieve them from the marriage tie must bring themselves clearly and affirmatively within the jurisdiction of the court. *Fleming v. Fleming*, 86 Nev. 135, 134 Pac. 445; *Presson v. Presson*, 38 Nev. 203, 147 Pac. 1081. But the mere fact that the main purpose of one in going to another state is to obtain a divorce will not prevent a divorce there if it is his or her purpose to remain permanently. *Presson v. Presson*, *supra*; *Andrade v. Andrade*, 14 Ariz. 379, 128 Pac. 813; *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92

Atl. 684, Ann. Cas. 1916B, 920; *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153; *Gregory v. Gregory*, 76 Me. 535; *Hege-man v. Fox*, 31 Barb. (N. Y.) 475; *In re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406; *Colburn v. Colburn*, 70 Mich. 647, 38 N. W. 607; *Graham v. Graham*, 9 N. D. 88, 81 N. W. 44; *Wallace v. Wallace*, 65 N. J. Eq. 359, 54 Atl. 433; *Fosdick v. Fosdick*, 15 R. I. 130, 23 Atl. 140; 2 Schouler, M. D. & S. (6th Ed.) § 1506, 14 Cyc. 587; *Minor's Conflict of Laws*, § 90, p. 199, also section 50.

The result of these and other authorities is that, where the animus really exists to remain permanently, the fact that the motive of the removal is to procure a divorce is immaterial.

[3, 4] The question of plaintiff's residence in a divorce action (necessary to be pleaded and proved) is one of fact to be determined by the trial court. *Blakeslee v. Blakeslee*, 41 Nev. 243, 168 Pac. 950. We are also of the opinion that where the bona fides of plaintiff's residence is attacked by a spouse charged with cruelty, a personal element is injected into the issue of residence, and where the trial court finds upon a substantial conflict in the evidence in favor of the plaintiff and assumes jurisdiction, and refuses to find that plaintiff's residence was a fraud upon its jurisdiction, its finding imports that the residence was in good faith, and such finding, when supported by the testimony on behalf of the plaintiff, cannot be disturbed on appeal. *Miller v. Miller*, 37 Nev. 257, 142 Pac. 218; *Gildersleeve v. Gildersleeve*, supra.

The plaintiff in this action was subjected, as a witness in her own behalf, to a most able and searching cross-examination to lay bare before the court her real animus in coming to Nevada. It covered every period of her marital life, her every movement before leaving the state of Illinois, and her acts and conduct and mode of living in Nevada from the time she arrived up to the bringing of her action in the district court of Clark county, where the cause was heard and determined. The credibility of her story was a matter for the trial judge. It seems to have carried conviction to the mind of the court as to its verity, and satisfied the court that plaintiff's residence in Nevada was in good faith and not merely colorable. The court was entitled to believe it, and we cannot properly disturb the conclusion reached. We have carefully considered, in connection with all the testimony, the point raised that plaintiff's residence could not be bona fide, for the reason that the unmistakable indications from surrounding circumstances are that plaintiff was moved to leave Illinois because she was impatient of delay in throwing off and eager to be rid of her marriage ties, and that she could more readily and speedily

obtain a divorce under the six-month residence clause in the Nevada law. These considerations are, indeed, pertinent, and cast a suspicion, and quite a strong suspicion, upon the credibility of plaintiff's testimony, but we assume that they were weighed by the trial court in connection with all the testimony bearing upon the point.

[5] There is no rule of law which prevents one from changing his domicile in order to facilitate his obtaining a divorce or to secure other advantages he may think that the laws of the new domicile may afford him. He is free to change at his pleasure, but the change must be a bona fide one to be effective. If actual and bona fide, the change will be accomplished. *Gildersleeve v. Gildersleeve*, supra, and other cases hereinabove cited.

As to the second proposition—that the charges of cruelty are not sustained by the proof—we are of the opinion that the trial court's full and specific findings thereon are correct.

The judgment is affirmed.

DUCKER and COLEMAN, JJ., concur.

(60 Mont. 8)

JACKSON v. LOMAS. (No. 4321.)

(Supreme Court of Montana. May 6, 1921.)

1. Explosives ⚡—Boy injured in discharging fireworks in violation of ordinance could not recover from seller violating ordinance.

In view of Rev. Codes, § 6192, 10 year old boy injured in the discharge of fireworks, in violation of an ordinance prohibiting the sale and discharge of fireworks, could not recover damages on the ground that the storekeeper who sold the fireworks was negligent in selling them in violation of such ordinance; the boy in such case being equally in the wrong, in that he himself violated the ordinance, without which wrongful act the injury would not have been sustained.

2. Negligence ⚡—Injured person's violation of ordinance defeats recovery.

Generally the violation of a penal statute or ordinance by one resulting in injury to another is negligence per se, but such negligence is not actionable where the parties are in pari delicto, as Rev. Codes, § 6192, declares.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Action by Elmer Jackson, by his guardian ad litem, W. M. Jackson, against C. T. Lomas. From judgment for plaintiff and from order denying defendant's motion for new trial, defendant appeals. Judgment and order reversed, with directions to enter judgment for defendant.

F. C. Fluent, of Butte, for appellant.
William Meyer, of Butte, for respondent.

GALEN, J. The amended complaint in this action, after alleging that the plaintiff is a minor, 10 years of age, and the appointment of W. M. Jackson as his guardian ad litem, alleges:

"That a long time prior to the 9th day of July, 1916, to wit, on or about the 22d day of September, 1910, the city council of the city of Butte duly passed, and the then mayor did approve, an ordinance, being Ordinance No. 948 of the series of ordinances of the city of Butte, which said ordinance was entitled: 'An ordinance prohibiting the discharge of fireworks and other pyrotechnic display(s) and to prohibit the sale thereof.' Which said ordinance was in full force and effect on the 9th day of July, 1916, and at all the times herein mentioned, and where and whereby it was provided, amongst other matters, as follows: 'Section 2. The sale of fireworks at retail is prohibited.' And that said ordinance has not been amended or repealed."

It is further alleged that the defendant was engaged in the general mercantile business within the corporate limits of the city of Butte, and that "on the 9th day of July, 1916, the said defendant unlawfully, recklessly, carelessly, and negligently did sell to the above-named Elmer Jackson, and in violation of the provisions of Ordinance No. 948 of the ordinances of the city of Butte, one package of firecrackers." It is alleged that Elmer Jackson "did not know, and in the exercise of ordinary care could not have known, that the amount of powder contained in said firecracker was sufficient so that when the same was exploded it would be liable, if held in the hand," to cause injury to the plaintiff's hand, and that the defendant failed to warn the plaintiff "of the quantity of powder contained in each of said firecrackers or the probable effect of the explosion" thereof, and that the plaintiff "did not know, and in the exercise of ordinary care could not have known," of the danger. It is then alleged that, while held by the plaintiff, one of the firecrackers exploded and caused injuries to plaintiff's left hand, necessitating partial amputation of the left thumb and the tip of the index finger; and, further, that it was dangerous to sell firecrackers to children and was dangerous and unsafe to sell firecrackers to the plaintiff, and that the defendant knew, or by the exercise of ordinary care should have known, of the danger. It is then alleged that by reason of the injuries sustained to the plaintiff's left hand it has become deformed, and that his earning capacity is greatly diminished and impaired, and the injuries by him sustained permanent. Damages are alleged in the sum of \$5,000.

The answer admits that plaintiff is a minor 12 years of age, and the appointment of W. M. Jackson as his guardian ad litem. The existence of Ordinance No. 948 of the city of Butte and the sale by the defendant

to the plaintiff of one package of firecrackers are admitted, and each other allegation of the complaint is denied; and by way of affirmative defense the answer pleads contributory negligence, and that the sole cause of the accident was the illegal act of the plaintiff in discharging the firecracker within the corporate limits of the city of Butte in violation of the ordinance, which provides, in addition to the provisions thereof alleged in plaintiff's amended complaint, as follows:

"The discharge, firing, or use of all firecrackers, rockets, torpedoes, Roman candles, or other fireworks or substances designated for pyrotechnic display, and of all pistols, canes, cannons, or other appliances, using blank cartridges or caps containing chlorate of potash mixture, is hereby prohibited."

The plaintiff's reply admits that the plaintiff is 12 years of age and the existence of the provision in the ordinance as alleged by the defendant, and all other allegations of the answer are denied.

A trial to the court and jury was had, which resulted in a verdict in favor of the plaintiff for the sum of \$1,200, and judgment was regularly entered thereon. This appeal is from the judgment and order denying defendant's motion for a new trial.

Eight specifications of error are assigned, involving the decision of but a single question determinative of the case, viz.: Did the defendant render himself liable, under the circumstances of this case, by making the sale of the firecrackers in violation of the city ordinance?

No objection was made to the sufficiency of the pleadings, and there is but little conflict in the evidence. There is no dispute with reference to the fact that the city ordinance was violated by both the plaintiff and the defendant, i. e.: (1) By the defendant in unlawfully making sale of the firecrackers, and (2) by the plaintiff in discharging the same within the corporate limits of Butte.

[1, 2] Notwithstanding the youth of the plaintiff, he is chargeable equally with the defendant with the obligation of refraining from violation of penal statutes or ordinances. And where the parties are in pari delicto, a recovery may not be had by the plaintiff for his own misconduct. Section 6192, Revised Codes, provides:

"Between those who are equally in the right, or equally in the wrong, the law does not interpose."

See, also, *Melville v. Butte Balaklava Copper Co.*, 47 Mont. 1, 130 Pac. 441, and *Kallio v. Northwestern Improvement Co.*, 47 Mont. 314, 132 Pac. 419, Ann. Cas. 1915A, 1228.

The leading case applying the principle involved is that of *Butterfield v. Forrester*, 32 K. B. 103 Eng. Rep. 927, wherein Lord Ellenborough, C. J., said:

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right."

That was an action on the case for obstructing a highway by means of which the plaintiff, who was riding along the road at excessive speed, was thrown down with his horse and injured.

It is the general rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence per se. *Watts v. Montgomery Co.*, 175 Ala. 102, 106 South. 471; *Thompson's Commentaries on the Law of Negligence*, § 10; *Osterholm v. Boston & Mont. Consol. Copper & Silver Min. Co.*, 40 Mont. 508, 107 Pac. 499; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 490, 110 Pac. 226; *Melville v. Butte-Balaklava Copper Co.*, supra. But this rule fails of application where the parties are in pari delicto. *Melville v. Butte-Balaklava Copper Co.*, supra; *Thompson's Commentaries on the Law of Negligence*, § 204; *Kallio v. Northwestern Improvement Co.*, supra.

We think the rule laid down by Mr. Chief Justice Brantly, speaking for this court, in the case of *Melville v. Butte-Balaklava Copper Co.*, supra, conclusive. It is there held:

"If a violation of the statute by the employer is negligence, it is equally so on the part of the employee; and if the disobedience, on the one hand, is the proximate cause of the injury, so the dereliction, on the other hand, must be regarded as a contributing proximate cause; for the disobedience is concurrent, and the injury is the result of the concurrent causes which operated to the same end. In such a case the employé cannot recover, because, in alleging the injury, he must, of necessity, allege his own fault. It is a general rule that an action never lies when the plaintiff must base his claim, in whole or in part, on the violation of a criminal or penal law of the state. *Lloyd v. North Carolina R. R. Co.*, 151 N. C. 536, 66 S. E. 604; *Nottage v. Sawmill Phoenix (C. C.)* 133 Fed. 979; *McGrath v. Mervin*, 112 Mass. 467, 17 Am. Rep. 119; *Louisville, etc., Ry. Co. v. Buek*, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 521, 9 Am. St. Rep. 883; *Little v. Southern Ry. Co.*, 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509, 102 Am. St. Rep. 104; *Vosheskey v. Hillside C. & I. Co.*, 21 App. Div. 168, 47 N. Y. Supp. 386; *Thompson's Commentaries on the Law of Negligence*, §§ 10, 204, 249."

While the plaintiff bases his claim for damages upon a violation of the city ordinances by the defendant, yet from the pleadings as well as the evidence introduced at the trial it appears that plaintiff's claim of damages is attributable to his own violation of such ordinances, and therefore he is not entitled to recover.

It is not necessary for decision in this case to determine the question of the proximate

cause of the injury, either as a matter of law or of fact, further than to say, if the plaintiff had not lighted the firecracker and discharged it in violation of the ordinance, he would not have been injured thereby.

The fact alone that the act of the defendant was in violation of the ordinance does not afford ground for the recovery of damages for the injury complained of, unless it shall, in addition, be affirmatively made to appear (1) that the plaintiff was free from fault, and (2) that defendant's act was the proximate cause of the injury. Neither party having obeyed the city ordinance, and the accident being due to such nonobservance, they are in pari delicto, and the plaintiff is not entitled to recover. The law leaves them where it finds them, equally in the wrong, although injury resulted to the plaintiff from their combined wrongs.

For the reasons stated, the judgment and order appealed from are reversed, with directions to the district court to enter judgment in favor of the defendant.

Reversed and remanded.

BRANTLY, C. J., and REYNOLDS, COOPER, and HOLLOWAY, JJ., concur.

(60 Mont. 87)

DONOVAN v. BULL MOUNTAIN TRADING CO. (No. 4364.)

(Supreme Court of Montana. May 16, 1921.)

1. Pleading ¶408, 409(1)—Failure to move to strike or specially demur does not excuse bad pleading.

The fact that a party does not move or specially demur to a pleading on the ground that it is indefinite does not obviate the necessity of the complaint stating a cause of action, or an answer stating a defense.

2. Contracts ¶9(1)—Must be definite.

An agreement, to be binding, must be sufficiently definite to enable the court to fix an exact meaning upon it.

3. Work and labor ¶11 — Recovery may be based on quantum meruit, in absence of named consideration, if contract is sufficiently definite to acquire legal status.

In the case of a contract for the sale of goods or for hire, without a fixed price or consideration being named, it will be presumed that a reasonable price or consideration is intended, and recovery may be based upon quantum meruit, provided the contract is sufficiently definite to acquire a legal status.

4. Master and servant ¶72—Contract for extra compensation held too indefinite.

A contract whereby it was agreed that manager of store should receive a salary of \$175 per month, that there was "no limit" to his salary, and that he should receive a salary "commensurate with the earnings of the company,"

held too indefinite to entitle the manager to a salary in excess of the stipulated amount.

5. Work and labor \Leftrightarrow 29(2)—Recovery on quantum meruit limited to amount specified in special contract.

Where a recovery is sought as in quantum meruit, and the evidence reveals a special contract, the measure of recovery is to be limited to the amount specified in the contract.

Commissioners' Opinion.

Appeal from District Court, Musselshell County; George P. Jones, Judge.

Action by J. J. Donovan against the Bull Mountain Trading Company. From judgment for plaintiff and from order denying a new trial, defendant appeals. Judgment and order reversed and cause remanded, with directions to enter judgment for defendant.

Thomas J. Mathews, of Roundup, for appellant.

Boorman & Boorman, of Roundup, for respondent.

POORMAN, C. C. Appeal by defendant from a judgment entered against it on a verdict for plaintiff, and also from an order overruling defendant's motion for a new trial. The action, as appears from the amended complaint, is to recover extra compensation for services alleged to have been rendered by plaintiff for defendant. Defendant was engaged in general merchandise business at Klein, Mont., which, under the then management, was "losing money rapidly." It is further alleged in the amended complaint:

"The defendant promised to pay plaintiff, if the latter would take charge of said merchandise business * * * as manager thereof, and would conduct the same at a salary of \$175 per month, and in the event that the plaintiff was successful in placing said business upon a profitable basis and rescuing the said business from the deplorable and desperately unprofitable condition in which the said business then was and had been for a long time, the defendant promised to pay plaintiff, in addition to the said salary, an extra and reasonable compensation, liberally commensurate with the results obtained; that this plaintiff, in reliance upon the said promises and acting thereon, accepted said offer of employment on the 17th day of August, 1915, * * * and continued in the said employment of defendant as such manager of said business up to the 1st day of September, 1916."

It is further alleged:

"That plaintiff succeeded in placing said business upon a profitable basis and rescued it from the unprofitable condition in which it then was."

It is further alleged that the fair and reasonable value for the extra compensation due the plaintiff is the sum of \$5,000, and that \$500 of this sum has been paid.

Defendant filed a general demurrer to this

amended complaint, which demurrer was afterwards withdrawn and answer made, admitting certain allegations of the amended complaint, admitting the payment of the \$500 extra, but denying any contract with Donovan except that relating to the \$175 per month. A replication to this answer was filed. No other objection was made to the amended complaint until at the trial the defendant objected to the introduction of any evidence, for the reason that "the amended complaint fails to state a cause of action against defendant."

1. The respondent here contends that the objection to the amended complaint came too late.

[1] The fact that a party does not move or specially demur to the pleading of his adversary on the ground that it is indefinite does not obviate the necessity of the pleading stating a cause of action, if a complaint, or a defense, if an answer. In *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201, cited by respondent, the objection to the pleading was made for the first time in the Supreme Court and the court held that the complaint did state a cause of action, and that the objection thus urged could not then be entertained.

In passing on this assignment of error, we go no farther than to hold that the amended complaint is indefinite in not stating any basis or time of computing any claim for extra services. We believe that the rights of the parties may be better subserved by considering the actual contract as testified to by the plaintiff, and under which he claims to have accepted the employment and performed the services.

2. At the close of plaintiff's case, the defendant asked the court to direct a verdict in its favor for several reasons therein stated. All of these reasons, in the final analysis, are based upon the appellant's contention that the contract of employment is insufficient to support a finding for plaintiff. While confining our discussion to the legal question involved, a brief statement of the facts leading up to the employment may be helpful. It appears that the plaintiff was general manager of a store at Carpenter Creek, Mont., which was owned by plaintiff, H. S. Hopka, and this defendant; that the plaintiff was receiving a salary of \$125 per month. The defendant was conducting a mercantile business at Klein, Mont., and, being dissatisfied with the management thereof, requested plaintiff to take charge as the general manager, which the plaintiff did, and continued in charge until he quit of his own volition at the time named in the amended complaint. The contract of employment was made with G. W. Megeath, president of the defendant corporation. Plaintiff in his testimony, in stating the contract, says:

"He told me he had been paying a salary of \$200 per month to the man who preceded me.

If I would take it at \$175 per month and put the business on its feet, there would be no limit to my salary, and I agreed to take it on those terms.

"Question: What conditions were there upon which you should receive anything more than the \$175 per month? (Objected to as leading and suggestive.)

"Court: He may answer.

"Answer: My salary was to be commensurate with the earnings of the company for the time I was there, and I agreed to take it for a year and try it. That was the conditions of my employment."

It further appears that the \$175 per month had been regularly paid; that the only claim of plaintiff now is for the extra compensation.

The appellant contends that the language of this contract of employment is too uncertain and speculative to constitute a binding and enforceable agreement, in so far as it relates to extra compensation.

[2] It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to fix an exact meaning upon it. If an offer contemplates an acceptance by merely an affirmative answer, the offer must itself contain all the terms necessary for the required definiteness.

In *Price et al. v. Stipek*, 39 Mont. 426, 431, 104 Pac. 195, 196, this court quoted with approval from the decision in *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371, wherein it is said:

"In order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law."

This doctrine was again announced by this court in *Schwab v. McVey*, 54 Mont. 422, 171 Pac. 277. See, also, *Ahlstrom v. Fitzpatrick*, 17 Mont. 295, 42 Pac. 757.

In *Mackintosh v. Kimball*, 101 App. Div. 494, 92 N. Y. Supp. 132, the plaintiff sought to recover compensation in addition to a stated salary which he had received, upon a claim by him that during his employment he stated to defendants that he intended to quit unless given an increased salary, and one of the defendants said to him they would make it worth his while if he stayed on and would increase his salary, and that the idea was to give him an interest in the profits. The defendant further remarked: "You can depend upon me. I will see that you get a satisfactory amount." The court held that the arrangement was too indefinite to form

the basis of any obligation on the part of defendants.

In *Butler v. Kemmerer*, 218 Pa. 242, 67 Atl. 332, the plaintiff was in the employ of defendant at a regular salary, and the defendant promised him that if there were any profits in the business he would divide them with the plaintiff "upon a very liberal basis." The court held that the contract was never made complete and that there was no standard by which to measure the degree of liability and that the contract was too vague and indefinite to be enforced.

In *Fairplay School Township v. O'Neal*, 127 Ind. 95, 26 N. E. 686, a verbal contract by which the trustees agreed to pay a teacher "good wages," it was held that the contract was void for uncertainty as to compensation.

In *United Press v. N. Y. Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288, a contract to pay "not exceeding \$300 per week" was held void for uncertainty. The court said:

"If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to explain them by evidence of their acts and thus to show a practical construction, but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements; in the absence of a statement of the price to be paid * * * it is elementary in the law that, for the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit and that their full intention may be ascertained to a reasonable degree of certainty."

The court further held that certain payments made by the defendant of the additional compensation did not have the effect of giving validity to the contract.

In *Varney v. Ditmars*, 217 N. Y. 223, 111 N. E. 822, Ann. Cas. 1916B, 758, the plaintiff was an employé of the defendant, receiving a salary of \$35 per week, and on complaint that his salary was too small the defendant said:

"I am going to give you \$5 more a week; if you boys will go on and continue the way you have been and get me out of this trouble and get these jobs started * * * on the 1st of next January I will close my books and give you a fair share of my profits."

The court held that these statements made by the defendant were too indefinite to constitute a contract, and discussed at considerable length the principles here involved and cited many authorities.

The respondent maintains that these New York cases do not apply, for the reason that the questions there involved a division of profits, while the instant case is for extra compensation. This is true in a sense, but the principle discussed by the New York court is applicable here.

The phrase "commensurate with the earnings of the company" would require the ascertainment of the profits and, in effect, their division.

[3] There is no question that, in the case of a contract for the sale of goods or for hire without a fixed price or consideration being named, it will be presumed that a reasonable price or consideration is intended, and recovery may be based upon quantum meruit or quantum valebat, but even in such a case the contract alleged must be sufficiently definite to acquire a legal status; otherwise there is not any contract, either express or implied.

[4] The contract in this case is definite and certain as to the \$175 per month, but the phrase therein "no limit to my salary" cannot be regarded as having been made with contractual intent, and the further phrase "commensurate with the earnings of the company" is equally indefinite. Neither furnish any rule nor contain any intimation as to the amount of the increase, nor how it is to be computed, or when it is to commence. All is left to conjecture. The parties having omitted these essential requirements, any increase or change in the compensation would have to be the subject of future agreement or stipulation. Similar language in a contract was held by the Supreme Court of Massachusetts as being merely "hopeful encouragement sounding only in prophecy." *Hall v. Bank*, 173 Mass. 16, 53 N. E. 154, 44 L. R. A. 319, 73 Am. St. Rep. 255.

[5] Nor is the respondent's case strengthened if we regard the statement "my salary was to be commensurate with the earnings of the company" as a separate or special contract, for, "where a recovery is sought as in quantum meruit, and the evidence reveals a special contract, the measure of recovery is to be limited to, or, in other words, must not exceed the amount specified in the contract." *Swift v. Johnson*, 175 Mo. App. 660, 158 S. W. 96. No amount is specified in this alleged contract, nor is there any statement therein by which any amount can be ascertained. This entire subject is discussed at length, with citation of cases and holdings of the court, in 1 Williston on Contracts, § 36, and following sections: 1 Page on Contracts (1st Ed.) § 27, and following sections (2d Ed.) § 25, and following sections.

The contract stated by plaintiff in positive terms in his testimony, and on which he bases his claim for extra compensation, is so vague and indefinite as to be wholly void, and hence unenforceable in either law or equity.

We recommend that the judgment and order appealed from be reversed, and the cause remanded to the district court, with directions to set aside the verdict and judgment for plaintiff and to enter judgment for defendant for its costs.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order of the lower court be reversed and the cause remanded with directions to set aside the verdict and judgment for plaintiff and to enter judgment for defendant for its costs.

(60 Mont. 166)

PRICE v. NORTHERN PAC. RY. CO.
(No. 4389.)

(Supreme Court of Montana. May 23, 1921.)

1. New trial ¶137—Statement that motion for new trial would be heard on records and files, contained in notice of hearing, may be disregarded.

Where notice of intention to move for a new trial was based upon the minutes of the court as well as the bill of exceptions thereafter to be settled, a statement in a notice that the motion would be called for hearing in 30 days, that it would be heard upon the records and files in the action, may be disregarded, for the statement was purely gratuitous.

2. Appeal and error ¶948—Burden on appellant to show that order granting new trial was not on minutes.

Where notice of intention to move for new trial was based upon the minutes of the court as well as a bill of exceptions thereto to be settled, it will be presumed on appeal, the record being silent as to the existence of a bill of exceptions, that the order was made on the minutes of the court, and the burden is on appellant to show that it was not so made.

3. New trial ¶155—Determination of question of diligence in presenting motion for new trial for hearing is for trial court.

The determination of the question of diligence in presenting for hearing a motion for a new trial is within the discretionary power of the trial court, for Rev. Codes, § 6797, requires the application to be heard at the earliest practicable period.

4. Appeal and error ¶933(1)—Presumption that motion for new trial was heard at earliest practicable period.

Though there was practically a year's delay in hearing a motion for new trial, and Rev. Codes, § 6797, requires such motion to be heard at the earliest practicable period, it will be presumed, in the absence of affirmative showing to the contrary, that the trial court heard the motion in the ordinary exercise of his judicial duties at the earliest practicable period after notice of motion.

5. Appeal and error ¶977(2)—Unless abuse appears, appellate court will not interfere with lower court's exercise of discretion.

Although there was nearly a year's delay in disposing of a motion for new trial, yet, as the question of the time for disposing of such motion rests in the discretion of the trial court, its action will not be disturbed unless an abuse appears.

Commissioners' Opinion.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

Action by R. C. Price against the Northern Pacific Railway Company. There was a verdict and judgment for defendant, and, from an order vacating the same, defendant appeals. Affirmed.

Gunn, Rasch & Hall, of Helena, for appellant.

F. W. Mettler and E. G. Toomey, both of Helena, for respondent.

SPENCER, C. This is an action for damages to plaintiff's land and certain personal property, caused, as charged by the plaintiff, by negligence of the defendant in constructing and maintaining an obstruction which diverted the flood waters of the Missouri river upon the plaintiff's land. Issue was joined and trial had to a jury, which returned its verdict in favor of defendant. Judgment upon the verdict was made and entered November 30, 1917. On December 8, 1917, plaintiff served and filed his notice of intention to move for a new trial upon the grounds of (1) the insufficiency of the evidence to justify the verdict and (2) errors in law occurring at the trial and excepted to by the plaintiff, and based his motion "on the minutes of the court and upon a bill of exceptions hereafter to be settled." On October 11, 1918, plaintiff served notice upon the defendant that on November 11, 1918, he would call for hearing his motion for new trial, and among other things the notice contained the following:

"The said motion will be made pursuant to the notice of intention to move for a new trial heretofore filed in the above-entitled action, and will be heard upon the records and files in said action."

And on November 11th, the motion for new trial was submitted to the court upon brief of plaintiff and written communication from defendant to the court objecting to the hearing of said motion as being in violation of section 6797 of the Revised Codes. On November 27th, the court made its order vacating the verdict and judgment based thereon and granting a new trial. Appeal is from said order.

Appellant concedes that if the motion for a new trial based upon the minutes of the court could be heard at all, under the conditions as shown by the record, this court will not interfere with the order of the court below, so that but two questions are before us for determination, viz.: Could the motion be heard upon the minutes of the court at all, in view of the record before us? and was such hearing in violation of the provisions of section 6797, R. C.?

[1, 2] The notice served on defendant, advising it of the day upon which the motion

for a new trial would be called for hearing, has served its purpose when the adverse party is told a reasonable length of time in advance that the motion would be called to the attention of the court, so that he may present any defense he may have to the motion. No particular form of notice is required. In this case 30 days' notice was given, and defendant was advised that the motion would be heard pursuant to the notice of intention, and "upon the records and files in said action." The last phrase was purely gratuitous upon the part of the movant, and neither added to nor detracted from the grounds of the motion itself. The respondent was not bound by any statement in his notice, as the motion, in any event, could only be heard upon the grounds and pursuant to the notice of intention. The notice of intention was based upon the minutes of the court, as well as a bill of exceptions, thereafter to be settled. The motion having been granted, and the record before us being silent as to the existence of a bill of exceptions, we indulge the presumption that the order was made upon the minutes of the court, and the burden was upon the appellant to show that it was not so made. *Moore v. Butte Elec. Ry. Co.* et al., 47 Mont. 214, 131 Pac. 635.

[3-5] Was the court justified in hearing the motion notwithstanding the provisions of section 6797, R. C.? This section provides:

"The application for a new trial must be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court."

The record does not disclose any cause or excuse for delay in hearing the motion. The determination of the question of diligence in presenting the motion for hearing was within the discretionary power of the trial court. *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831; *Dorcy v. Brodis et al.*, 153 Cal. 673, 96 Pac. 278. Delay such as appears here should not be countenanced by the court unless for good cause shown, and much of the criticism heaped upon the courts of to-day is due to such cause. However, we presume, in the absence of affirmative showing to the contrary, that the trial court heard the motion in the ordinary exercise of his judicial duties, at the earliest practicable period after notice of motion (*State ex rel. Beach v. District Court*, 29 Mont. 265, 74 Pac. 498), and unless there is clear abuse of discretion, this court will not interfere (*Brange v. Bowen*, 57 Mont. 77, 186 Pac. 680; *Jones v. Shannon*, 55 Mont. 225, 175 Pac. 882; *Robinson v. Cole*, 46 Mont. 140, 126 Pac. 850; *Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597; *Ettien v. Drum*, 32 Mont. 311, 80 Pac. 369; *Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355).

Either party could have called this motion for hearing, and while primarily this duty devolved upon the movant, yet if the defendant

felt aggrieved by the delay it could have exercised its privileges, and by not doing so it must share the fault. We cannot say the court abused its discretion.

We find no error in the ruling of the court, and therefore recommend that the order of the court vacating the verdict and judgment and granting a new trial be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the order of the court vacating the verdict and judgment and granting a new trial be affirmed.

GALEN, J., being disqualified, takes no part in the above order.

(60 Mont. 34)

NEWTON v. CITY OF ROUNDUP.
(No. 4363.)

(Supreme Court of Montana. May 9, 1921.)

1. Municipal corporations \S 742(4) — Complaint against city for negligent construction and maintenance of septic tank held sufficient.

A complaint against a city to abate a nuisance, consisting of negligent construction and management of a septic tank and to recover damages, *held* sufficient as against demurrers.

2. Municipal corporations \S 742(4) — Proof that air was polluted by noxious odors sufficient to show negligent management of septic tank by city.

In an action against a city to abate a nuisance, proof that air over the plaintiff's land was polluted by noxious odors that emanated from material from the septic tank deposited on a gravel bar was sufficient to show negligent and improper operation of the tank and establishment of a nuisance to plaintiff under an allegation, "and the excrement is so unlawfully, negligently, and improperly dumped on said gravel bar."

3. Appeal and error \S 930(2), 1053(2)—Instruction taking matters from consideration of jury cured erroneous admission of evidence.

It was not reversible error to admit immaterial and incompetent matters in evidence that might tend to confuse the jury, where the court gave an instruction taking from the jury any consideration of such matters; for it is to be assumed that the jury followed the court's instructions.

4. Nuisance \S 50(7) — \$2,000 not excessive damages for discomfort from noxious odors.

In an action against a city to abate a nuisance consisting of negligent operation of septic tank, resulting in noxious odors and vacancy for a year of a house having a rental value of \$15 a month, and discomfort and annoyance, *held*, that a verdict for \$2,000 damages was not excessive.

Commissioners' Opinion.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

Action by J. W. Newton against the City of Roundup. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Thomas J. Mathews, of Roundup, for appellant.

Maris & Mercer, of Roundup, and Goddard & Clark, of Billings, for respondent.

JACKSON, C. In this case J. W. Newton brought his action against the city of Roundup, alleging in substance as follows: That he owned certain lands in the county of Musselshell, through which lands flows the Musselshell river; that he had improved the west portion of the said lands by erecting a dwelling, slaughterhouse, houses for domestic animals, fencing some of the land hog-tight, dug a well, had purchased machinery for the purpose of running an artificial ice plant and fishpond, and had begun the erection of an icehouse thereon; that he had for many years used the waters and underflow of the Musselshell river for stock and domestic purposes, and that he has that right to so use it, and likewise to use it for the purpose of making artificial ice and running a fishpond on his premises in an unpolluted condition; that he has the right to the use of the air over his premises in a pure and unpolluted condition; that the proximity of his land to the city of Roundup contributes to its value; that he has the right to the free and unobstructed use of a certain public highway leading from the city of Roundup to his premises, and that he is obliged to make from two to six trips per day over the highway in attending to his business, and that it is the only road leading from his premises to the city; that defendant, knowing these facts, built a sewer system, completed about October 8, 1915, and in the system constructed a septic tank about 50 yards west of plaintiff's property; that the excrement and sewage of the city was conducted by the sewer system into the tank and thence to a gravel bar in the Musselshell river, about 150 yards southwest of plaintiff's improved property; that the septic tank is so unlawfully, negligently, improperly, and unskillfully constructed, and the excrement is so unlawfully, negligently, and improperly dumped on the gravel bar, and by means of these several acts and things defendant caused noxious odors and smells and polluted and contaminated the atmosphere over the public road and the lands containing the dwelling, slaughterhouse, and other improvements, and polluted and contaminated the water of the said Musselshell river and the underflow thereof so as to render the dwelling house unfit for habitation, and to render the lots, houses for domestic

animals, and other improvements on the lands unfit for the use of the plaintiff, and also prevented the plaintiff from renting the same, or otherwise receiving any income therefrom, and that travel on the said public highway was made very offensive and disagreeable. The abatement of the nuisance is asked and \$10,000 damages. The general and special demurrers to the complaint were overruled, and the defendant answered in effect by a general denial of the nuisance and damages, setting up as an affirmative defense that prior to the construction of the sewer and septic tank the plaintiff had erected a slaughterhouse in proximity to the septic tank, with the usual slaughterhouse appurtenances, and that through plaintiff's neglect large amounts of decayed animal matter were deposited around the premises, and that there arose therefrom noxious gases and smells which polluted the surrounding atmosphere and made the road travel disagreeable; that the tank was properly constructed and functioned in a sanitary and odorless fashion; and any damage done was due to the use of the plaintiff made of his premises. The plaintiff traverses by reply the allegations of defendant's affirmative defense.

The trial was had before a jury, and it returned special findings of fact as follows:

"(1) Was the slaughterhouse mentioned in the complaint in this action in such a condition from the time of the erection of the septic tank to the trial of this action that it complied with the requirements of the State Board of Health of the state of Montana relating to slaughterhouses? Answer: No.

"(2) If you find that the plaintiff has suffered any damages by reason of the acts complained of, how much of said damages was suffered by reason of plaintiff's being deprived of the use of the slaughterhouse for slaughterhouse purposes? Answer: None.

"(3) What is the reasonable rental value per month of the house and the garden in connection therewith? Answer: \$15 per month.

"(4) If you find that the plaintiff has suffered damage by reason of the acts of the defendant, was such damage suffered by reason of the defective construction of the septic tank, or the failure to properly manage the same? Answer: Failure to properly manage."

And a general verdict for the plaintiff in the sum of \$2,000. Defendant appeals from the judgment and order denying a new trial.

Error has been predicated in 19 assignments, all of which will be treated under the following heads: sufficiency of the complaint; sufficiency of plaintiff's evidence under the allegations; excessiveness of the verdict in view of the special findings and the evidence; immaterial and incompetent matters testified to at the trial tending to confuse the jury; the giving and refusing of certain instructions.

[1] That the complaint is sufficient has been definitely settled by this court in *Dawes*

v. City of Great Falls, 31 Mont. 9, 77 Pac. 309. We also think no fatal error shows in the instructions.

[2] While plaintiff did not prove the tank was "unlawfully, negligently, improperly, and unskillfully constructed," the evidence overwhelmingly shows that the air over the west portion of plaintiff's land, on which was situated the house and other improvements, and the road, was polluted by the noxious odors that emanated from the material which came from the septic tank and was deposited on the gravel bar. This proof, as we view it under the allegation "and the excrement is so unlawfully, negligently, and improperly dumped on said gravel bar," is sufficient to show the negligent and improper operation of the tank and the establishment of a nuisance to plaintiff. The function of this court "is to determine whether plaintiff made a case by his evidence upon which he is entitled to relief within the allegations of his complaint, considered from any point of view." *Hamilton v. Hamilton*, 51 Mont. 521, 154 Pac. 721; *Forsell v. Pittsburg, etc., Copper Co.*, 38 Mont. 407, 100 Pac. 218.

Practically all of plaintiff's case is devoted to the showing that the "lower 80" was the portion of plaintiff's lands, the air over which and the water thereon, were subject to the detriment of the noisome smells and water pollution, with consequent unfitness for use or rental by plaintiff, and that the air over the road traveled by plaintiff in the use of his property had been vitiated. Plaintiff's evidence shows that the witness Smith was compelled to leave plaintiff's house, in which he had lived, on account of disagreeable odors, and the house had been vacant for one year at least prior to the trial; that plaintiff had not used his property without annoyance for practically two years; that he suffered no loss from his purchase of machinery; and that the nuisance was abated a short time prior to the date of this trial. The evidence of the defendant sharply conflicts with that of the plaintiff, but its weight and the credibility of the witnesses were solely within the province of the jury.

[3] While it is true that during the course of the trial many immaterial and incompetent matters were permitted in evidence that might tend to confuse the jury, we are of the opinion that the instruction of the court taking from the jury any consideration of those matters disposes of this contention; for it is to be assumed that the jury followed the court's instructions. The jury found that all of the evidence preponderated in favor of plaintiff, and, while returning to the court the findings of fact, assessed the damages of the plaintiff at the sum of \$2,000.

[4] Plaintiff made his case to the satisfaction of the jury, and while two findings of fact show the jury decided he had suffered no damages by reason of being deprived of the

(198 P.)

use of the slaughterhouse as such, and that the rental value of the house and garden was but \$15 a month, there was certainly nothing to preclude the jury from considering the discomfort and annoyance suffered by the plaintiff and the loss of the entire "lower 80" and its improvements for any purpose for which it might ordinarily be used by reason of the nuisance, and that plaintiff was damaged to the amount of the verdict. We think the damages not excessive. *Anderson v. C., M. & St. P. Ry. Co.*, 85 Minn. 337, 88 N. W. 1001.

The case is one where no fixed measure of damages can be laid down. *Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; *Neary v. N. P. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Hollenback v. Stone & Webster Engineering Co.*, 46 Mont. 559, 129 Pac. 1058; *Kelley v. John R. Daily Co.*, 56 Mont. 63, 181 Pac. 326.

For the reasons herein stated, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(60 Mont. 206)

BRIGGEMAN v. CORRIGAN. (No. 4387.)

(Supreme Court of Montana. May 23, 1921.)

Fences §15—Landowner, who constructs partition fence without waiting the required time after notice, cannot recover.

Where plaintiff, after serving notice on decedent for the construction of a partition fence, pursuant to Rev. Codes, § 2087, began the construction of the fence without waiting for the expiration of the six-month period prescribed by the statute, plaintiff, though the fence was not completed until after six months, cannot recover contribution from decedent.

Commissioners' Opinion.

Appeal from District Court, Powell County; Jeremiah J. Lynch, Judge.

Action by Joseph Briggeman against Anna C. Corrigan, executrix of the estate of Mary Corrigan, deceased. Defendant's motion for nonsuit was granted, and from the judgment, and order denying a new trial, plaintiff appeals. Affirmed.

S. P. Wilson, of Deer Lodge, for appellant.
W. E. Keeley, of Deer Lodge, for respondent.

JACKSON, C. This action is to recover by contribution \$92.35, alleged to be defendant's share of the cost of building a partition fence built by plaintiff between the property of the parties. The complaint is in three counts, the first based on section 2087, R. C.,

the second on sections 2085, 2086, R. C., and the third on section 4535, R. C. Defendant admits severalty ownership of the lands of both, and that, previous to the building of the fence, the lands were without partition; admits the lands were occupied by the respective owners; admits that plaintiff built the fence; and denies all other allegations.

The record shows the ownership of the lands by the respective parties; that both occupied their premises in severalty, which were fenced as against all, except that the northern part of defendant's land and section 15 of plaintiff's land were without a partition fence, and were grazed by their stock in common; that plaintiff desired to have a partition fence between the lands, and thinks he delivered to defendant, on November 20, 1914, a notice dated November 25, 1914, in conformity with section 2087, R. C.; that on May 18, 1915, plaintiff started the construction of the partition fence, and built the whole thereof, completing the same some time early in June of the same year; that defendant has neglected to pay her proportionate share for the fence.

The trial was had to a jury, and at the conclusion of plaintiff's case, the defendant moved for a nonsuit on all three counts. Motion was granted. Plaintiff appeals from the judgment and the order denying a new trial, assigning as error the sustaining of the motion for a nonsuit; the ruling that the testimony introduced did not show plaintiff was entitled to any recovery under any of the causes of action; the denial of the motion for a new trial.

Sections 2085, 2086, and 4535, R. C., have not the slightest application under the proof, as the most cursory examination will show. The showing made by plaintiff from the record plainly entitled him to relief, if any, under section 2087, and none other. But, instead of allowing the defendant the six months as required by statute, the plaintiff, two days prior to the expiration of that time, takes things in his own hands and builds the fence. It is not material that the six-month period had elapsed prior to the time of its completion. Defendant was entitled to every day of the six months before default could be predicated, and before defendant could take advantage of section 2087.

The right to sue under section 2087, R. C., is purely statutory. Without such a statute the right would not exist.

"The rule is well settled in the country that whenever a statute grants a right which did not exist at common law, and prescribes the time within which the right must be exercised, the limitation thus imposed does not affect the remedy merely, but is of the essence of the right itself, and one who seeks to enforce such right must show affirmatively that he has brought his action within the time fixed by the statute." *Dolenty v. Broadwater County*, 45

Mont. 267, 122 Pac. 919; Eby v. City of Lewis-town, 55 Mont. 113, 173 Pac. 1163.

And so, in this case, the six months' time prescribed by the statute must have passed before the notifying party is entitled to act, and if he has acted before that, whether it be a day or a month, he has no cause of action, as the lapse of the entire time is of the essence of the right itself.

For the foregoing reasons, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

(80 Mont. 156)

BUCKHOUSE v. PARSONS. (No. 4380.)

(Supreme Court of Montana. May 23, 1921.)

1. New trial ⇐2—Motion lies, regardless of manner in which decision was rendered.

A motion for new trial lies where it appears from the record that an issue of fact was erroneously determined after trial and decision by a jury, a court, or by referees, under Rev. Codes, § 6793, and it is immaterial whether the verdict was reached by the jury or by direction of the court.

2. New trial ⇐2—Motion lies after both parties had requested direction of verdict.

Although both parties had moved for a directed verdict, thereby in effect submitting an agreed statement of facts to court, the unsuccessful party may nevertheless be granted a new trial if the verdict, as directed by the court, was erroneous.

3. Appeal and error ⇐978(1)—Insufficiency of evidence presents question for discretion, but error of law presents question of right.

A motion for new trial because of insufficiency of evidence to justify the verdict moves the discretionary powers of the court, but an error of law, occurring at the trial and excepted to by the defendant, presents question of strict legal right, and in either case the granting of the motion, if sustained by the record, is not error.

4. Husband and wife ⇐23—Wife has authority to employ counsel for husband when he fails to defend.

Under Rev. Codes, § 6480, providing that if a husband and wife be sued together the wife may defend for her own right, and if husband neglects to defend she may defend for his right also, a wife, who had brought suit for divorce which had not yet been determined, had authority to employ counsel on behalf of her husband, in a suit for partition against both of them in which the husband had failed to appear.

5. Attorney and client ⇐26—Attorney employed by wife to represent husband can pay money recovered to the wife.

An attorney who has been lawfully employed by a wife to represent her husband in a

partition suit against both of them could lawfully pay the money awarded to the husband to the wife, and is not liable to the husband therefor.

Commissioners' Opinion.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by Donald Buckhouse against Harry H. Parsons. From an order granting defendant's motion for new trial after verdict directed for plaintiff, plaintiff appeals. Affirmed.

Madeen & Russell, of Missoula, for appellant.

Charles H. Hall and A. N. Whitlock, both of Missoula, for respondent.

JACKSON, O. In this case the defendant, an attorney at law, is sued by the plaintiff to recover judgment for the sum of \$1,808.89, with interest from February 15, 1917. The plaintiff alleges that on February 23, 1916, an action was commenced in the district court of the Fourth district of Montana, wherein John Buckhouse et al. were plaintiffs, and Donald Buckhouse et al. were defendants, for the purpose of partitioning the estate of Henry Buckhouse, deceased, and dividing the proceeds thereof among the heirs, one of whom was the plaintiff in this action. No summons or complaint was served on the plaintiff, and he was out of the state between November 26, 1915, and May 29, 1917; that the defendant, without authority, appeared in the partition suit for the plaintiff, and after the right of plaintiff in this action was determined, and he was decreed the sum of \$1,808.89, the defendant, without plaintiff's authority, received the said money and turned it over to one Fletty Buckhouse, about February 15, 1917, and that she was not entitled to any part of the same; that plaintiff had no knowledge of this proceeding until about March 17, 1917, and shortly thereafter demanded of defendant the payment of the money, which was refused. By answer, the defendant admits he appeared for plaintiff, but alleges that his appearance and all of his acts in connection therewith were lawful and with plaintiff's authority and consent; admits plaintiff's interest was determined in the partition suit, and alleges that the portion of the estate allotted to the plaintiff and his wife, Fletty Buckhouse, was the sum of \$2,177.77; that a portion was paid out of this sum to the Missoula Mercantile Company, leaving a net sum of \$1,808.89, which defendant admits he received as attorney for plaintiff and his wife, and turned over to her, less \$221.49, his fees for services in the partition suit, and in a divorce action wherein Fletty Buckhouse was plaintiff and the plaintiff herein was defendant, and which was pending at that time; admits the de-

mand by plaintiff for the money and his own refusal. Defendant then alleges: That on February 25, 1916, Fleety Buckhouse had him file proceedings against plaintiff for divorce and custody of their four children. That service was had by publication in March, 1916, and a divorce granted February 17, 1917, awarding Fleety Buckhouse the custody of the children. That after the action for divorce had been filed, service of summons in the partition suit was had on Fleety Buckhouse. That on or about March 18, 1916, she employed defendant to represent the interests of herself and her husband in the said suit. That she represented to have, and in fact did have, authority from her husband to employ counsel on his behalf, and was empowered to deal in such manner as she deemed fit and proper with all of his property, in accordance with exhibits A and B, as follows:

"Exhibit A. Missoula, Mont., Nov. 26, 1915. I hear by give Fleety Buckhouse authority to sign my name to any leases or to do as she sees fit with any real estate which I possess. [Signed] Donald Buckhouse."

"Exhibit B. Missoula, Mont., Nov. 26, 1915. To Whom It may Concern: I have sold and delivered to Fleety Buckhouse all my personal property except one threshing machine for the sum of (\$1.00) one dollar value received. [Signed] Donald Buckhouse."

That under the authority vested in her, he turned over the money, and that no proceedings were had to determine the interests of plaintiff and Fleety Buckhouse in the fund, and that nothing is due plaintiff from defendant. That plaintiff had, at the time the divorce action was instituted, deserted Fleety Buckhouse and their children, and failed and refused to contribute to their support, and for more than two years before she received the money turned over to her by defendant she had no means whatever for providing herself with the necessities of life, and that the sum so received of \$1,587.40 was reasonably necessary for providing the necessities of life for her and her children, and that the sum of \$221.49 was reasonable for defendant's services in the partition and divorce actions. That plaintiff was legally obliged to support his wife and children and that he should be estopped from denying the authority of the defendant to pay over the said money. Issue was joined by the reply. The trial was had to a jury and at the conclusion of all the testimony plaintiff and defendant each moved the court for a directed verdict. The motion of the plaintiff was granted and a verdict returned for him in the sum of \$1,808.89. Motion by defendant for a new trial was granted, and from that order plaintiff appeals. The sole assignment of error is the granting by the court of the motion for a new trial.

[1] A motion for a new trial lies in cases where it appears from the record that there is an issue of fact wrongfully or erroneously determined after trial and decision by a jury, a court, or by referees. Section 6793, R. C. It is immaterial, as far as the motion is concerned, as to how the verdict was reached, whether by the jury or direction of court. If the record shows it comes within the purview of section 6794, R. C., the motion is proper, and the trial court may grant a new trial.

[2] Plaintiff contends quite vigorously that a motion for a new trial cannot lie when both parties move for a directed verdict, and that defendant's only remedy is by appeal from the judgment. He urges that, since each has moved for the directed verdict, they thereby concede in effect that it is a submission of an agreed statement of facts to the court. That this is the law, as far as the purpose of the motion is concerned, there is no doubt, but no authority can hold that the mere ex parte motion of either or both is binding on the record or the court's action. Such a motion merely states to the court that, in the opinion of the movant, from all of the testimony in the case, giving to the adverse party the extreme benefit of his proof, there is but one legal conclusion to be drawn therefrom. And while the court may grant the motion and direct the verdict, it would be a far-fetched course of reasoning that would prevent a re-examination of the facts upon which the judgment of the court was based, when, upon a motion for a new trial, the court is convinced it had made an error in drawing its conclusion, to which proper exception had been taken, and where under a re-examination the correct determination would be had. If the directed verdict had been erroneously granted, it is an error in law during the trial, and one of our statutory grounds for a new trial.

[3] The motion for a new trial was made on the ground of insufficiency of the evidence to justify the verdict, which moves the discretionary power of the court, and also error in law occurring at the trial and excepted to by the defendant, which, standing alone, presents a question of strict legal right. In either assignment, if borne out by the record, the granting of the motion is not error. *McIntyre v. N. P. Ry. Co.*, 56 Mont. 43, 180 Pac. 971; *Jones v. Shannon*, 55 Mont. 225, 175 Pac. 882; *State v. Schnepel*, 23 Mont. 529, 59 Pac. 927; *Hayne*, New Trial and App. § 100.

In the long line of authorities cited by both parties, the ultimate result determined was whether or not the record of the case justified the action of the court in its rulings. *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700; *Fifty Associates Co. of Great Falls v. Quigley*, 56 Mont. 348, 185 Pac. 155; *De Burg v. Armenta*, 22 N. M. 443, 164 Pac.

838; *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 568, 39 L. Ed. 654; *Empire State Cattle Co. v. Atchison Ry. Co.*, 210 U. S. 2, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70.

Consequently, we are brought to the merits of the instant case to determine whether or not the granting of plaintiff's motion for a new trial was well taken.

[4] This action was brought against the defendant and Fleety Smith, formerly Fleety Buckhouse, and dismissed before trial as to the latter. Plaintiff proved a prima facie case in showing that the defendant appeared in the partition suit without his authority, collected the money, refused to pay it to plaintiff, and plaintiff did not authorize him to turn it over to any one else. The defendant's chief, and in our opinion only defense, was based on the provisions of section 6480, R. C. Mont.:

"If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also."

He proved that Donald Buckhouse deserted his wife, Fleety Buckhouse, and their four children of tender years, in the latter part of November, 1915, with the evident intention of abandoning them; that Fleety Buckhouse knew nothing of his whereabouts, although she had tried to locate him; that she requested the defendant to appear in the partition suit on her behalf, and likewise to defend for her then husband. Since the defendant's evidence so appears, we are compelled to the conclusion that the plaintiff was certainly guilty of negligence with respect to any property right he may have had at that time, and Fleety Buckhouse, who was still his wife, in spite of the fact that she had brought suit against him for divorce, had not only the right, but the duty, to defend for him and for herself in the partition suit, both being parties defendant. The only possible construction that can be placed on section 6480, R. C., is that the wife represents her husband when he neglects to defend, and that she is clothed with authority, as his agent, for the purpose of the defense.

"It is a familiar principle of the law of agency that every authority given to an agent, whether general or special, express or implied, impliedly includes in it, and confers on such agent all the powers which are necessary, or proper, or usual, to effectuate the purposes for which such authority was created. It embraces appropriate means to accomplish the desired end." *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384, quoting Justice Storrs.

Our statute would indeed be emasculated and nugatory if the wife had not the power to employ counsel and bind the negligent husband by the contract of employment.

There seem to be no cases directly in point, construing section 6480, but the trend of judicial viewpoint may be gathered from *Butts v. Newton*, 29 Wis. 639, and *Savage v. Davis*, 18 Wis. 608. Having this power conferred on her by the law, in what position is the defendant? We pass over the ethics of his appearance for Fleety Buckhouse in the divorce action, and at the same time his representing both her and plaintiff in the partition suit, because under our construction of the statute, she had a right to hire defendant, and, as far as the partition suit was concerned, the interests of both Donald and Fleety Buckhouse were not antagonistic.

[5] The defendant was the lawful employé of his clients, and in turning over to Fleety Buckhouse the amount decreed to be the share of Donald and Fleety Buckhouse in the estate of Henry Buckhouse, deceased, he acted lawfully. We have no concern as to the duty of Fleety Buckhouse with respect to this fund.

For the reasons herein set forth, we recommend that the order of the lower court in granting the motion for a new trial be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the order of the lower court granting the motion for a new trial be affirmed.

(60 Mont. 106)

HASSAN v. NORTHERN PACIFIC RY. CO. (No. 4342.)

(Supreme Court of Montana. May 23, 1921.)

1. Master and servant §265(6) — Burden upon injured employé to prove negligence.

In a section hand's action against the railroad company for personal injuries sustained through being struck by a tie falling from a car while lifting another tie on the ground, the burden was on plaintiff to prove negligence.

2. Master and servant §285(3) — Evidence as to section hand's injuries by falling tie held insufficient for jury.

In a section hand's action against a railroad company for personal injuries sustained through being struck by a tie falling from a car while he was lifting another tie on the ground, evidence held insufficient to make a case for the jury.

Cooper, J., dissenting.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Action by John Hassan against the Northern Pacific Railway Company. Nonsuit entered, and from the judgment and a denial of a new trial, plaintiff appeals. Affirmed.

J. O. Davies, of Butte, for appellant.
Gunn, Rasch & Hall, of Helena, and Walker & Walker, of Butte, for respondent.

HOLLOWAY, J. Plaintiff instituted this action to recover damages for personal injuries. The trial court granted a motion for nonsuit, and a judgment was entered dismissing the complaint. From that judgment and from an order denying a new trial, plaintiff appealed.

The complaint alleges that on November 9, 1915, plaintiff was employed by the defendant in its yards at Butte, loading and unloading material from cars; that defendant, through its foreman, John J. Kelly, had negligently permitted a car of railroad ties to be loosely and negligently loaded; that the foreman negligently ordered plaintiff to work close to the car, and while he was engaged in the work in obedience to the order, one of the ties, so loosely loaded through the negligence of defendant, fell from the car, striking plaintiff, and causing the injuries of which he complains.

The answer admits defendant's corporate existence, and that plaintiff was employed by it on November 9, 1915, and denies every other allegation of the complaint.

Upon the trial plaintiff testified in his own behalf that on November 9, 1915, he was employed by the defendant as a section man, and engaged in unloading coal at the depot; that the foreman, Kelly, ordered him to go about a block and a half and assist in unloading a car of ties that had come in; that when he reached the car of ties the foreman ordered him to remove a tie from under the car, and while he was engaged in that work a tie from the top of the car fell upon him, causing injuries which are described somewhat at length. He testified further that the ties were on a flat car which "did not have any sides permanently built up on the car above the bottom"; that the posts on the sides of the car had been removed and the wires cut; that the purpose of the posts "was to keep the ties together from falling down"; that at the time he was injured some men were "getting up on the car, and" some had gone up, and they were waiting for me to pull this tie "from under, and then begin unloading"; that Kelly told him to hurry, and then walked away, and was 6 or 7 feet away from the car when he gave the order.

On cross-examination plaintiff testified:

"Before we went up there they had some men to cut off the wires and cut the posts, and then we went over to unload the ties. The posts were cut and the wires cut when I first came up there. At that time there were a couple of men on the other corner of the car of ties, on top. There was just that one tie on the ground when I first got up there. It was on the ground; one end of it was under the car, in front of a wheel. * * * It was just about when I had lifted, partly, the tie from the ground, when I was in a position of pulling

the tie away that the other tie struck me. The tie slipped from the car and struck me with one end. * * * The car was standing still all the time from the time I first went up there until this tie fell off. The men on the car were on the other corner of the car. They were on the same side where I was, on the other corner, the other end of the car. * * * When Mr. Kelly brought me up there from the coal cars he simply told me to pick that tie up, and he then walked right on. * * * I don't know how far he had gotten away when I started to pull the tie."

George Raisis, a witness on behalf of plaintiff, testified:

That he was working with plaintiff at the time of the accident; that the foreman told plaintiff "to pull the ties off the car. When he pulled tie off car another tie came off from the top and hit John Hassan on the side. The tie which John Hassan was pulling was under the car; it was near the car; it was right by the rail. * * * The ties were piled about twelve or thirteen feet on the car. The car had stakes out. We had about 100 ties out of car when we took the stakes out. The assistant foreman took the stakes out. * * * At the time the tie fell on the plaintiff John Hassan, I was working in the end of the car about 15 feet from the place where the tie fell."

On cross-examination he testified:

"I was standing on the ground at the time the tie fell. There were two or three men on top of the car at the time the tie fell off. They were unloading ties. * * * These were square ties, railroad ties; they were about 7 or 8 feet long. * * * I heard only the assistant foreman tell John Hassan to pull the tie off the car. * * * It was two or three minutes before John Hassan started to pull the tie out from under the car that Kelly had gone away. There were two or three men on the car unloading ties right along."

The foregoing fairly summarizes the evidence introduced by plaintiff, and upon which the motion for nonsuit was based.

[1, 2] The burden was imposed upon the plaintiff to prove negligence, and in this he failed. It is therefore immaterial whether chapter 29, Laws of 1911, applies to one in the capacity in which plaintiff was engaged at the time he was injured. That the evidence is insufficient to make a case for the jury is so obvious that a discussion of it or of the rules of law applicable would be a work of supererogation. With this in mind, the case cannot be distinguished from *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40, and upon the authority of that case the judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and REYNOLDS and GALEN, JJ., concur.

COOPER, J. I dissent. Appellant relies upon the negligent order given by the foreman. The complaint charges the defend-

ant with the negligent loading of ties upon a car, and negligently directing the plaintiff to remove another tie from beneath it. The evidence shows that the plaintiff and other men were brought from another part of the yard to unload the ties from this car, a flat car. The posts and wires designed to hold them in place had already been removed by some one else. The plaintiff testified that—

"There were some men getting upon the car, and some had gone up, and they were waiting for me to pull the tie. Kelly came along with us; he gave me the order to pull the tie; told me to hurry along; that they had to unload the car; and he walked away from me. Kelly was about 6 or 7 feet away when he gave the order to pull this tie out."

About 100 ties had been thrown off at the time the order was given to plaintiff. Kelly was the foreman, directing the movements of the crew. The record does not show that any of the men were immediately above the plaintiff when the tie started to fall. Under these circumstances, it is proper to infer that the car was negligently loaded. In any event, it was the foreman's duty to observe immediate conditions, and not to negligently send plaintiff into a place of danger. If he had exercised due care, he might have noticed the precarious position of the tie before delivering the order. With plaintiff's eyes fixed upon the tie under the car, he could not be expected to apprehend conditions above him. He had a right to assume that Kelly would not expose him to danger from another agency out of his vision.

If we substitute the name of Kelly for that of Price, and ties for the lumber, the circumstances shown in *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, furnish a complete analogy to those presented here. This court, reviewing a ruling of the trial court in denying a nonsuit, used these words:

"The evidence further shows that the plaintiff was directed by Price to go to the very place where he was injured, and it is self-evident that, if properly piled, the lumber would not have fallen of its own account."

This is just as true of the tie in question. In my view, that case is favorable to plaintiff's contention.

The law, it seems to me, applicable to this

case is exemplified by *Mr. Labatt*, in volume 4, section 1470, page 4304, of his latest edition on *Master and Servant*, where it is said:

"According to the great majority of the cases, therefore, all that is necessary to fix liability upon the master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position."

In section 1364, page 3939, the same author further explains the rule announced, thus:

"The judicial theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor."

See, also, *Bailey's Personal Injuries*, vol. 2, § 414, pp. 1256, 1261; 8 *Thompson on Negligence*, § 3814.

McGowan v. Nelson, 36 Mont. 67, 92 Pac. 40, did not involve the negligent order of a vice principal. The following cases from other jurisdictions did: *Lee v. Woolsey*, 109 Pa. 124; *Johnson v. Minneapolis, etc., Co.*, 67 Minn. 141, 69 N. W. 713; *Foster v. Railway Co.*, 115 Mo. 165, 21 S. W. 916; *Illinois Steel Co. v. Schymanowski*, 59 Ill. App. 32; *Haley v. Case*, 142 Mass. 323, 7 N. E. 877; *Sambo v. Railroad*, 134 Mo. App. 460, 114 S. W. 567; *Dooley v. Town of Sullivan*, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209; *Harrison v. Denver R. Co.*, 7 Utah, 523, 27 Pac. 728.

The foreman's duty brought him in full view of the entire operations, and, had he used ordinary care to observe the conditions then presented, he might have delayed his order until the danger was past, or have given plaintiff timely warning of the falling tie. Prompt obedience to the orders of a superior, without time, opportunity, or mind to apprehend danger, not immediately and obviously threatening, should not defeat the action.

The foreman's demeanor at the time might have suggested to Hassan that more was to be feared from debate upon the propriety of his order than from contact with a falling tie, or any other danger then apparent to him. The case is not entirely free from doubt, but, in my opinion, the evidence presents a case for the jury upon its weight, not one of legal sufficiency for the court.

(60 Mont. 172)

WHITELAW v. VALLANCE et al.
(No. 4374.)

(Supreme Court of Montana. May 23, 1921.)

1. Damages §12—Breach of contract entitles other party to at least nominal damages without proof of actual damages.

A violation of a valid contract, unless excusable or justifiable, is an invasion of other party's legal rights for which he may recover nominal damages without proof of actual damages.

2. Damages §147—Loss of profits by breach is "special damages," not "general damages."

The loss of business and profits resulting from breach of contract are not general damages, which are such as the law holds to be the necessary result of the acts of defendant, but are special damages, which result from the action of defendant, but are not such a necessary result that they will be implied by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages; Special Damages.]

3. Sales §411—Complaint held not to authorize recovery of special damages.

A complaint, alleging that plaintiff purchased potatoes from defendants at a stated price, and offered to receive and pay for the potatoes, but that defendants failed to make delivery, does not entitle plaintiff to more than nominal damages, although the evidence shows that plaintiff was a commission merchant engaged in buying and selling potatoes; the complaint not being aided by Rev. Codes, §§ 6056, 6082, which prescribe rules for the measurement of damages, but not for the construction of pleadings.

4. Sales §411—Complaint held insufficient because failing to allege time when performance was due.

Complaint for breach of contract for the sale of potatoes, which alleged that plaintiff offered to receive the potatoes on a stated date, but did not allege that defendant had agreed to deliver potatoes on that date, or that a reasonable time for the delivery thereof had elapsed, is insufficient.

Commissioners' Opinion.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by Paul Whitelaw against John B. Vallance and another. From judgment for plaintiff on directed verdict and from the order denying defendants' motion for new trial, defendants appeal. Reversed and remanded.

B. C. Kurts and H. C. Packer, both of Hamilton, and Geo. T. Baggs, of Stevensville, for appellants.

O'Hara & Madeen, of Hamilton, for respondent.

POORMAN, C. C. Appeal by defendant from a judgment in favor of plaintiff entered

on a directed verdict, and from the defendants' motion for a new trial.

The plaintiff alleges that "on or about the 14th of October, 1916, the plaintiff and defendants mutually agreed that the defendants should deliver to the plaintiff two carloads of potatoes, about 800 sacks and 100,000 pounds, same to be free from frost, and that the plaintiff should pay therefor on delivery the sum of \$1.30 per hundredweight"; that on or about the 1st of November, 1916, plaintiff offered to receive and pay for the potatoes and fully perform the conditions of said contract on his part to be kept and performed, and that the defendants failed at all times and neglected and refused to deliver the potatoes, or any part thereof, and that the plaintiff has been damaged in the sum of \$700 by reason of such failure on the part of the defendants. Judgment is asked for \$700. Defendants filed separate demurrers on the ground that the complaint does not state facts sufficient to constitute a cause of action. These demurrers were overruled, and defendants filed separate answers, which amount in effect to general denials. At the trial, defendants objected to the introduction of any evidence for the reason that the complaint fails to state a cause of action, etc. At the close of plaintiff's case, and after plaintiff had rested, the defendants moved "for an order and judgment of nonsuit" for several reasons, which may be generalized in the one statement of insufficiency of evidence to sustain a verdict or judgment for plaintiff. These motions were overruled by the court, and the plaintiff then asked that the jury be instructed to return a verdict for the plaintiff for the sum of \$700. This motion was granted, and a verdict returned for the plaintiff and against both the defendants for the sum of \$700.

The issue taken with the complaint by the demurrers and by the objections to the introduction of evidence is to the effect that the damages, if any, are special, and that evidence of special damages could not properly be admitted under the complaint; that no time was named or otherwise fixed for the delivery of the potatoes, and that any damages awarded would be conjectural and speculative.

[1, 2] 1. It is settled law that a violation of a valid contract, unless excusable or justifiable under the circumstances, is an invasion of the injured party's legal rights for which he may recover nominal damages without proof of the actual damages. O'Brien v. Quinn, 35 Mont. 441, 90 Pac. 166; 13 Cyc. 14. The rule stated in the O'Brien Case is:

"Damages for loss of business and profits could only properly come under the designation 'special damages.' General damages are defined to be such as the law implies and presumes to have occurred from the wrong complained of (13 Cyc. 15), or such damages as the

law holds to be the necessary result of the action of the defendant (5 Ency. of Pl. & Pr. 717); while special damages are such as actually result from the action of the defendant, but are not such a necessary result that they will be implied by law. *Root v. Butte, Anaconda & Pac. Ry. Co.*, 20 Mont. 354, 51 Pac. 155, 13 Cyc. 13."

[3] This complaint is to the effect that on October 14, 1916, plaintiff purchased some potatoes of defendants at \$1.30 per hundred-weight, and on November 1, 1916, plaintiff offered to receive and pay for the potatoes, and that defendants failed at all times to make delivery. From this meager statement, we are unable to understand, as a matter of law, how any damage can be implied or presumed from the wrong complained of, beyond the nominal. The damages complained of might be treated as general damages under appropriate pleadings.

In his brief, respondent says, "We have already shown that plaintiff was a commission merchant engaged in buying and selling potatoes," but this fact appears for the first time in the evidence. The complaint is silent respecting any such matter. The complaint, as it appears, does not do more than to allege general damages, while evidence was erroneously admitted for the purpose of proving special damages. We may say that sections 6056, 6062, R. C., prescribe rules for the measurement of damages, and not for the construction of pleadings. Respondent cites *Carlson v. Stone-Ordean-Wellis Co.*, 40 Mont. 442, 107 Pac. 419; *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339; *Bussard & Robson v. Hibler*, 42 Or. 500, 71 Pac. 642; *Johnson v. Gilmore*, 6 S. D. 276, 60 N. W. 1070. We do not think these cases sustain respondent's contention. The complaints therein contained some statements which brought the damages claimed within the rule of general damages.

[4] The contract, as alleged in the complaint, is wholly silent as to the time of its performance, and no allegation appears naming any time, and no statement from which any particular time may be inferred, except the statement that the plaintiff offered to receive the potatoes on the 1st of November, 1916. The other party to the contract may have decided upon a different date for performance. If a reasonable time is to be the guide, it should be alleged. In *Borough, etc., v. Atl. Coast Elec. Co.*, 68 N. J. Law, 73, 52 Atl. (N. J.) 231, the court said:

"The plaintiff having demurred, we have examined the pleadings sufficiently to see that the narr. itself is bad, in that the time of the material traversable facts is not stated, viz., the time at which the defendant ought to have performed, and the time at which it failed to perform, and the time at which the plaintiff's right of action arose. These allegations are not only required by the rules of correct pleading, but,

in a case into which reasonable time enters, they are of the essence of the declaration, not that the plaintiff must prove the actual time sued or fail, but that it may appear what relation time bore to the alleged breach of duty, and that, at least by the plaintiff's own showing, the cause of action had accrued before the commencement of the suit. *Chit. Pl. p. 251; Gould, Pl. § 63.*"

The same rule is announced by the following authorities: 9 Cyc. 725; 13 C. J. 729; *Pope v. Terre Haute Car & Mfg. Co.*, 107 N. Y. 61, 13 N. E. 592; *Armstrong v. Reide*, 47 Misc. Rep. 609, 94 N. Y. Supp. 434.

Objection is also made to the admission of certain evidence. These questions may not arise on a retrial of this cause. We will say, however, that the facts as presented in this record are not sufficient to justify the admission in evidence of plaintiff's exhibits as against the defendant John B. Vallance, but that the said exhibits were properly admitted in evidence as against the defendant Fred Vallance. That the court erred in directing a verdict for the plaintiff is apparent from the foregoing discussion.

We believe that the judgment and order appealed from should be reversed, and the cause remanded for a new trial, and we so recommend.

PER OURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

(60 Mont. 118)

HAWLEY v. RICHARDSON. (No. 4336.)

(Supreme Court of Montana. May 23, 1921.)

1. Malicious prosecution — Complaint held to set forth necessary facts.

Complaint alleging that defendant appeared before a justice of the peace, and maliciously, and without probable cause, made, subscribed, and verified a complaint charging plaintiff with grand larceny in stealing an automobile, etc., held to have set forth all facts necessary to state a cause of action for malicious prosecution.

2. Appeal and error — 1052(4) — Evidence — 162(4) — Warrant best evidence of its own contents; error in admitting parol evidence harmless where loss of warrant subsequently proved.

In an action for malicious prosecution, in the absence of proof of the loss or destruction of the warrant on which plaintiff was arrested and brought into court, parol evidence of its contents or of the contents of the indorsements on it was inadmissible, but error in such admission was rendered harmless where, later in the trial, the necessary proof was made of the loss of the warrant.

3. Trial \S 59(2)—Court has discretion as to order of proof.

The trial court must be permitted to exercise a reasonable discretion as to the order of proof.

4. Evidence \S 178(5)—Proof of loss of warrant would have admitted parol evidence of contents, etc.

Under Rev. Codes, \S 7872, in an action for malicious prosecution, if proof of the loss of the warrant on which plaintiff was arrested and brought into court had been made, oral testimony as to the proceedings in court, etc., would have been admissible.

5. Evidence \S 158(7)—Parol evidence admissible to prove discharge where warrant lost.

In view of Rev. Codes, \S 9089, in an action for malicious prosecution, where the warrant on which plaintiff was arrested and brought into court was lost, parol evidence was admissible to prove the fact that plaintiff was discharged, plaintiff not being limited in such proof to the entries in the justice's docket.

6. Evidence \S 82—Malicious prosecution \S 8—Proof of filing of complaint unnecessary.

In an action for malicious prosecution, where defendant admitted he subscribed and swore to the complaint against plaintiff, it was not incumbent on plaintiff to prove the complaint was actually filed, the presumption referred to in Rev. Codes, \S 7962, subd. 15, arising that the justice's official duty to file the complaint was regularly performed.

7. Evidence \S 411—Oral testimony as to preliminary examination properly admitted.

In an action for malicious prosecution, plaintiff cannot be held responsible for the failure of the justice before whom he was arraigned to make his docket entries sufficiently complete to be intelligible, and, in such condition of the case, oral testimony that a preliminary examination was had was properly admitted.

8. Malicious prosecution \S 21(1) — Advice of nonprofessional persons no defense.

In an action for malicious prosecution, the fact that defendant acted on the advice of non-professional persons is inadmissible to show probable cause.

9. Malicious prosecution \S 20 — Instruction on probable cause held correct.

In an action for malicious prosecution, instruction that to constitute probable cause justifying institution of a criminal prosecution it is only necessary there should be evidence reasonably warranting belief in the guilt of accused, and that it need not be sufficient to insure conviction, properly stated the rule.

10. Malicious prosecution \S 24(3)—Discharge evidence of want of probable cause.

In an action for malicious prosecution, the trial court did not err in refusing to give defendant's requested instruction that plaintiff's discharge by the justice of the peace before whom he was arraigned was not any evidence whatsoever of malice on the part of defendant, or want of probable cause from which malice may be implied.

11. Trial \S 260(1)—Instructions need not be repeated.

Instructions requested by defendant appellant, being covered fully by another instruction given by the trial court, were properly refused.

12. Malicious prosecution \S 20 — Strict impartiality not required of party making complaint.

In an action for malicious prosecution, the instruction that probable cause is a reasonable ground, or a suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily prudent and cautious man acting impartially and honestly in believing a crime has probably been committed, was improper, as requiring the party making a criminal complaint to act with entire impartiality, and as not taking into account the circumstances surrounding him at the time.

13. Appeal and error \S 853—Instruction unobjectioned to became law of case.

Under Rev. Codes, \S 9271, an instruction given without objection became the law of the case, and the Supreme Court is precluded from reversing the cause for error in it.

14. Trial \S 186—Requested instruction in action for malicious prosecution held a comment on evidence.

In an action for malicious prosecution, instruction requested by defendant that, in determining whether there was probable cause for instituting the criminal proceedings, the court might make some allowance for the fact that defendant felt himself injured by the offense which he alleged plaintiff had committed, and under the circumstances could not be held as likely to draw his conclusions with the impartiality of a disinterested person, held improper as, in effect, comment on the evidence.

15. Trial \S 272—Defendant who did not object to instruction cannot complain of refusal to give conflicting instruction.

Where defendant, in an action for malicious prosecution, did not object to an instruction defining probable cause, he cannot complain that the court refused his offered and conflicting instruction on the same matter.

16. Malicious prosecution \S 72(2) — Instruction defining offense charged properly given.

In an action for malicious prosecution, instruction defining grand larceny in the language of the statute held proper, as furnishing a standard whereby the jury might determine the question of probable cause.

17. Malicious prosecution \S 71(1) — Evidence sufficient to take case to jury.

In an action for malicious prosecution of plaintiff on the charge of larceny of an automobile, evidence held sufficient to take the case to the jury.

18. Malicious prosecution \S 67 — Attorneys' fees not recoverable.

In an action for malicious prosecution of plaintiff, who left Montana and went into Minnesota, where, after some preliminary hearing before the Governor of Minnesota, plaintiff abandoned his opposition to extradition, and

came voluntarily back with a Montana sheriff, money paid by plaintiff to his Minnesota attorneys did not constitute a proper element of damages, being too remote.

Appeal from District Court, Richland County; C. C. Hurley, Judge.

Action by G. B. Hawley against H. N. Richardson. From judgment for plaintiff, and from order denying his motion for new trial, defendant appeals. Order denying new trial affirmed, and cause remanded, with instructions to deduct an amount from the judgment, and the judgment, as modified, affirmed.

John A. Bird, of Fairview, and Henry C. Smith, of Helena, for appellant.

F. P. Leiper, of Glendive, and Sydney Saner, of Butte, for respondent.

HOLLOWAY, J. This action was brought to recover damages for malicious prosecution. Plaintiff prevailed in the lower court, and defendant appealed from the judgment, and from an order denying his motion for a new trial.

It is alleged in the complaint that on the 28th day of May, 1915, defendant herein appeared before John H. Smith, a justice of the peace at Sidney, Mont., and maliciously and without probable cause made, subscribed, and verified a complaint charging this plaintiff with grand larceny in stealing a certain Buick automobile; that a warrant was duly issued upon the complaint; that plaintiff was arrested in Minneapolis, and returned to Sidney; that he was arraigned before the justice of the peace, and given a preliminary examination; that, upon such hearing, evidence was introduced; that defendant appeared as a witness, and testified against the plaintiff; and that, at the conclusion of the hearing, plaintiff was discharged, and the criminal proceeding finally terminated. Then follow appropriate allegations of plaintiff's damages, with a prayer for judgment. To this complaint defendant interposed a demurrer, which was overruled, and then answered, denying that he acted maliciously or without probable cause, and that plaintiff was damaged in any amount whatever. As an affirmative defense he alleged that on May 26, he signed and verified a complaint before John H. Smith, the justice of the peace, charging plaintiff with grand larceny; that he first made a full and complete presentation of the facts to an attorney at law; that he was advised that probable cause existed for believing plaintiff guilty, and that he acted in good faith upon the advice of counsel; that thereafter, on May 28, the first complaint was dismissed upon motion of the county attorney, and he then signed and verified the complaint involved in this action at the request and upon the direction of the county attorney after a full and fair state-

ment of the facts had been made. All of the affirmative allegations were denied by the reply.

[1] The complaint sets forth all the facts necessary to state a cause of action (*Stephens v. Conley*, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958), and is not open to the criticism that causes of action are improperly united.

[2-4] Complaint is made of the rulings of the trial court in admitting evidence of the proceedings had before the justice of the peace. It was not necessary for plaintiff to prove the institution of the criminal proceeding, or that defendant was the responsible agency for it. These two facts are admitted sufficiently by the answer. The docket entries made by the justice of the peace were introduced in evidence, but they are so meager and were kept after such fashion that they do not prove anything whatever. Without further preliminary proof, and over objection, plaintiff then offered oral testimony that a warrant was issued and served; that plaintiff was arrested and brought into court; that he was given a preliminary examination at which witnesses, including defendant herein, were examined, and that plaintiff was discharged. The warrant itself was the best evidence that it was issued and the sheriff's return the best evidence of the action taken under it. In the absence of proof of the loss or destruction of the warrant, parol evidence of its contents, or of the contents of the indorsement on it, was inadmissible and the court erred in its rulings, but later, during the trial, the necessary proof was made of the loss of the warrant, and this, in our judgment, robs the errors of their harmful effect. The question resolves itself largely into one of order of proof with respect to which the trial court must be permitted to exercise a reasonable discretion. *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45. We fail to see wherein defendant could have been prejudiced. If proof of the loss of the warrant had been introduced first, the competency of the oral testimony would be beyond question. Section 7872, Rev. Codes; 3 Jones on Evidence, § 620.

[5] Counsel for appellant insist that the fact that plaintiff was discharged could be proved only by the entries in the justice's docket, but in this they are in error. Section 9089 of the Revised Codes provides that the fact of discharge shall be evidenced by indorsement on the testimony or warrant. As the charge against plaintiff was not such as that the testimony was required to be reduced to writing, and filed as depositions, under the provisions of section 9087, the indorsement on the warrant would have furnished the best evidence of plaintiff's discharge, and, since the warrant was lost, parol evidence was admissible to prove the fact under the rule above.

[6] The complaint, signed and verified by defendant, charging plaintiff with grand larceny, was admitted in evidence. It bore a file mark, but there was no evidence that the indorsement was made by Smith, the justice of the peace. We think it was not incumbent upon plaintiff to prove that the complaint was actually filed. Defendant admitted that he subscribed and swore to the complaint. By these acts he set the machinery of the law in motion. It was the duty of the justice to file the complaint, but over his action plaintiff had no control. Upon proof that a warrant was issued and the subsequent proceedings had, the presumption arises that official duty was regularly performed and that the complaint was duly filed. Section 7962, subd. 15, Rev. Codes.

[7] If we assume that the justice of the peace is required to keep a docket in criminal cases, the plaintiff cannot be held responsible for his failure to make the entries sufficiently complete to be intelligible, and under the circumstances the oral testimony that a preliminary examination was had was properly admitted. 1 Greenleaf on Evidence, § 513; 8 Jones on Evidence, § 623.

[8] Upon the trial defendant sought to show that, in addition to his consultation with an attorney at law, he also consulted with and secured the advice of his wife and the cashier of his bank, and complaint is made of the rulings excluding this evidence. It is the general rule that the advice of non-professional persons is inadmissible to show probable cause. 26 Cyc. 33; 18 R. C. L. 50.

[9] Complaint is made of instruction No. 4 given to the jury, as follows:

"To constitute probable cause which would justify the institution of a criminal prosecution, it is only necessary that there should be evidence which reasonably warrants a belief in the guilt of the accused; it need not be sufficient to insure a conviction."

In *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33, this court approved the following definition of "probable cause":

"Probable cause is only such a state of facts and circumstances as would lead a careful and conscientious man to believe that the plaintiff was guilty."

And in the further consideration of that definition, we said:

"In the particular case, then, the inquiry must be, not whether the plaintiff was actually guilty, but whether the facts and circumstances were such as to warrant the defendant, as a prudent and conscientious man to believe him guilty. * * * All that is required is that a prudent and conscientious inquiry be made, and if it then appears that testimony is at hand or obtainable justifying a well-founded belief that a violation of the law can be established and a conviction secured, there is probable cause to proceed with the prosecution."

Instruction No. 4 fairly states the rule as announced in the case above.

[10] Exception is taken to the refusal of the trial court to give defendant's requested instruction No. 3, as follows:

"The discharge of Hawley by the justice of the peace is not any evidence whatsoever of malice on the part of Richardson or want of probable cause, from which malice may be implied."

The court did not err. The same question was presented and ruled adversely to appellant in *Grorud v. Lossi*, 48 Mont. 274, 136 Pac. 1069.

[11] Instructions 1, 2 and 6, requested by defendant, are covered fully by instruction 3 given by the court.

[12-15] The court refused to give defendant's requested instructions 8 and 9, as follows:

"8. You are instructed that in determining whether there was probable cause for instituting the criminal proceedings by Richardson, you may make some allowance for the fact, if you believe it to be a fact, that Richardson felt himself injured by the offense which he alleged Hawley had committed, and under such circumstances he cannot be held as likely to draw his conclusions with the same impartiality that a person entirely disinterested would deliberately do."

"9. All that was required of Richardson was that he should act as a reasonable and prudent man would be likely to act under like circumstances."

However, the court gave the following definition of probable cause, in instruction No. 3:

"Probable cause, as used herein, is a reasonable ground or a suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily prudent and cautious man, acting impartially and honestly, in believing that a crime had probably been committed."

We do not approve this definition. It requires the party making a criminal complaint to act with entire impartiality, and does not take into account the circumstances surrounding him at the time he makes the complaint; but the instruction was given without objection. It became the law of the case, and we are precluded from interfering. Section 9271 of the Revised Codes provides, among other things:

"No cause shall be reversed by the Supreme Court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions herein specified, and such error and exception incorporated in and settled in the bill of exceptions as herein provided."

See *State v. Cook*, 42 Mont. 329, 112 Pac. 537; *State v. Thomas*, 46 Mont. 463, 123 Pac. 583.

Neither do we approve instruction 8 above, when considered standing alone. It amounts in effect to a comment upon the evidence. Our attention is directed to the case of *Spear v. Hiles*, 67 Wis. 361, 30 N. W. 511, wherein an instruction embodying the general provisions of defendant's requested instructions 8 and 9 above was approved, but the court laid emphasis only upon the last sentence, which is defendant's offered instruction 9, and did not comment upon the other portion. If we assume that instruction 9 should have been given, if instruction 3 had correctly defined probable cause, still the court could not give that definition and also give instruction 9. The two are essentially conflicting, and since defendant did not object to instruction 3, he cannot complain that the court refused his offered instruction 9.

Instruction 12 tendered by the defendant, but refused by the court, correctly states an abstract proposition of law, but it has no particular application to the facts of this case; on the contrary, the statement, "The policy of the law is to favor prosecutions for crime," might naturally lead the jury to infer that, in the opinion of the court, plaintiff was actually guilty of the larceny with which he had been charged by the defendant.

[16, 17] Complaint is made of instruction 4A given to the jury, in which the court defined grand larceny in the language of the statute. One of the principal questions for the jury's determination was: Were the facts and circumstances such as to warrant the defendant, as a reasonably prudent person, in believing that plaintiff was guilty of grand larceny? The definition would furnish a standard by which the jury might determine that question, and for this purpose we think it was given properly.

The plaintiff's story of the automobile transaction is substantially as follows: He had been engaged in purchasing and selling cattle, and had associated with one Balcolm. Balcolm had issued checks against plaintiff's bank account in Fairview, and plaintiff, fearful that the holders of these checks would sue him and attach his property—the automobile in question, and a cow—on October 7, 1914, gave to defendant a bill of sale of the automobile and cow, for the sole purpose of covering up the property and, as he presumed, putting it beyond the reach of attachment process. He testified that he did not owe defendant anything; that he did not receive any consideration for the alleged transfer and that defendant had no interest in or lien upon the property; that the cow was afterward sold and the purchase price paid to plaintiff; that when he came to Fairview, on April 25, 1915, he told defendant that he was then going to take the automobile to Minneapolis, and did so. Defendant

claimed, in effect, that the bill of sale was given him as security for the payment of \$148.25, which he alleges plaintiff owed him, and had not paid. If plaintiff's story is true, defendant did not have probable cause, or any cause whatever, for instituting the criminal action, and the verdict can be accounted for only upon the theory that the jury accepted plaintiff's version as the true one, and did not believe defendant's testimony. The language of this court in *Gronrud v. Loss*, above, is pertinent here:

"Of course, if the jury had accepted the story told by the defendant, the inevitable conclusion would have been that the plaintiff was guilty of the charge of larceny made against him, or, in any event, that the prosecution had not been instituted without probable cause. On the other hand, having accepted the story told by the plaintiff, with the legitimate inferences to be drawn from it, the jury were justified in concluding that the charge made was wholly without probable cause; and, having so concluded, they were at liberty to infer that in preferring the charge the defendant was prompted by malicious motives." "All the authorities agree that, while the plaintiff must prove both the want of probable cause and malice in order to make a prima facie case, they also agree that, when the absence of the former has been established, the presence of the latter may be inferred."

The evidence is sufficient to take the case to the jury, and to justify the court in denying a new trial.

[18] Over objection of defendant, plaintiff was permitted to show that he paid \$75 to his attorneys in Minneapolis to appear before the Governor of Minnesota and resist extradition, and the court instructed the jury that, if they found in favor of plaintiff, they might take this item into consideration as an element of damage. The evidence discloses, however, that, after some preliminary hearing before the Governor, plaintiff abandoned his opposition, and came voluntarily with the Montana sheriff. Under these circumstances we think the money paid to the Minneapolis attorneys did not constitute a proper element of damages. It was altogether too remote.

Other assignments of error are made, but, in our judgment, they do not warrant special consideration.

The order denying a new trial is affirmed. The cause is remanded to the district court, with instructions to deduct \$75 from the amount of the judgment as of the date of the entry of judgment, and as thus modified, it will stand affirmed. Each party shall pay his own costs of these appeals.

Modified and affirmed.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur,

(69 Mont. 111)

STETTMEIER et al. v. CITY OF BUTTE.
(No. 4324.)

(Supreme Court of Montana. May 23, 1921.)

1. Appeal and error ¶1003—Verdict must stand unless against preponderance of evidence.

In an action against a city involving the latter's right to occupy portions of the lode mining claim for streets, assuming without deciding that plaintiffs' title to the ground occupied was complete, nevertheless, if the defendant adduced proof sufficient to take the case to the jury upon the question of its adverse occupancy and use for the period prescribed by Rev. Codes, §§ 6432, 6435, the findings of the jury are not to be disturbed unless the evidence preponderates against them.

2. New trial ¶72—Where evidence did not preponderate against jury's finding, denial of new trial held not abuse of discretion.

In an action by claimants of the lode mining claim to recover from the city possession of a part thereof used for streets, where the jury found in favor of the city, unless the evidence preponderates against the jury's finding, it was no abuse of discretion to refuse plaintiffs a new trial.

3. Municipal corporations ¶648—City's open and notorious occupation of land for streets for 10 years gives it title by adverse possession.

Under Rev. Codes §§ 6432, 6435, construed in conjunction with section 3259, a prescriptive right can be built on public use of land for streets and thoroughfares, when jurisdiction has been acquired by a city and maintained for 10 years, and such proprietorship for such time fully satisfies sections 1337 and 1340, providing a general rule for establishing or vacating highways, and the jury's verdict of such adverse possession by a city must stand where the evidence is insufficient to overcome the presumption of such open and notorious adverse occupation.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Action by Joseph C. Stettmeier and others against the City of Butte. Verdict and judgment for the defendant, and from an order denying motion for new trial, the plaintiffs appeal. Affirmed.

Frank Woody, of Billings, B. K. Wheeler, of Butte, and A. A. Grorud, of Helena, for appellants.

R. L. Clinton, of Butte, for respondent.

COOPER, J. This action involves the right of the defendant to use and occupy portions of the Frankie lode. The premises in dispute are traversed by the southern extension of Main street, and by Kaw avenue from its junction with Main street to its outlet into Front street.

The plaintiffs allege that they are the

owners of the Frankie lode claim, and that defendant, without right, by force of arms, and against their will, entered into the possession of portions thereof, began, and are still hauling and depositing dirt thereon, and withholding possession thereof from plaintiffs under a pretended claim of right thereto. The prayer is that the defendant be restrained from further interference with their possession; that their title be quieted and the cloud thus cast thereon removed. Defendant's answer is that for more than 30 years immediately prior to April 30, 1913, as against the plaintiffs and all others, it has been in the sole, notorious, exclusive, and adverse use and possession thereof as public streets and thoroughfares of the city known as Kaw avenue and Main street; and for a period of more than 10 years next preceding April 30, 1913, the people of the city of Butte and the public generally have used and enjoyed the portions in dispute as such. These averments are put in issue by plaintiffs' reply thereto. The case was tried by the court with the aid of a jury. Upon the evidence adduced, and under the court's instructions, the jury returned a general verdict in favor of the defendant, and judgment was entered thereon. Plaintiffs' motion for a new trial was denied, and this appeal is from that order.

[1, 2] In the brief and argument, appellants confine the issues for our consideration to the naked legal question of the sufficiency of the evidence to establish adverse user by the city for the period of 10 years next preceding the 30th day of April, 1913. Despite the nature of the action, the case was submitted to the jury upon the evidence and the instructions of the court upon the law, upon which a general verdict for defendant was returned. Assuming, without deciding, that plaintiffs' title to the ground occupied was complete, nevertheless, if the defendant adduced proof sufficient to take the case to the jury upon the question of its adverse occupancy and use for the period prescribed by the statute (Revised Codes, §§ 6432, 6435), the findings of the jury are not to be disturbed on appeal—unless the evidence preponderates against them—for the reason that—

"Since the enactment of section 6253 of the Revised Codes, on appeals in equity cases, this court has observed the rule: The findings of the trial court will not be set aside unless there is a decided preponderance in the evidence against them; and, when the evidence as it appears in the record, fully considered, furnishes reasonable grounds for different conclusions, the findings will not be disturbed." *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.

Primarily, the question at issue was one for solution by the jury and the trial court.

"As we have so often said, the conclusion of the jury in such a case must be accepted as final and conclusive, subject to the rule, however, that it is within the sound legal discretion of the trial judge to grant a new trial on motion of the losing party, if, aided by his recollection of the appearance and conduct of the witnesses in giving their testimony at the trial, he is impelled to the conclusion that the evidence as a whole preponderates against the verdict. *Orr v. Haskell*, 2 Mont. 225; *Western Min. Supply Co. v. Melzner*, 48 Mont. 174, 136 Pac. 44; *Gibson v. Morris State Bank* [supra.] Otherwise the motion should be denied. In no case will the conclusion of the trial judge in disposing of the motion be revised by this court, except for manifest abuse of discretion." *Jones v. Shannon*, 55 Mont. 225, 175 Pac. 882.

The action is of equitable cognizance. *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064; *Id.*, 55 Mont. 384, 177 Pac. 402. Unless, therefore, the evidence does preponderate against the findings of the jury, it was no abuse of discretion to refuse plaintiffs a new trial. *Robitaille v. Boulet*, 53 Mont. 66, 161 Pac. 163; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565. The reason why this is so is made apparent from the language of Chief Justice Brantly, expressing the opinion of this court on rehearing, in the case last cited, viz.:

"Though the evidence is presented in question and answer, it is in cold type, without the gestures, behavior or appearance of the witnesses, and often, as in this case, the illustrations made by them through the medium of maps, diagrams and other instrumentalities used to make their statements intelligible. It would be manifestly out of place for this court to undertake to try a case and determine it as does the district court."

[3] Upon the trial below, seven witnesses testified that Kaw avenue and the portion of Main street in dispute had been continuously traveled as streets and highways for a period ranging from 17 to 20 years prior to the trial. Other persons were present to testify to the same thing. They were not put upon the stand because of a rule of the court which limited the witnesses upon the one point to that number. At least three of the seven witnesses produced by the defendant had been employed at its expense in directing or doing the work of grading, leveling, surfacing, and filling in the strips of ground within the confines of Kaw avenue and the portion of Main street in dispute at various times during that period. In this condition

of the evidence, the presumption that the property in dispute had been occupied and used by the city openly and notoriously adverse to plaintiffs' legal title for more than 10 years before the commencement of the action has not been overcome. The finding of the jury to that effect places it beyond revision by this court. Under sections 6432 and 6435 a prescriptive right can be built upon public use of land for streets and thoroughfares, when jurisdiction has been acquired by the city authorities and maintained for a period of 10 years, as the proof here shows it was. These sections of the Codes, in conjunction with section 3259, were so construed in *Barnard Realty Co. v. City of Butte*, 48 Mont. 111, 112, 136 Pac. 1063, as this language exemplifies:

"That the streets of these municipalities are subject to the control of the municipal authorities is true. Section 3259, Rev. Codes. That the provision in question does not in terms refer to them is also true. But, taking sections 1337 and 1340 together, a legislative intention is clearly evinced to provide a general rule by which highways of every character may be established or vacated. The latter section has reference to those highways enumerated in the former, to streets, etc., as well as to county roads; and though the only public authority mentioned is the board of county commissioners, it cannot be conceived that the Legislature by this reference alone intended that this board should thereafter have control of the streets of cities and towns, or that these should be established by methods other than those prescribed for the establishment of county roads."

Upon that point—the only one seriously controverted by plaintiffs—the jury found, not only that the public had enjoyed continuous and uninterrupted use of the premises in dispute, but that by building up and maintaining them as streets of the city the defendant had assumed and maintained proprietorship and jurisdiction over them for the full period named in the statute. This fully satisfied the requirements of sections 1337 and 1340 of the Revised Codes.

An examination of the authorities upon which appellants rely for a reversal of the ruling of the trial court discloses the fact that they are all based upon statutes different in language and in terms from our own, and are not authority upon this appeal.

The order appealed from is affirmed.

BRANTLY, C. J., and REYNOLDS, HOLLOWAY, and GALEN, JJ., concur.

(22 Ariz. 431)

PACIFIC GAS & ELECTRIC CO. v. ALMANZO et al. (No. 1857.)

(Supreme Court of Arizona. June 7, 1921.)

1. Fraud ¶64(1) — Whether statement is opinion is for jury.

As a general proposition, the expression of an opinion which is understood to be only an opinion does not render one liable for fraud; but, where it is impossible to determine as a matter of law whether a statement is a representation of a fact which the defendant intended should be understood as true of his own knowledge or an expression of opinion, the question is one for the jury.

2. Appeal and error ¶1002—Findings on conflicting evidence conclusive.

Findings of a jury based on conflicting evidence are conclusive upon the Supreme Court on appeal.

3. Appeal and error ¶1010(1)—Scope of review of findings that statements constituted fraudulent representations of fact.

The Supreme Court on appeal from a judgment involving finding that certain statements were fraudulent representations of fact, and not mere opinions, can only determine as to whether the statements were such that one might reasonably infer from them, taking into consideration all the circumstances surrounding their utterance, that it was intended by the one who used them that they should carry to the persons to whom they were spoken the weight of spoken facts, and not be regarded merely as the expression of opinion.

4. Release ¶17(2)—Statement of no cause of action may constitute fraud vitiating release.

If employer of plaintiff's son represented to plaintiff, in order to prevail on him to execute a release of damages arising from the son's death, that plaintiff had no cause of action against defendant, and that the accident was the boy's fault, without believing such representations to be true, and plaintiff believed such representations and so believing executed the release, such representations constituted fraud and vitiated the release, if the representations were false.

5. Release ¶17(2)—Statement that father of wrongfully killed son would have to pay funeral admissible on question of fraud in obtaining release.

In an action to recover damages for the death of a son, it was proper for the jury to consider a statement of defendant's representatives, "If you do not sign that paper you will have to pay the funeral," referring to a release, on the question of fraud in obtaining the release, which provided for payment of funeral expenses by defendant.

6. Release ¶57(2)—Evidence held to show fraud in obtaining release from parents of deceased servant held for jury.

In an action under the Employers' Liability Law to recover damages for death of a son, evidence held sufficient to sustain the finding of

the jury that a release was obtained from plaintiff by fraud.

7. Death ¶87—Loss to parents.

In an action under the Employers' Liability Law to recover damages for the death of a son, parents are entitled to have the jury consider in fixing damages what the parents would probably receive from the son after reaching his majority, as well as previous to that time, and this is to be determined by consideration of the boy's treatment of his parents, his health, his habits, his industry, and his ability and inclination to help his parents.

8. Trial ¶337—Erroneous instruction law of case to be followed by jury.

An instruction, although erroneous, is the law of the case until reversed, and should be followed by the jury, even though in doing so a verdict which accords with its ideas of right cannot be returned.

9. Trial ¶337—Reversible error where jury does not follow instruction though erroneous.

Where jury in assessing damages does not follow the court's instruction as to the measure of damages, and awards damages which would be excessive under the instruction as given, a judgment based thereon must be reversed, since the jury cannot constitute itself a judge of the law as well as the facts.

10. Death ¶99(3)—\$3,000 held not excessive for death of 19 year old son.

A verdict of \$3,000, in addition to \$800 expended by defendant under a release fraudulently obtained, was not excessive for the death of a son 19 years of age, strong and well and industrious, who regularly gave his mother his earnings, amounting to \$3 per day, for the support of the family under the Employers' Liability Law.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Action by Angel Almanzo and another against the Pacific Gas & Electric Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded with directions.

R. E. Sloan, C. R. Holton, E. G. Scott, and Bullard & Jacobs, all of Phoenix, for appellant.

T. J. Croaff and S. B. Pugh, both of Phoenix, for appellees.

McALISTER, J. This action was brought under the Employers' Liability Law (Rev. St. 1913, pars. 3153-3162) by Angel Almanzo and Dolores Almanzo, appellees, against the Pacific Gas & Electric Company, a corporation, appellant, to recover damages for the death of their minor son, Jesus Almanzo, and from a judgment for them in the sum of \$3,000 and an order overruling its motion for a new trial, appellant appeals.

It appears from the complaint that appellant was engaged in erecting a building the framework of which was iron and steel, and

that in the prosecution of this work a derrick run by electric power was used for hoisting materials; that Jesus Almanzo, a boy about 19 years of age, was employed as a laborer in connection with this work, and while in the performance of his duties as such laborer, on August 28, 1919, was seriously injured by the derrick's breaking and falling upon him, and that within a few hours thereafter he died from the injury; that the accident arose out of the employment and was due to a condition or conditions of such occupation or employment, and not to the negligence of said Jesus Almanzo; that said Jesus Almanzo was able-bodied, unmarried, without any estate, but was receiving \$3 per day at the time of his death, and was the sole support of his parents, who had four other children, ranging from 8 to 17 years of age.

A general demurrer which was overruled, a plea in bar, and a general denial constitute the answer. In bar of the action appellant alleged that on August 29, 1919, the appellees, Angel Almanzo and Dolores Almanzo, for a consideration of \$800 made, executed and delivered to the appellant a release from any and all actions, causes of action, claims, or demands by reason of any damages or loss which they had sustained, or might thereafter sustain, in consequence of the death of their son. The release is in the words and figures following, to wit:

"In consideration of the payment of five hundred (\$500) dollars, to us in hand paid by the Pacific Gas & Electric Company, the receipt whereof is hereby confessed and acknowledged, and in consideration of the further payment of the funeral expenses, not exceeding two hundred and fifty (\$250) dollars, and the bill of the St. Joseph's Hospital, not exceeding twenty-five (\$25) dollars, and the bill of Dr. Brockway, not exceeding twenty-five (\$25) dollars, we, Angel Almanzo and Dolores Almanzo, father and mother, respectively, of Jesus Almanzo, deceased, a minor of the age of eighteen years, jointly and severally, do hereby release and forever discharge the said Pacific Gas & Electric Company from any and all actions, causes of actions, claims, and demands for, upon, or by reason of any damage, loss, or injury which heretofore have been or which hereafter may be sustained by us or either of us in consequence of that certain accident occurring on or about August 28, 1919, at the plant of the said Pacific Gas & Electric Company in the city of Phoenix, county of Maricopa, and state of Arizona, wherein the said Jesus Almanzo sustained diverse injuries, both internal and external, resulting in his death.

"It being further agreed and understood that the payment of the said five hundred (\$500.00) dollars and the further payment of the said funeral, hospital, and doctor expenses is not to be construed as an admission on the part of the said Pacific Gas & Electric Company of any liability whatever in consequence of said accident.

"In witness whereof we have hereunto set

our hands and seals, respectively, this 29th day of August, 1919.

"Angel Almanzo.

her
"Dolores X Almanzo.
mark

"Witness to mark:

"Lasser H. Gornetzky.

"W. C. Hornberger."

In their reply appellees admit signing the release, but allege that it was procured by duress, undue influence, fraud, and misrepresentation, and in support of such allegations set up:

That the release was presented to appellees at a time when the body of their son was unburied and while both of them were suffering great mental anguish and were weak from weeping, and that they were at said time incapable of resistance against the importunities made by defendants to compel them to sign the same; that at said time Lasser H. Gornetzky and W. C. Hornberger presented to them an instrument for their signatures and offered to pay them \$500 and all the funeral expenses and doctor bills on account of the injury and death of their son; that these plaintiffs were then asked numerous questions by the said representatives of the defendant regarding their affairs, and refused at first to consider the release and requested said parties to leave them alone and come back some other time which they refused to do; that "the defendant through its said representatives stated to these plaintiffs at said time that, if they did not take this money and sign the said release which they had presented to them that night, they would not have an opportunity to do so again, and represented to the plaintiffs that the death of the deceased was caused by his own fault, and that, unless they accepted the money and signed the paper at this time, they could recover nothing on account of his said death; that these plaintiffs did not know at said time that the said statement that the injury and death of the deceased was caused by his own negligence was untrue, and did not know how same was caused, but relied upon the representations of the defendant aforesaid, which representations were untrue and fraudulent, and the plaintiffs only signed their names and accepted the said sums on account of relying upon the same; that, in fact, the deceased met his death while in due care for his own safety, and these plaintiffs have since learned that the defendant is liable to them under the Liability Act for damages in a large amount, as set out in their complaint; that at the time of signing said release these plaintiffs believed in and relied upon all the representations made by the defendant, and on account of the mental agony and suffering and weakness of will which they were undergoing at said time and in the death chamber, as aforesaid, and the persistence of said agents of the defendant, were not competent to fully consider the said matter and were unduly influenced and could not resist the said importunities to sign the said paper; that the said amount so received by them and for their benefit is inadequate and unconscionable and does not adequately compensate them for the damage received by them in the premises."

[1] The employment, its hazardous character, and the fact that the injury resulting in death was due to a condition of the employment, and not to the negligence of the deceased, are in no way contested. The defense, other than a claim that the award is excessive, is a settlement as evidenced by the release. The court eliminated the question of undue influence in procuring the release by instructing the jury that there was not sufficient evidence to sustain such charge, but submitted its procurement through fraud and misrepresentation. Appellant urges that the reply does not allege, nor does the evidence disclose, any facts establishing fraud or misrepresentation, for the reason that the allegation as well as the proof in substantiation of it is merely an opinion of the officers of the defendant company and is not therefore actionable. It is true as a general proposition that the expression of an opinion, which is understood to be only an opinion does not render one liable for fraud. *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Hedin v. Minneapolis Surgical Institute*, 35 L. R. A. 417, note. There are many exceptions to this general rule, however, for "it is often impossible to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion, and when such is the case the question is one for the jury." 12 R. C. L. 446, par. 190; *Stubbs v. Johnson*, 127 Mass. 219. "Each case must in a large measure be adjudged upon its own circumstances." *Hedin v. Minneapolis Surgical Institute*, above; *Reeves v. Corning (C. C.)* 51 Fed. 774. This necessitates a brief review of the facts concerning the procuring of the release.

The accident occurred about 8 o'clock in the afternoon, and the boy was immediately removed to the hospital, where he died about two or three hours afterward. The father heard of the accident, went immediately to the plant, and then to the hospital where the boy had been taken. From there he went home, returning very soon afterwards to the hospital, where he remained until the boy died, about 6:30 o'clock, after which he returned to the plant to inform Mr. Hornberger, superintendent of defendant company, of the death, but did not find him. Some one at the plant, however, telephoned the superintendent of the accident and death, and that the father was there looking for him. He then went home, and in an hour or so Mr. Hornberger arrived there and took him to the company's office, where they found Mr. Aller, the general manager. Soon Lasser H. Gornetzky, who had charge of the claim department of the Carl H. Anderson Insurance Agency, through which the defendant company had been insured covering injuries to its employees, arrived. At this meeting the death of the son, the funeral arrangements, and a settlement were dis-

cussed. Five hundred dollars and the funeral expenses not to exceed \$250 or \$300 were offered, and, according to appellant's testimony, was more or less tentatively agreed upon, though Angel Almanzo testifies:

"That night they wanted to fix—Mr. Aller told me they were all handling the job, and I was a pretty good old man, and they wanted to treat me good. I says, 'All right; thank you.' He said, 'I want these men to give you \$500, and I am going to give you all the funeral, make you pretty nice funeral.' That is all I cared for then; I didn't ask for any money but they offered me \$500. I left my wife home and my boy lying dead at the hospital at that time."

No papers of any kind were signed that night. From the office, Mr. Hornberger took Almanzo to the undertaker's to arrange for the funeral, and about 8 o'clock the following morning from his house to the priest to make further funeral arrangements, and from there to the insurance office at the Adams Hotel, where the release was drawn up, after which Angel Almanzo, Mr. Hornberger, Mr. Gornetzky, and a Miss Kingsbury went to appellees' home, where the release was signed. Almanzo testifies concerning this occurrence as follows:

"When she made that mark my wife was like this, lying down on the rocking chair like that; she was picked up from the floor shortly before we came. She was in this condition, and I set a small table close by her. I grabbed her hand when they told me that we had to sign, if we didn't we would have to pay all the expenses and wouldn't get anything, because it was my boy's fault. I believed it then, but after a while I found it wasn't true. That is the reason I come to you people to get my case. I can swear that my wife never signed her name; she don't know—they told me that she had to sign; if we didn't, I wouldn't get anything. That man told me that, that man over there. * * * At that time I did not know the circumstances as to how he was killed."

The witness Manuela Roblez, a young woman in the Almanzo home at the time the release was signed, testified as follows:

"The next day after the accident I saw two men and one lady. I do not know whether these were the same two men or not; I know two men came up to their rooms and a lady came with them. The two men told Mr. Almanzo to sign the paper. They said to him the first time, 'You got the money to pay the funeral?' Mr. Almanzo said, 'No.' And the men told him, 'You don't sign that paper you don't get nothing, and you will have to pay the funeral.' He said it was the boy's fault. Q. Who said that? A. The mens. I don't know which one; one of those men over there."

After the release was executed and delivered, a check for \$500 was delivered to appellees, and Mr. Gornetzky took Angel Almanzo to the bank and aided him in getting it cashed.

The witnesses for appellant denied that appellees were told, just before the release was executed or at any other time, that if they did not sign it, they would have to pay all of the funeral expenses and would not get anything because it (his death) was the boy's own fault.

[2-4] It is not within the province of this court to say whether these statements were or were not made; that was purely a question of fact for the jury under the evidence submitted. It can only be determined by us whether they are such that one might reasonably infer from them, taking into consideration all the circumstances surrounding their utterance, that it was intended by the one who used them that they should carry to the persons to whom they were spoken the weight of facts, and not be regarded merely as the expression of an opinion. According to Angel Almanzo's testimony, he was at the time greatly disturbed over the death of his son and in no condition to discuss a matter of this kind. His boy's body was yet unburied. He knew nothing of the circumstances of the accident, nor whether he had a cause of action, for, so far as the record discloses, he had talked with no one on the subject, and when told by the managing agents of the defendant company that it was the boy's fault, that he could not get anything, it seems clear that he might have thought this a fact, coming as it did from one who, he supposed, knew better than himself how the accident occurred.

"If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

"Sometimes a statement of an opinion is necessarily based upon a fact or carries with it such an inference of fact that it can be interpreted as a statement of fact, and where it is known to be false and made with intent to deceive, it may be actionable."

Olston v. Oregon Water Power & Ry. Co., 52 Or. 843, 98 Pac. 1095, 20 L. R. A. (N. S.) 915.

The fact that the matter was discussed with him even before the funeral arrangements had been made might have appealed to the jury as pressing the matter with undue haste and as being prompted by a desire to get the release before appellees had had an opportunity to consult counsel as to their rights, and, if this be true, the jury could have concluded that the statements that the accident was the boy's own fault and that appellees would get nothing out of it did not represent the real belief of those making them, but resulted largely from fear of the result of an action and was intended to mislead. That they were not true is conclusively shown by the jury's ver-

dict and by the implied admission of liability by the defendant's failure to offer any defense on the merits as well as by its payment of some consideration for the release. We think the Supreme Court of Oregon, in the case of *Woods v. Wikstrom*, 67 Or. 581, 135 Pac. 192, correctly states the law in a situation of this kind in the following language, to wit:

"If the defendant represented to the plaintiff, in order to prevail on him to execute the release, that the accident was unavoidable, and that he had no cause of action against him, without believing said representations to be true, and the plaintiff believed said representations, and, so believing, executed the release, such representations constituted fraud and vitiated said release, if the representations were false."

[5] It was proper for the jury to consider the other part of the statement testified to by Angel Almanzo and Manuela Roblez, "If you do not sign that paper you will have to pay the funeral," on the matter of fraud, after the question of undue influence had been eliminated from the case by the court's instruction. It is true that appellees would have been compelled to meet the expenses of the funeral before they could have collected damages; yet in the sense that they would be out these expenses ultimately the statement was not true if appellees had a good cause of action, for in that event they would be recovered as a proper element of damage.

[6] We are clearly of the opinion that the evidence on the question of fraud is such that the court would not have been justified in refusing to submit the case to the jury as requested by appellant. We realize the correctness of the following statement by the Supreme Court of Washington in the case of *Cortez v. Spokane International Ry. Co.* (Wash.) 191 Pac. 820, to wit:

"Releases of this kind are like any other writing, and are not to be lightly overcome. If they are not induced by fraud, false representations or overreaching, they must be sustained. The testimony, to sustain the charge of fraud, must be clear and convincing."

Under the facts, however, we cannot say as a matter of law, contrary to the findings of the jury, that there was no fraud in procuring the signatures of appellees to the release.

It is urged that the judgment is excessive by practically the entire amount of \$3,000, and in support of this contention appellant cites the fact that at the time of his death Jesus Almanzo was just 19 years of age and earning \$3 per day; that if he had lived he could not have worked over 600 days between the date of his death and the attainment of his majority, when his parents would no longer be entitled, as a matter of

law, to his earnings; that at best he could have earned during this time a total of only \$1,800, and from this should be deducted the \$800 paid for the release, which would leave \$1,000 to cover his own maintenance for a period of two years and the loss to appellees. This contention is based on the court's instructions that the loss of services for which appellees could recover is limited to the probable earnings of the son during his minority less the cost of his own maintenance, and on the further specific instruction that "the chances of survival and of his ability and willingness, if he should become of age, to support the plaintiffs, are matters too vague, uncertain, and remote to enter into an estimate of such loss."

[7] As applied to the facts of the case, this instruction does not prescribe the proper measure of damage. It is true that a child's earnings are his own after he becomes 21 years of age, and in a sense any service he may then render his parents is voluntary; yet that feeling of gratitude and affection in every dutiful child which leads him always to the succor of needy parents is recognized by that provision of the Employers' Liability Law which makes the employer liable in damages to the parents of a son (or daughter) who loses his life in the employment under circumstances giving rise to a cause of action, when neither widow nor children survive, and the fact that he is over 21 years of age will not in itself defeat such an action. The support the parents will probably receive from him after he reaches his majority, as well as previous to that time, is the proper guide, and this is determined by a consideration of the boy's treatment of his parents, his health, his habits, his industry, his ability and inclination to help his parents. If the boy is one who realizes his responsibility and desires to perform his filial duty to the extent of his ability, the attainment of his majority will in no way lessen his laudable efforts in this direction. Even when a boy of this character takes upon himself the responsibility of a family of his own, his sense of duty in this regard still remains, and is affected only by the limitation such increased obligation imposes.

[8, 9] At the time of his death Jesus Almanzo was 19 years of age, strong and well, and industrious; he regularly gave his mother his earnings for the support of the family, and shortly before his death expressed a desire to join the army; one of his reasons for such a step being that he might learn something by which he could increase his earning power and thus be able to do more for his parents. These are evidently the

considerations by which the jury was guided in arriving at the amount of its verdict, for it is clear that the instructions on this subject were disregarded. Such a verdict could have been reached in no other way, for it cannot be figured that within the 2 remaining years of the son's minority he could have earned at the wages he was receiving at the time of his death a total of over \$1,800; and if from this the cost of his own maintenance for that period be deducted there would remain at best only about \$1,000 or \$1,200. But appellees contend that the jury evidently felt that he might have increased his earning power sufficiently during the 2 years to earn within that time \$3,000 above his own maintenance. It would hardly seem possible, however, that a boy 19 years of age, following only ordinary labor, could so improve himself within such a short time as to enable him to earn as much more than he had theretofore earned as would be required to enable him to help his parents to the extent of \$3,000, or would have made his estate at the end of 2 years, in case of his death at that time, worth to them \$3,000 less the amount he might give them during that period. The instruction, although erroneous, was the law of the case until reversed, and should have been followed by the jury, even though in doing so a verdict which accorded with its ideas of right could not have been returned. Under our system of jury trial procedure the judge of the court determines the law of the case and the jury the facts, and to allow the jury to constitute itself the judge of the law as well as the facts would violate this fundamental principle. To affirm this judgment, however, it will be necessary to permit such a departure, but the fact that in this particular case it would lead to a proper result would not justify the establishment of such a dangerous precedent.

[10] The only alternative to ordering a new trial is an affirmation of the judgment upon the filing by appellees of a remittitur in the amount held to be excessive, but it would be manifestly unfair to them to compel them to remit a part of a judgment which is excessive only when measured by the wrong standard. Apply the proper rule, and the judgment is not excessive. Appellees are entitled to have a jury, guided by the proper measure of damage, say just how much they should receive as compensation for the death of their son.

The judgment of the lower court is reversed, and the case remanded, with directions to grant a new trial.

ROSS, C. J., and BAKER, J., concur.

(22 Ariz. 445)

VERDE COMBINATION COPPER CO. v. REITO. (No. 1882.)

(Supreme Court of Arizona. June 7, 1921.)

1. Dismissal and nonsuit \S 81(9)—Appellant waived error in reinstatement of case by appearing, demurring, and entering on trial.

Under Civ. Code 1913, par. 600, empowering the court to relieve against a judgment, order, or proceeding within 6 months, where a cause was dismissed because plaintiff was not present when it was called, and the court reinstated it 6 months and 11 days thereafter, defendant, by not objecting, but appearing and demurring and agreeing to setting for trial, and by entering on trial, waived the error.

2. Witnesses \S 255(4)—Where hospital record did not refresh witness physician's memory, testimony therefrom was properly excluded.

In an action for personal injuries where a physician did not remember the case or what operation was performed upon the plaintiff, and the hospital record did not refresh his memory and the record card was not properly authenticated and he did not write it or identify the writer or handwriting and he had not looked it over the time it was made to see if it was correct, it was proper to sustain an objection to the witness' testimony.

3. Damages \S 132(8)—\$6,000 for permanent injury to right hand and arm and severing of tendons held not excessive.

Where plaintiff was right-handed, and the injury consisted of the severing of the nerves and tendons extending from the fingers along his right arm, and at the time of the trial the tendons had not knitted together, the fingers had drooped and had limited motion, the arm and hand were greatly weakened, and the injury permanent, and he lost seven or eight months' time before he could work again and suffered considerable pain, a verdict for \$6,000 damages was not excessive.

4. Damages \S 33 — Defense that servant's damages would have been much less but for venereal disease not available.

In a servant's action for personal injuries, an objection that plaintiff was afflicted with a venereal disease which prevented or retarded the healing processes, and but for such disease the injury would not have been so serious and his damage much lessened, is not available.

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Action by Eino Reito against the Verde Combination Copper Company. Verdict and judgment for plaintiff, and the defendant appeals. Affirmed.

Anderson, Gale & Nilsson and R. E. Morrison, all of Prescott, for appellant.

Armstrong, Lewis & Kramer, of Phoenix, for appellee.

ROSS, C. J. Action under Employers' Liability Law for damages for personal injury

alleged to have been sustained by plaintiff-appellee, Reito, while he was working as a mucker in defendant-appellant's mine. There was a verdict and judgment for plaintiff for \$6,000.

The suit was commenced by filing complaint November 9, 1917. The answer, consisting of demurrers, special denials, and the plea that injury was caused by plaintiff's negligence, was filed December 5, 1917. October 7, 1918, on motion of defendant's counsel, according to minute entry, plaintiff making no appearance, the cause was dismissed. April 17, 1919, plaintiff moved that order of dismissal be vacated and case reinstated. This motion was argued by counsel for both parties and granted. September 29th, by agreement, the demurrers were submitted without argument. May 4, 1920, by agreement of counsel, the case was ordered set for trial, on May 19, 1920, on which date the trial was started.

[1] Appellant assigns as error the court's order reinstating the action after it had been dismissed. It will be noted from the above statement of facts that the case was not dismissed for want of prosecution, but solely because the plaintiff was not present when it was called. The motion to dismiss was oral, and the reasons for it are not given. For 6 months and 11 days it remained a dismissed case, when, one day, plaintiff orally moved its reinstatement, but upon what grounds the record does not show. This latter motion was argued by both plaintiff and defendant and granted. The case thereupon became, if it had not always been, a live one if what was done was legal. Paragraph 600, Civil Code, empowers the court to relieve against, modify, or set aside a judgment, order, or proceeding within 6 months after entry upon good cause shown, and this, appellant asserts, settles it that the court was without power to reinstate the case after the lapse of 6 months from the date of the dismissal order.

It is not certain that appellant resisted the motion to reinstate. The only information we have upon that is that he argued it. After the order of reinstatement, the appellant not only did not object to the jurisdiction of the court, but appeared in the presentation of the demurrer, and later agreed to the setting down of the case for trial on a fixed date, and on that date entered upon trial without protest. It would seem that if the court did commit error in reinstating the case, the appellant waived it by thereafter submitting to the jurisdiction of the court without further objection.

It is argued by appellee that the motion to dismiss should have been in writing, and appellee served with a copy thereof in order to have given the court jurisdiction to dismiss the case, and he cites in support thereof paragraphs 659-663, Civil Code. We do

not deem it necessary to decide whether this question is legally correct or not. In the recent case of *Young Mines Co. v. Blackburn*, 196 Pac. 167, the same question that we have here was decided adversely to appellant's contention. If the appellant was dissatisfied with the order reinstating the case, it should have appealed from that order.

[2] The next assignment of error is based upon the ruling of the court in rejecting certain evidence offered by appellant. It arose in this way: Dr. Kaull, the surgeon in charge of the United Verde Hospital where appellee was treated for his injuries, testified that in the files of the hospital was the record of a man by the name of Eino Reito, kept on a regular record form; that he did not know who filled it out, but it was a nurse or some person delegated to do that part of the work; that it showed that Reito was treated for or on account of the appellant, and that the witness was the surgeon who attended to the operation; that he always dictated the operative procedure, somebody else taking it down, but that he could not recall dictating this particular record, it being after a period of three years; that he knew what the record said was done to this patient, having recently read it. He stated:

"I know nothing from memory about this case. I would not have known the patient, I don't think, had I seen him on the street. The only way in which I know what was done is what it says in our record at that time three years ago. I have no independent recollection of anything that occurred that isn't in the record."

The court sustained an objection to an offer to prove by Dr. Kaull "what the record was," and of this ruling appellant complains. We think the ruling was clearly correct. The witness only knew the contents of the card from having recently inspected it. It did not refresh his memory, for, if he ever had any connection with the operation, he had totally forgotten it. The card was not properly authenticated. The witness did not write it or identify the writer or the handwriting. He did not look it over at the time it was made to see if it was a correct statement of what occurred. He could not say what was on the card was what he dictated at the time of the operation or that he actually dictated anything that was on the card. The writer of the record was not produced and asked to verify it as true.

The law with reference to the use of memoranda to refresh the memory of witnesses is very well stated in 28 R. O. L. 594, § 185, as follows:

"The cases in which writings or memoranda may be used by a witness to assist and refresh his memory are to some extent accurately settled, and are confined principally to two cases. One is, where the witness has no independent recollection of the facts or circumstances, and where a consultation of the writ-

ing fails to recall a distinct recollection of the circumstances to his memory. In this case, if he testifies that he once knew the facts, and a memorandum of them was made at the time or soon after they transpired, which he knew to be correct, that memorandum may be used to refresh his memory, although he has no present recollection of the events. * * * Another case where the use of memoranda is always permitted by a witness is where the witness can, after consulting the memorandum, testify to the facts to which it relates from independent recollection."

Dr. Kaull's testimony clearly did not fall within either of the rules above stated. He had no independent recollection of attending the appellee or of what was done for him, or the character of his injuries. The memorandum which was proposed to be used was not one of his own making, and he could not say whether it was correct or not.

[3] The only other complaint is that the damages awarded appellee are excessive. It is suggested that the jury acted under the influence of passion and prejudice, but there is nothing in the record to sustain this suggestion, unless it be the mere fact of the size of the verdict. The appellee was a miner. He was right-handed, and the injury he received was on his right hand or forearm near the wrist, and consisted of a severing of the nerves and tendons extending from the fingers along the arm. At the time of the trial these tendons had not knitted together, and the fingers of the hand drooped and had limited motion. The right hand and arm was greatly weakened. The injury is of a permanent character. Appellee lost some 7 or 8 months' time before he could work again, and the evidence shows he suffered considerable pain by reason of the injury. We cannot say, in view of the evidence, that the verdict was so exorbitant as to imply any passion or prejudice. It may seem somewhat high, and more than we would have given ourselves, but the jury are the judges of the facts, and their verdict upon the question of damages is binding, unless it is made very clear that they have exceeded all reasonable bounds.

[4] Appellant also makes the point that appellee was afflicted with a venereal disease, which prevented or retarded the healing processes of nature, and that but for such diseased condition of his body the injury would not have been so serious and his damage much lessened. The evidence as to whether the appellee was afflicted as contended or not was in sharp conflict, but if it be granted that appellee was diseased, we do not understand that appellant could take advantage of that fact as reducing its liability. The proximate cause of appellee's damages was not the presence of any bodily disease, but the injury inflicted in severing the tendons of his arm. That injury would have been the same whether he was sick or well. If sick,

of course the healing processes might have been interfered with, but this would aggravate, rather than lessen, the damages. 8 R. C. L. 436, § 10.

We have concluded that the judgment of the lower court should be affirmed; and it is accordingly so ordered.

BAKER and McALISTER, JJ., concur.

(33 Idaho, 767)

LITTLE v. BURLINGHAM et al.

(Supreme Court of Idaho. May 17, 1921.)

1. Taxation \S 686 — Description in tax sale certificate held insufficient.

Held, that a tax sale certificate describing the lands sold as "75.18 A in S²SW⁴, Sec. 13, Twp. 7, Range 3," is invalid by reason of the insufficiency of such description.

2. Taxation \S 686, 764(3)—Tax sale certificate with insufficient description invalid; deed based on insufficient tax sale certificate invalid.

A tax sale certificate containing an insufficient description is invalid, and a deed based thereon is likewise invalid, either by reason of insufficiency of the description in the deed, or, as in this case, by reason of the fact that the description in the deed is not substantially the same as that appearing in the certificate.

Appeal from District Court, Gem County; Ed L. Bryan, Judge.

Action by Andrew Little against Justin M. Burlingham and another to quiet title. Judgment for defendants, and plaintiff appeals. Affirmed.

Frawley & Koelsch and Martin & Cameron, all of Boise, and Finley Monroe and J. F. Reed, both of Emmett, for appellant.

Geo. C. Huebener, of Emmett, for respondent Burlingham.

Martin & Martin and Wyman & Wyman, all of Boise, for respondent Little.

BUDGE, J. This action was brought by appellant to quiet title in him to certain real estate in Gem county, described in his amended complaint and in the deeds upon which he relies as the south half of the southwest quarter, section 13, township 7 north, range 3 west of Boise meridian. This appeal is from a judgment dismissing the action.

The material facts as disclosed by the record are as follows: That respondent Burlingham is the owner and in possession of the lands above described; that respondent John Little holds, by assignment from the Boise Title & Trust Company, a mortgage thereon dated September 21, 1912, to secure the pay-

ment of \$4,000, together with interest; that appellant's claim of title to said lands as alleged in his amended complaint, is based upon two tax deeds issued by the Emmett irrigation district, Gem county; that one of said deeds is dated March 21, 1917, and the other November 26, 1917; that the former deed is based upon tax certificate No. 13, dated September 2, 1913, for delinquent assessments levied by the district for 1912, and the latter upon tax certificate No. 197, dated September 1, 1914, for delinquent assessments for 1913; that the description of the lands given in said certificates, as well as that contained in two other certificates, numbered 11 and 196, which were introduced in evidence, is as follows: "75.18 A in S²SW⁴, Sec. 13, Twp. 7, Range 3"—and that each of the respondents offered and tendered to appellant payment of all money due him by reason of money paid for said tax certificates, costs, penalties, and interest, or whatever sum therefor equity might require.

[1] Numerous errors have been assigned, but, as we view the case, it is only necessary for us to consider one question presented thereby, viz. whether the tax sale certificates contain a sufficient description of the land upon which to base valid tax deeds.

Upon the authority of *Wilson v. Jarron*, 23 Idaho, 563, 131 Pac. 12, we are of the opinion that this question must be answered in the negative. Furthermore, there is a total variance between the description in the certificates and in the deeds.

[2] A tax sale certificate containing an insufficient description is invalid, and the deed based thereon must likewise be invalid, either by reason of insufficiency of the description in the deed, or, as in this case, by reason of the fact that the description in the deed is not substantially the same as that appearing in the certificate. *Wilson v. Jarron*, supra; *Cahoon v. Seger*, 31 Idaho, 101, 168 Pac. 441; *Dickerson v. Hansen*, 32 Idaho, 18, 177 Pac. 760. An irrigation district cannot issue a valid tax deed unless the delinquency certificate upon which the deed is based contains a sufficient description of the property sought to be conveyed thereby.

Other questions presented on this appeal have been examined, but, since the point above decided is decisive of this appeal, we find it unnecessary to discuss them.

From what has been said it follows that the judgment of the district court should be affirmed; and it is so ordered. Costs are awarded to respondents.

RICE, C. J., and DUNN and LEE, JJ., concur.

McCARTHY, J., did not sit at the hearing and took no part in this opinion.

(33 Idaho, 760)

LITTLE et al. v. LITTLE.

(Supreme Court of Idaho. May 17, 1921.)

Appeal from District Court, Gem County;
Ed L. Bryan, Judge.

Action by John Little and another against Andrew Little to foreclose a mortgage. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frawley & Koelsch and Martin & Cameron, all of Boise, and Finley Monroe and J. P. Reed, both of Emmett, for appellant.

Geo. C. Huebener, of Emmett, for respondent Burlingtonham.

Martin & Martin and Wyman & Wyman, all of Boise, for respondent Little.

BUDGE, J. The questions presented upon this appeal are identical with those in the case of Little v. Burlingtonham, 33 Idaho, —, 198 Pac. 464. Upon the authority of that case, the judgment in this case is affirmed. Costs are awarded to respondents.

RICE, C. J., and DUNN and LEE, JJ., concur.

MCCARTHY, J., did not sit at the hearing and took no part in this opinion.

(33 Idaho, 746)

TURNER v. ROSEBERRY IRR. DIST. et al.

(Supreme Court of Idaho. May 14, 1921.)

1. Municipal corporations \Rightarrow 906—Noncompliance with legislative conditions in issuing bonds renders them invalid.

The power of municipal corporations to issue bonds depends upon a grant of authority from the Legislature. While a municipality has discretion to issue such bonds as will best accomplish the general object to secure which their issue was authorized, yet the Legislature in granting authority therefor may impose such conditions as it may choose, and unless the conditions are complied with the issue is unauthorized and the bonds are invalid.

2. Waters and water courses \Rightarrow 230(4)—Directors of irrigation district held authorized to sell bonds in their discretion notwithstanding delay after authority from electors.

Under the provisions of C. S. § 4367, the board of directors of an irrigation district may in their discretion offer for sale and sell duly authorized bonds of the district from time to time, in such quantities as may seem under existing circumstances to be desirable. Delay of the board in acting does not nullify the action of the electors in authorizing a bond issue. Such delay does not operate to relieve the board of their duty nor deprive them of their authority to issue bonds which have been duly authorized, provided they have not previously withdrawn the bonds from issue in accordance with the statute, and no showing is made of a change of circumstances which would render it impossible to carry out the purpose for which the bonds were authorized.

3. Waters and water courses \Rightarrow 230(2)—Drainage district bonds must be dated January 1st or July 1st next following date of authorization.

Under the provisions of C. S. § 4360, all bonds of a series authorized by vote of the electors of an irrigation district, regardless of when they may be issued, must bear the date of January 1 or July 1 next following the date of their authorization.

4. Waters and water courses \Rightarrow 230(2)—Irrigation district cannot issue bonds maturing less than 11 or more than 20 years from date of issue.

An irrigation district is without authority to issue bonds maturing less than 11 or more than 20 years from the date of issue thereof.

5. Waters and water courses \Rightarrow 230(2)—Drainage district bonds begin to mature from date of resolution of directors offering the issue for sale.

Under the provisions of C. S. § 4360, an issue of bonds of an irrigation district is all or some part of a series offered for sale at any one time by the board of directors, and such bonds begin to mature from the date of the resolution by the board of directors offering the issue for sale.

6. Waters and water courses \Rightarrow 230(2)—Irrigation district bonds may be signed by officers in office at time of issuance and delivery.

Bonds of an irrigation district may be signed by the officers of the district in office at the time of their issuance and delivery.

Appeal from District Court, Valley County; Chas. P. McCarthy, Judge.

Action by M. Turner against the Roseberry Irrigation District and others to restrain the issuance of irrigation district bonds. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

D. M. Cox, of Cascade, for appellants.

Hawley & Hawley and Sam S. Griffin, all of Boise, for respondent.

BUDGE, J. This is an action brought by respondent to restrain appellant district and its board of directors from the proposed execution, issuance, and sale of certain bonds. From a decree perpetually enjoining and restraining the district from executing, issuing, selling, or otherwise disposing of bonds of the form proposed, and setting forth a form of bonds which the district might execute and dispose of, the district appeals.

The facts, which are stipulated, are substantially as follows: That respondent is a resident, landowner, and taxpayer within the district; that the district was organized January 11, 1910; that a series of bonds in the total amount of \$15,000 was authorized by the electors of the district at an election held June 6, 1910; that bonds to the amount of \$7,500, designated as first series, first issue, have been executed, issued, and sold,

and with respect to which no question is now raised; that Walter Watts and H. F. Erwin were respectively president and secretary of the district on July 1, 1910; that the organization of the district and the authorization of the series of bonds was confirmed by a decree of the district court on August 1, 1911.

The appellant board of directors, consisting of W. H. H. Meador, secretary, Charles McDonald, and William Barker, president, adopted a resolution on March 30, 1920, declaring an intention to sell the remaining \$7,500 bonds, authorized June 6, 1910, and providing that the bonds and coupons should be dated July 1, 1910; that maturities should be figured from that date; that interest coupons falling due each January 1st and July 1st beginning January 1, 1911, and ending January 1, 1920, being coupons numbered 1 to 19, inclusive, should be detached upon sale; and that coupons numbered 20 to twice the number of years within which the bonds are to mature should remain attached to the bonds.

It was stipulated that appellants will, unless restrained, execute and dispose of such bonds, in such form, designated as "first series, second issue," principal \$100 each, bonds numbered 1 to 4, inclusive, being further designated "eleven-year bonds," maturing July 1, 1921, or 11 years after their date of July 1, 1910, and statutory percentages of the remaining bonds being designated as 12, 13, and successively to 20-year bonds, maturing the designated number of years after July 1, 1910; that the president and secretary will execute the bonds on behalf of the district, though not such officers on July 1, 1910; and that appellants intend that such bonds, so executed and disposed of, shall be binding obligations of the district and a charge and lien upon the lands therein, including respondent's, and, beginning in 1920, instead of 1930, to levy annual assessments against such lands, and collect benefits, for the payment of matured bonds and interest.

Appellants make numerous assignments of error, which present the following questions of law:

1. Whether authority for the proposed issue has been lost by lapse of time.
2. Whether the bonds of such issue should be dated January 1 or July 1 next following the election at which they were authorized.
3. Whether the bonds should begin to mature from such date or from the date of the issue of the bonds.
4. Whether the bonds may be executed by the president and secretary in office at the time of issue, notwithstanding such officers were not in office at the time such bonds were authorized.

[1] The power of municipal corporations to issue bonds depends upon a grant of authority from the Legislature. Dillon, Munic-

ipal Corporations (5th Ed.) vol. 2, § 883, pp. 1357, 1358. While a municipality has discretion to issue such bonds as will best accomplish the general object to secure which their issue was authorized (*Packwood v. Kittitas County*, 15 Wash. 88, 45 Pac. 640, 33 L. R. A. 673, 55 Am. St. Rep. 875), yet the Legislature in granting authority therefor may impose such conditions as it may choose, and unless the conditions are complied with the issue is unauthorized and the bonds are invalid. 19 R. C. L., *Municipal Corporations*, § 288, p. 992; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, 33 L. Ed. 887.

[2] The issuance, confirmation, and sale of bonds of irrigation districts in this state are provided for and regulated by C. S. art. 4, c. 175.

C. S. § 4359, provides for the authorization of the issuance of bonds by a two-thirds vote of the electors of any irrigation district voting in favor thereof, and C. S. § 4367, provides that—

"The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous. * * *

"If, for any reason, the duly authorized bonds of a district cannot be sold, or if at any time it shall be deemed for the best interests of the district to withdraw from sale all or any portion of an authorized bond issue, the board of directors may, in their discretion, cancel the same."

These provisions of the statute, by expressly conferring upon the board the power to withdraw from sale and cancel all or any portion of a bond issue, preclude the withdrawal of all or any portion of a bond issue in any other manner. The authorization of the issuance of the bonds by popular vote conferred upon the board a continuing authority and duty to issue the bonds or to withdraw them from issue, in whole or in part, as they might deem best for the interests of the district. Failure of the board to act promptly did not nullify the action of the electors, nor operate to relieve the board of their duty or deprive them of their authority to issue bonds which had been duly authorized, provided they had not previously withdrawn the bonds from issue in accordance with the statute, and that no showing is made of such a change of circumstances as would render it impossible to carry out the purpose pursuant to which the bonds were authorized. *Baltes v. Farmers' Irr. Dist.*, 60 Neb. 310, 83 N. W. 83.

[3] The date which must appear upon all bonds and coupons issued by irrigation districts is prescribed by C. S. § 4360, which provides that—

"The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any

(198 P.)

time shall be designated as an issue, and each issue shall be numbered in its order. * * *

"Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January 1 or July 1 next following the date of their authorization. * * *

The provision of the statute in this regard is plain. But one authorization is provided for, i. e., an authorization by a two-thirds vote of the electors of the district, and all bonds of a series, regardless of when they may be issued, must bear the date of January 1 or July 1 next following the date of their authorization. *Emmett Irr. Dist. v. Thompson*, 253 Fed. 316, at page 320, 185 O. C. A. 98.

While the purpose of the statutory date thus provided for is not clear, inasmuch as it is neither the actual date of authorization nor the date of issue, from which the bonds begin to mature, yet the language of the statute is plain, and the rule is well established that, if the intention of the Legislature is expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, the courts will not resort to a strained interpretation to avoid any inconvenience which might follow the enforcement of the law as expressed. 25 R. C. L., Statutes, § 260, p. 1026. The duty of the court ends in construing the statute in accord with the manifest purpose of the law-makers. *Tierney v. Ledden*, 143 Iowa, 286, 121 N. W. 1059, 21 Ann. Cas. 105.

The next question presented is whether such bonds begin to mature from the statutory date thereof, i. e., the January 1 or July 1 next following their authorization, or from the date of the issue, and raises the further question as to what date is to be regarded as the date of issue.

Section 4360 provides, with respect to the maturity of bonds, that—

"The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due, and they shall be designated as 11-year bonds, 12-year bonds, etc. They shall be negotiable in form and payable in money of the United States as follows, to wit: At the expiration of 11 years from each issue, 5 per cent. of the whole number of bonds of such issue; at the expiration of 12 years, 6 per cent. * * *

[4, 5] We think from the provision above quoted that it is clear that the district is without authority to issue bonds maturing less than 11 years from the issue thereof, the statute expressly providing that a certain percentage of the bonds of each issue shall be paid yearly from 11 to 20 years after the issue shall have been made. The portion of the bonds of a series sold at any time shall be designated as an "issue," and the bonds of each issue shall be payable at the expiration of 11 years, etc., from each issue. This negatives the idea that such bonds begin to

mature from the January 1 or July 1 next following their authorization.

Section 4367, after providing that the board may sell said bonds from time to time, provides:

"Before making any sale the board shall, by resolution, declare its intention to sell a specified amount of the bonds."

The board, in the present case, by a resolution adopted March 30, 1920, declared its intention to sell \$7,500 in bonds as the second issue, first series. Were these bonds to be sold at one time, the date of actual sale might conveniently be considered the date of issue; but should this \$7,500 in bonds be put upon the market at one time, but be sold in small amounts at different times over a period of several weeks or months, the question whether the date of the resolution of the board declaring its intention to sell said bonds or the date of actual sale should be considered the date of issue would become highly important. If the latter date were to control, each purchase constituting a new issue under the statute, the board would be unable to provide in advance for an issue of a certain amount of bonds, or to definitely provide for the maturity of the bonds according to law. Furthermore, the statute contemplates that bonds shall begin to mature prior to the actual sale thereof. It is provided in C. S. § 4367, that—

"Said board shall in no event sell any of the said bonds for less than the par or face value thereof and accrued interest."

As was said by the Supreme Court of Washington in *Yesler v. City of Seattle*, 1 Wash. 308, 25 Pac. 1014:

"In financial parlance the term 'issue' seems to have two phases of meaning. 'Date of issue' when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery, and we see no reason why the act of March 28, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be 'issued' to him, which is the other meaning of the term. Usually the question of interest from the date of issue to the time of sale of bonds is adjusted by payment of the face and interest by the purchaser, or the removal of coupons." *Board of Directors v. Mineah* (Wash.) 192 Pac. 997.

From the statute as a whole it appears to have been the intention of the Legislature that an issue of bonds should be all or some part of a series of bonds offered for sale at any one time, and that the bonds should begin to mature from the date of the resolution by the board of directors offering the issue for sale, and that the board may continue to make issues of bonds by such resolutions until the total amount of bonds authorized shall have been exhausted.

[6] The last question presented is whether officers of the board at the time an issue is offered for sale may sign the bonds, notwithstanding those officers were not in office at the time the bonds were authorized.

The general rule is that the government of a municipal corporation is a continuing one, and, while the personnel of officers changes, the office itself continues, and an act initiated by or during the term of one individual as a municipal officer, for and on behalf of the city, may be completed by his successor in office. *City of Albuquerque v. Water Supply Co.*, 24 N. M. 368, 174 Pac. 217, 5 A. L. R. 519. In the process of the issuance and sale of the bonds in question, it was legal and proper for the individuals in office to do such acts and things as were essential and proper to be done by them, as such officers, toward the execution and sale of the bonds, and such acts were not invalidated by reason of the expiration of the term of the officers who were in office at the time the bonds were authorized.

The correct rule was announced by the United States Circuit Court of Appeals in the case of *Emmett Irr. Dist. v. Thompson*, supra, in the following language:

"Providing, as the Idaho statute does, for the issuance of authorized bonds in series and for their sale from time to time, all, however, to be dated on January 1st or July 1st next following the date of their authorization, and there being no express statutory provision as to who should sign them, the obvious and necessary implication is that they were authorized to be signed by the officers of the district in office at the time of their issuance and delivery."

From what has been said it follows that the bonds proposed to be issued by the district should be modified so as to provide for the maturity thereof in the statutory percentages from 11 to 20 years after the date of issue.

The cause is remanded to the district court, with instructions to modify its decree to conform with the views herein expressed and as so modified it is affirmed.

RICE, C. J., and DUNN and LEE, JJ., concur.

MCCARTHY, J., being disqualified, did not sit at the hearing and took no part in the opinion.

(33 Idaho, 785)

MARRS v. OREGON SHORT LINE R. CO.
(No. 3327.)

(Supreme Court of Idaho. May 21, 1921.)

1. Master and servant §80(18) — Employé making excessive demand not entitled to attorney's fees.

Under C. S. § 7380, a mechanic, artisan, miner, laborer, servant, or employé cannot re-

cover for attorney fees, in addition to his wages, when he has made demand in writing for an amount greater than is found to be due.

2. Master and servant §83—Penalty recoverable though demand is excessive.

The penalty provided for in C. S. § 7381, may be recovered by an employé, although he demands a greater amount than is due from his employer.

Lee and McCarthy, JJ., dissenting in part.

Appeal from District Court, Lincoln County; H. F. Ensign, Judge.

Action by Dock Marrs against the Oregon Short Line Railroad to recover wages, attorney's fees, and a statutory penalty. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

H. B. Thompson and John O. Moran, both of Pocatello, for appellant.

C. O. Stockslager, of Shoshone, for respondent.

RICE, C. J. Respondent recovered judgment against appellant for the sum of \$107.53 and \$50 attorney fees in an action instituted to recover for wages as an employé. On January 17, 1918, respondent made written demand for \$33.90. Appellant admitted in its answer that there was due respondent \$24.01. By stipulation it was agreed that the actual amount due was \$23.91. It seems to be conceded that at the time the written demand was made the payment for wages was due. The remainder of the judgment was given for time after respondent ceased to work for appellant until suit was brought during which he was without employment. Respondent was not discharged by appellant, but quit work of his own accord.

[1] Respondent seeks to uphold the judgment by virtue of C. S. §§ 7380 and 7381. Section 7380 is as follows:

"Whenever a mechanic, artisan, miner, laborer, servant or employee shall have cause to bring suit for wages earned and due according to the terms of his employment, and shall establish, by decision of the court or verdict of the jury, that the amount for which he has brought suit is justly due, and that a demand has been made, in writing, at least five days before suit was brought, for a sum not to exceed the amount so found due, it shall be the duty of the court before which the case shall be tried to allow to the plaintiff a reasonable attorney's fee, in addition to the amount found due for wages, to be taxed as costs of suit."

Under this section the judgment for attorney fees cannot be sustained. In this case it cannot be determined from the judgment itself what portion of it the court found was due for wages, but in view of the record the greatest amount of the judgment which could represent wages due is the amount admitted by the answer, namely, \$24.01. The writ-

ten demand was for an amount exceeding any amount which could be found due for wages, and therefore under the terms of the statute respondent was not entitled to judgment for attorney fees.

C. S. § 7381, is as follows:

"Whenever any employer of labor shall hereafter discharge or lay off his or its employees without first paying them the amount of any wages or salary then due them, in cash, lawful money of the United States, or its equivalent, or shall fail or refuse on demand to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of his or its employees may charge and collect wages in the sum agreed upon in the contract of employment for each day his employer is in default until he is paid in full, without rendering any service therefor: Provided, however, he shall cease to draw such wages or salary 30 days after such default."

The constitutionality of this statute when reasonably construed was upheld in *Olson v. Idora Hill Mining Co.*, 28 Idaho, 504, 155 Pac. 291.

Respondent does not bring himself within the first alternative of the section, because he was not discharged or laid off by appellant.

The question presented under the second alternative is whether respondent may recover wages without rendering service therefor, when his demand is for an excessive amount, although the wages earned while in the employ of appellant was due when demand was made. This section of the statute, unlike the preceding one, does not in terms preclude recovery of the penalty in case excessive demand is made. It does not require that the demand be made in writing, nor that any amount should be named by the claimant.

In support of the contention that a demand for an excessive amount prevents a recovery of the penalty provided for in this section, and that otherwise the section must be held unconstitutional, appellant cites *St. Louis Iron Mountain, etc., R. Co. v. Wynne*, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102, *Pac. Mt. Life Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, and *Pierce v. C. & N. W. R. Co.*, 180 Iowa, 1385, 164 N. W. 182.

In those cases the claims were for unliquidated damages for the destruction of property. In the case of *C., M. & St. P. R. Co. v. Polt*, 232 U. S. 165, 34 Sup. Ct. 301, 58 L. Ed. 554, the plaintiff demanded \$838.20. The railroad company offered \$500, and plaintiff got a verdict for \$780. The statute of South Dakota required the railroad company, within 60 days after notice, to offer in writing to pay a fixed sum, being the full amount of damages sustained, and, if

the owner refused to accept the offer, then in any action thereafter brought for such damage, if such owner recovered less than the amount offered, he could recover only his damages; otherwise the railroad company should be liable for double the amount of damages actually sustained. The court, through Mr. Justice Holmes, said:

"No doubt states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand."

In such cases, however, if the claimant is able to forecast the action of the jury and does not demand an amount greater than that body finds his actual damage to have been, he is entitled to recover the penalty. *Kans. City So. R. Co. v. Anderson*, 233 U. S. 325, 34 Sup. Ct. 599, 58 L. Ed. 983.

These considerations do not appear to be applicable in a case where the amount due is fixed by contract and may be determined by simple computation. The means of determining the amount due is within the control of the employer. He has the data at hand to enable him to determine in each case the proper amount to be paid. He may relieve himself from liability for the penalty by tendering the proper amount. 26 R. C. L. p. 648, § 30, and page 652, § 34; *Mobile & Ohio R. Co. v. Brandon*, 98 Miss. 461, 53 South. 957, 42 L. R. A. (N. S.) 106.

That the employer has the means of knowing the amount due is a proper matter to take into consideration finds support in the case of *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 110.

In the case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the court held a law which permitted recovery of attorney fees in certain actions against railroad corporations was invalid, on the ground that it denied to railroad corporations equal protection of the laws under the Fourteenth Amendment to the federal Constitution. In the course of the opinion, however, there is the following paragraph:

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in

the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency."

The statute we are considering is designed for the protection of laborers and mechanics and to prevent the necessity of their being delayed in the collection of wages due upon ceasing their employment and the consequent loss of time while awaiting settlement for services rendered. It provides that, upon failure of an employer on demand to pay any wages or salary due to his employé under a contract of employment, he shall be liable as therein provided. The liability arises, not from a failure to pay the amount demanded, but from failure to pay any wages or salary due upon demand. *Hindman v. O. S. L. R. Co.*, 32 Idaho, 133, 140, 178 Pac. 837, 839.

[2] We think the statute is within the police power of the state and is constitutional, even though the claimant demand a greater amount than is due, unless the circumstances are such as to excuse a tender of the correct amount. In the case at bar the record does not indicate that an offer to pay the amount actually due would have been refused.

The cause will be remanded, with instructions to modify the judgment so as to eliminate the item for attorney fees, and as so modified will be affirmed. No costs awarded.

BUDGE and DUNN, JJ., concur.

LEE, J. (dissenting in part). I concur with that part of the majority opinion which holds that, before an attorney's fee can be recovered under C. S. § 7380, it is necessary for the claimant to make demand in writing, five days before suit is brought, for a sum not in excess of the amount found due. Unless the plain terms of the statute are to be disregarded, I think no other conclusion can be reached.

I do not concur in that part of the opinion which holds that a party may recover the penalty provided by C. S. § 7380, before he has made demand for the amount due him, or where he has made demand for an amount in excess of what he claims. The purpose of this statute in allowing laborers to charge and collect 30 days' wages, at the rate agreed upon, without rendering any service therefor, if the employer fails or refuses "upon demand to pay them in like money or its equivalent the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment," is to penalize the employer of labor for any expense, trouble, or annoyance such employer may cause such laborers in failing and refusing to pay such wages "on demand" when the wages have been earned. Obviously this statute means

that the employé, before being permitted to recover pay for 30 days' labor, in addition to that which he has actually rendered, must make demand for the value of the labor he has performed.

Respondent, in the agreed statement of facts, admits that he demanded a sum in excess of what was due him. The words "fail or refuse on demand" have no other meaning than that a demand shall first be made, and a demand for a sum in excess of what the employé claims to be due him is not a demand within the meaning of the statute. Therefore there was no failure or refusal to pay "upon demand" in this case, because no demand was made.

Statutes providing penalties similar to this, in the case of railroads, for their failure to pay for property injured or destroyed by trains, have frequently been passed upon, and it has quite generally been held that, where a person has made demand for a sum in excess of what is subsequently found to be the value of the property injured or destroyed, the owner cannot recover the penalty. In *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 32 Sup. Ct. 493, 58 L. Ed. 799, 42 L. R. A. (N. S.) 102, the owner demanded \$500 damages, which the company refused to pay. He did not in his suit thereafter either claim or establish that he was entitled to this amount, and the jury fixed his damages at \$400. The United States Supreme Court, in reversing the state court, said that the conclusion was unavoidable that the statute, as so construed and applied, was an arbitrary exercise of the powers of government, and violative of the fundamental rights embraced within the conception of due process of law; that, instead of providing a reasonable incentive for prompt settlement, without suit, of just demands, it attached onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative, and that plainly this could not be done consistently with due process of law. It then approves the principle announced by an earlier decision from the court whose decision it was overruling, *Pacific Mutual Life Insurance Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, wherein the Arkansas court held that the state statute provided that, if a loss under a policy of insurance was not paid within the time specified, "after demand made therefore," the company should be liable in addition to the amount of the loss to 12 per cent. damages and a reasonable attorney's fee. The insured demanded a sum in excess of what he subsequently recovered, and the court reversed the judgment and held that the statute contemplated that there should be a demand, saying:

"A recovery for penalty and attorney's fee cannot be had when complainant makes demand

for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. Such an act would be 'unconstitutional.'

In *Pierce v. C. & N. W. R. R. Co.*, 180 Iowa, 1385, 164 N. W. 182, the court construed a statute making a railway company liable to the owner of any stock killed or injured, under conditions specified, and which further provided that, if the company failed or neglected to pay such damages within 30 days after a notice in writing that a loss or injury had occurred, the owner would be entitled to recover double the amount of damages actually sustained by him. He demanded \$200 as the value of the animal killed. The company refused to pay, and subsequently a jury found its value to be \$190, and judgment was entered for \$380, whereupon the company moved that judgment be entered for only the value as fixed by the jury. The appellate court said that the motion should have been sustained, and that to hold otherwise would in effect result in penalizing defendant for not yielding to an unjust demand. The statute did not in specific terms require the owner to demand the correct amount, but the court held that, the owner having demanded an amount in excess of the value as found by the jury, the company, in refusing to pay such excessive claim, was guilty of no wrong, but was to be commended for not paying it, and thereby encouraging efforts at extortion, and cited the following authorities, which sustain this doctrine: *C. & M. & St. P. R. R. Co. v. Polt*, 232 U. S. 165, 34 Sup. Ct. 301, 58 L. Ed. 554; *Kansas City S. R. Co. v. Anderson*, 233 U. S. 325, 34 Sup. Ct. 599, 58 L. Ed. 983; *M., K. & T. R. R. Co. v. Cade*, 233 U. S. 642, 34 Sup. Ct. 678, 58 L. Ed. 1135.

The majority opinion avoids the force of the rule announced in the foregoing cases, and endeavors to differentiate between the rule applicable to statutes where a penalty is prescribed for a failure to pay unliquidated damages and the one under consideration, by saying, "These conditions do not appear to be applicable in a case where the amount due is fixed by contract, and may be determined by simple computation," and holds that under this statute a demand on the part of the laborer for the amount he claims to be due is unnecessary as a condition precedent to recovering the penalty, and that it is the duty of the employer to tender the amount due in order to escape the penalty. This distinction requires a refinement of reasoning that is neither sound nor logical. Where the amount of the claim is made definite and certain by the terms of the contract, a demand for the amount due can with more reason be required than where it is for unliquidated damages.

Many classes of labor, such as caring for stock on the range, operating farms, and the like, are not performed under the direct supervision of the employer, and frequently he does not know the exact amount he owes for such labor. The employé who performs this labor does know, but if he is not required to make a demand for the amount actually due, before subjecting his employer to this penalty, the construction given to this statute permits and encourages him to make an extortionate demand; for, if it be refused, he may still recover the penalty and the full amount found due.

This statute, when properly construed and applied, tends to promote fair dealing between the employer and the employé, and to compensate such employé for any loss occasioned by his employer negligently or wrongfully refusing to pay him "upon demand * * * the amount of any wages or salary at the time the same becomes due and owing." But it was not intended to penalize the employer for 30 days' wages for which no services are rendered, unless he falls or refuses "upon demand"; and "demand," as used in this statute, means a demand for an amount not in excess of what the claimant is entitled to receive.

The case should be reversed and remanded, with instructions to also strike from the judgment the penalty allowed, because of the failure of the respondent to make the demand required by the statute.

McCARTHY, J., concurs.

(33 Idaho, 764)

**CONTINENTAL & COMMERCIAL TRUST
& SAVINGS BANK v. WERNER
et al. (No. 3431.)**

(Supreme Court of Idaho. May 21, 1921.)

Appeal and error ⇐ 134(1)—Attempted appeal from final judgment will be dismissed where no final judgment in fact entered.

When it appears from the record that no final judgment has been entered, an attempted appeal from a final judgment in an action will be dismissed.

Appeal from District Court, Gooding County; H. F. Ensign, Judge.

Action by the Continental & Commercial Trust & Savings Bank against Wilhelmina Werner and others. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

E. D. Reynolds, of Jerome, E. A. Walters, of Twin Falls, and Paul S. Haddock, of Shoshone, for appellant.

H. A. Padgham and A. F. James, both of Gooding, for respondents.

DUNN, J. The appeal herein purports to be taken from a final judgment rendered in this action, but an examination of the instrument appearing in the record as the judgment appealed from shows that it is not in fact final judgment.

For this reason the appeal is dismissed. No costs to either party.

RICE, C. J., and BUDGE, McCARTHY, and LEE, JJ., concur.

(33 Idaho, 801)

COSNER v. UNITED MINES CO.
(No. 3364.)

(Supreme Court of Idaho. May 23, 1921.)

1. Attachment \S 193—Allowance of \$4 per diem for keepers held in conflict with statute.

An allowance of \$4 per diem each for two keepers for keeping possession of and preserving property under attachment is in conflict with C. S. \S 3704, which provides "that no more than \$3 per diem be allowed to a keeper." In this case \$3 per diem for one keeper will be allowed, although the trial court made no order allowing keepers' fees, inasmuch as appellant does not question such allowance.

2. Master and servant \S 80(18)—Attorney's fees to plaintiff improper, where no compliance with statute as to claim for wages.

Where in a claim for wages no demand is made in writing by plaintiff in accordance with the provisions of C. S. \S 7380, it is error to allow attorney's fees to plaintiff.

Appeal from District Court, Camas County; H. F. Ensign, Judge.

Action by P. H. Cosner against the United Mines Company. Defendant's motion to tax costs and to continue hearing on said motion was denied, and it appeals. Reversed in part.

D. W. Zent, of Fairfield, for appellant.
R. M. Angel, of Halley, for respondent.

DUNN, J. This is an appeal from the order of the trial court, made after judgment, denying the motion of appellant to tax the costs herein, and also denying the motion of appellant for a continuance of the hearing of said motion.

Appellant assigns three errors: First, the allowance of fees for two keepers at \$4 per day each; second, the allowance of attorney's fees to respondent; third, the denying of appellant's motion for continuance.

[1] C. S. \S 3704 (C. L. \S 2122) provides that—

The sheriff may demand and receive "for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, such sum as the court may order: Provided, that

no more than \$3 per diem be allowed to a keeper."

The respondent in his cost bill claims \$8 per day for 116 days for two watchmen, making a total of \$928. It may well be questioned whether respondent could legally claim any allowance for such services, there being no evidence in the record that the court at any time made an order allowing keepers' fees. *Berry v. G. V. B. Mining Co.*, 5 Idaho, 691, 51 Pac. 746. However, as appellant does not resist the allowance of \$3 per day for one keeper, but concedes the correctness of the allowance of that sum, the charge for keeper to the amount of \$348 may stand in this case.

[2] In the affidavit of counsel for appellant filed in support of his motion to tax costs, it is alleged that "on demand was made, as required by law, before the commencement of this action on his claim for wages due," and this is not controverted by the respondent. The allowance for attorney's fees on the three causes of action for wages should therefore have been disallowed. C. S. \S 7380 (C. L. \S 5148a); *Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.

On the showing contained in the record we cannot say that the trial judge abused his discretion in denying appellant's motion for continuance of the hearing of his application for the taxation of costs.

The order appealed from is reversed in the two particulars mentioned herein, and the trial court is directed to modify its judgment by disallowing the item of \$125 for attorney's fees and reducing the item of \$928 for keepers to \$348. Costs awarded to appellant.

RICE, C. J., and BUDGE, McCARTHY, and LEE, JJ., concur.

(33 Idaho, 765)

STATE ex rel. DAVIS et al. v. BANKS, State Treasurer. (No. 3665.)

(Supreme Court of Idaho. May 21, 1921.)

1. Constitutional law \S 25—Power of Legislature to create indebtedness, expenditure, or to make appropriations, plenary.

The power of the state Legislature in the creation of indebtedness, or the expenditure of state funds, or making appropriations, is plenary, except as limited by the state Constitution.

2. States \S 54—Act directing state treasurer to appoint fiscal agent held constitutional.

S. B. No. 319 (Session Laws 1921, p. 112, c. 61), authorizing and directing the state treasurer to appoint a fiscal agent, is not in conflict with the state Constitution.

3. States \S 150—Act submitting state highway bond issue to vote held constitutional.

Chapter 193 of the Session Laws of 1919, proposing Idaho state highway bonds, fourth

issue, to vote of the people, meets the requirements of article 8, § 1, of the state Constitution, and is a valid act of the state Legislature.

Lee, J., dissenting.

Original application for writ of mandate by the State, on the relation of D. W. Davis and others, against D. F. Banks, Treasurer of the State of Idaho. Writ denied.

Roy L. Black, Atty. Gen., and Dean Driscoll, Asst. Atty. Gen., for plaintiffs.

D. A. Dunning, of Boise, for defendant.

DUNN, J. This is an original application by the Governor, Attorney General, and commissioner of public works of the state, individually, as taxpayers, and in their several official capacities, for a writ of mandate directed to the defendant, D. F. Banks, as state treasurer, to compel him to employ a fiscal agent or broker to procure or assist in procuring a bidder for the Idaho state highway bonds, fourth issue, and to take such steps as may be necessary for the sale of said bonds.

The petition sets forth that, pursuant to the provisions of chapter 193 of the laws of the state of Idaho for the year 1919, which directed the defendant, as state treasurer, to issue and sell a series of state bonds of the par value of \$2,000,000, to be known as Idaho state highway bonds, fourth issue, upon approval by the people at the next general election, and pursuant to the Constitution and laws of the state of Idaho, the question whether or not such bond issue should be authorized for the laying out, surveying, and constructing of state highways was submitted to the electors of the state of Idaho on the 2d day of November, 1920, and that a majority of all the votes cast on said proposition at such election were in favor of the issuance of such bonds, and that the result of said election has been determined and certified as required by law; that thereafter the said state treasurer gave due notice of the intention of the state to sell said bonds, and invited bids therefor to be submitted on or before the 31st day of January, 1921, and that five bids were received, the highest of which was \$87,420 below the par value of said bonds; that by the provisions of said chapter it is required that said bonds shall be sold at not less than par, and upon the best terms offered, and at the lowest rate of interest named by any bidder, not exceeding the rate of 5 per cent. per annum; that all of said bids were rejected for the reason that they were below par of said bonds; that it is now, and at all times since the said chapter 193 became effective has been, and will be for an indefinite period in the future, impossible to sell said bonds at par to bear said rate of interest without the employment of a fiscal agent as hereinafter set forth, by reason of the fact that the rate of interest of money on loans is now, and for some time past has

been, and for an indefinite time in the future will be, in excess of 5 per cent. per annum, and the market for bonds of the character and of the interest rate provided in said chapter 193 below par; that by an act of the sixteenth session of the Legislature of the state of Idaho, known as Senate Bill No. 319, approved March 8, 1921, which said act became effective immediately upon its passage and approval, the said state treasurer was and is directed to employ a fiscal agent or broker to assist in procuring a bidder at not less than par, and accrued interest for said bonds, for whose compensation and expense the said treasurer is authorized and directed to expend the sum of not to exceed \$97,500 for the entire bond issue, and proportionately for any part thereof, to be paid, on payment for the bonds, by the purchaser furnished, for which purposes the sum of \$97,500 is appropriated by said act; that relators have demanded of said defendant that he proceed to employ such fiscal agent or broker, and again call for bids for said bonds, and proceed to sell and issue the same pursuant to the provisions of said chapter 193, but that said defendant has failed and refused to employ such broker or fiscal agent, or to take any other steps or proceedings whatever for the sale or issuance of said bonds, and still continues to so fail and refuse, and alleges as his reason and ground therefor that the said bonds cannot be sold for par bearing interest at the rate of 5 per cent. per annum without employment of a fiscal agent or broker, as provided by the said act of the sixteenth session of the Legislature, and that said act is invalid and unconstitutional.

The petition further alleges the lack of funds in the hands of the state to proceed with the construction of the system of highways heretofore laid out and partially constructed, or to enable it to provide funds to carry on the large amount of work that is necessary to be done by it in co-operation with the federal government, and with the several counties and highway districts of the state, in order to obtain the financial assistance in the construction of the state highways that will be available if the said bonds can be sold and the money derived therefrom used in the construction of the highways throughout the state, and that, without the funds to be derived from such sale, much of the unfinished work done on this system of highways whose construction has been undertaken by the state of Idaho will be lost.

The petition further alleges that, in addition to the matters hereinbefore stated, some question has been raised as to the validity of the said act, known as Senate Bill No. 319, and that said bonds cannot be sold, or readily sold, or, if sold, cannot be sold at so high a price until after their validity and the validity of said Senate Bill No. 319 have

been determined by judgment and decree of this court; and that the plaintiff and relators have no plain, speedy, or adequate remedy in the ordinary course of law.

The defendant filed a general demurrer to the petition. He also filed an answer, in which he urges that said chapter 193 is unconstitutional and void, for the reason that—

"The purposes specified in said chapter 193 as the purpose of the issuance of said bonds, and the creation of the indebtedness therein referred to, are not distinctly specified in said chapter 193, in that neither the extent, mileage, location, general character, or termini of the highways to be completed or constructed are set forth, nor do the same constitute some single object or work."

We will first dispose of the question raised by the answer as to the constitutionality of chapter 193.

The constitutional provision referred to above (article 8, § 1) prohibits the creation of the indebtedness provided for in chapter 193, Sess. Laws 1919, "unless the same shall be authorized by law, for some single object or work, to be distinctly specified therein." The word "object" is defined as "the end aimed at, the thing sought to be accomplished" (Paxton v. Baum, 59 Miss. 531, 536); "the aim or purpose" (State v. De Hart, 109 La. 570, 574, 33 South. 605); "the thing sought to be attained" (Scarborough v. Smith, 18 Kan. 399). These definitions given by the courts are in accord with the common understanding and use of the word "object."

[3] The end sought to be accomplished by said chapter 193 was the creation of a fund to be used in connection with the federal funds authorized by Congress in the construction of highways, upon certain conditions to be complied with by the state, and also to be used in co-operation with the various counties and highways districts of the state in accordance with existing laws, and, under certain contingencies, for the construction or completion of such state highways as should be deemed for the best interests of the state. This object or purpose is distinctly set out in said act, as required by the Constitution. We therefore hold that chapter 193, Sess. Laws 1919, is constitutional, and became valid when it was adopted by a majority vote of the people of the state at the last election.

In support of his demurrer, the defendant contends that the act of the sixteenth session of the Legislature in effect attempts to amend, after its approval by the people, said chapter 193, by indirectly authorizing an increase in the rate of interest to a rate exceeding 5 per cent. per annum, or by authorizing a sale of said bonds at less than par.

Article 8, § 1, of the Constitution of Idaho, so far as it is applicable to this case, reads as follows:

"The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate exceed

in the aggregate the sum of two million dollars, unless the same be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt or liability, as it falls due; and also for the payment and discharge of the principal of such debt or liability, within twenty years of the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until at a general election it shall have been submitted to the people, and shall have received a majority of all the votes cast for or against it at such election; and all moneys raised by the authority of such law, shall be applied only to specified object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, or city and county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people. The Legislature may, at any time after the approval of such law, by the people, if no debt shall have been contracted in pursuance thereof, repeal the same."

The constitutional limit of indebtedness having been reached, the state Legislature enacted chapter 193, Sess. Laws 1919, which reads in part as follows:

"Section 1. For the purpose of providing moneys to be used in paying for a portion of the cost of laying out, surveying and constructing a system of state highways in the state of Idaho a loan of \$2,000,000 is hereby authorized to be negotiated upon the faith and credit of the state of Idaho.

"Sec. 2. The state treasurer is hereby authorized, empowered and directed to issue bonds of the state * * * aggregating the amount of the loan authorized in section 1, which shall be known as Idaho state highway bonds, fourth issue. * * * Such bonds shall bear interest at a rate which shall not exceed the rate of five per centum per annum. * * *

"Sec. 12. The state treasurer shall give two weeks' notice by publication in two newspapers of general circulation, one of which is published in the state of Idaho, of the intention of the state to sell the bonds authorized by the provisions of this act, and shall invite bids therefor. Said bonds must be sold at not less than the par value thereof, upon the best terms offered and at the lowest rate of interest named by any bidder. The state treasurer shall have the right to reject any and all of the bids offered and may readvertise for bids, as herein provided."

This proposition was submitted to the people at the election held in November, 1920, and was adopted. An effort was made to sell the bonds so authorized, but no bidder was found who was willing to take them at par. Thereupon the sixteenth session of the state Legislature enacted Senate Bill No. 319 (Sess. Laws 1921, c. 61), which reads in part as follows:

"Section 1. The state treasurer of the state of Idaho is hereby authorized, directed and empowered to employ for and in behalf of the

state of Idaho, a fiscal agent or broker, to procure or assist in procuring a bidder, at not less than par and accrued interest, for the Idaho state highway bonds, fourth issue, being the bonds referred to in chapter 193 of the laws of the state of Idaho for the year 1919, when the same are offered for sale, pursuant to the provisions of said chapter 193. * * *

"Sec. 2. As payment and full compensation for such services and expenses of such broker or fiscal agent in connection therewith, the state treasurer of the state of Idaho is authorized and directed to expend such sum as he may determine to be necessary, but not to exceed the sum of \$97,500.00 for the entire issue, and proportionately for any part thereof, but no compensation, expenses or other sum shall be paid to said broker or fiscal agent unless the bidder procured by him shall actually purchase the whole or a part of said bonds at a price of not less than par and accrued interest, and then only coincident with delivery of said bonds to such purchaser and payment therefor by him. Payments made to said broker or fiscal agent shall be made on claims approved by the state treasurer as head of the department or institution, as required by general law, and passed upon and approved by the state board of examiners."

Said act further provides that the state treasurer is also authorized to pay for expenses incurred by him in the issuance and sale of said bonds, as distinguished from any expenses incurred by or paid for said fiscal agent or broker, the sum of \$500, or so much thereof as may be necessary.

The sole question in this case is whether or not the Legislature of this state has authority to make an appropriation such as is attempted in Senate Bill No. 319 in the sale of bonds after their issuance has been authorized by a vote of the people, when the act of the Legislature authorizing such a vote provides that the bonds shall be sold at not less than par, and shall bear interest at not more than 5 per cent. per annum. The contention of the defendant is that the payment of this sum to a fiscal agent or broker for assistance in selling said bonds amounts, upon the one hand, to increasing the rate of interest, or, upon the other, to selling the said bonds below par.

We are not inclined to agree with this view. To do so would be to hold, in effect, that it was the intention of the Legislature, in prescribing the maximum rate of interest to be paid and the minimum price at which the bonds should be sold, that such bonds should be sold either without any expense whatever to the state, or that the price received for them should not only equal the par value of the bonds, but such additional sum as would cover the expense necessarily incurred in their issuance and sale. This view is not consistent with the act of the Legislature submitting this proposition to a vote of the people, nor with the subsequent act authorizing the employment of a fiscal agent. In the former act provision was made

for the treasurer to advertise said bond issue in two newspapers of general circulation, one within and the other without the state, if the proposition to issue said bonds should be adopted, and it was also required, in obedience to the provision of the state Constitution, that the entire act submitting said proposition, covering four and one-half pages of the Session Laws of 1919, should be published in at least one newspaper in every county of the state for a period of three months next preceding the election at which said proposition was submitted to the people. These expenditures alone involved an outlay of several thousand dollars. Under the latter act provision is made for the payment of the fiscal agent's commission, and some expenses of the state treasurer. In addition to these provisions for expenses in connection with the sale of said bonds, the act submitting the bond proposition to a vote of the people provided that:

"The expenses of printing or lithographing and procuring suitable bonds with interest coupons attached, for the purpose of carrying out the provisions of this act, shall be paid out of the moneys arising from the sale thereof as an expense incident to the laying out, surveying and constructing of said system of state highways." Session Laws 1919, p. 581.

No mention is made of any of these expenditures in connection with the par value of the bonds or the rate of interest they were to bear, so it is clear that it was not the intention of the Legislature to require that these bonds should bring their face value over and above all expenses that might be incurred in connection with their issuance and sale. The fact is that, whether such expenses are great or small, they have nothing to do with determining the par value of the bonds or the rate of interest on them.

It is conceded that a bona fide attempt has been made by the state treasurer to dispose of these bonds according to the terms of chapter 193 of the 1919 Session Laws, and that such attempt has failed to bring a purchaser of said bonds at par and 5 per cent. interest. This condition being known to the late Legislature, suppose that body had determined that another effort should be made to sell said bonds, and that, instead of providing for the employment of a fiscal agent, in the hope of obtaining a large popular subscription to said bonds among the citizens of this state, it had provided that the state treasurer should advertise said bond issue for a certain period of time in every newspaper published in the state of Idaho, and that, in addition to this effort to arouse a local interest in the purchase of these bonds, he had been authorized to advertise said bonds in every daily newspaper and every financial publication published in the United States in a city of a population of 100,000 or more, and a large appropriation had been

made for this additional advertising, it would hardly be said that such a measure was beyond the legislative power, and that, by submitting said bond issue to a vote of the people, the Legislature had so limited itself that it was powerless to authorize the use of any additional means to effect a sale of these bonds. What difference in principle is there between such means and the means adopted by the late Legislature in authorizing the employment of a fiscal agent? There is none. Then there is no objection from a legal standpoint to the method adopted by the Legislature as to the employment of a fiscal agent.

But the objection that is urged, it seems to us, grows out of a suspicion that, under the guise of employing a fiscal agent and paying him a commission for services, there may be an attempt on the part of the purchaser to obtain the commission, and thus, in effect, make sale of the bonds at less than par, or, if at par, make them bear a higher rate of interest than that prescribed by the law. Clearly, to our minds, if the employment of a fiscal agent should develop into a subterfuge for the accomplishment of such a purpose as this, it would be a violation of the law, but we may not declare this provision invalid because of the fact that officers, if they were acting in bad faith, might permit something that is forbidden by the law. We must assume that the officers charged with the handling of this transaction will be honest, and will act in good faith, for the purpose of accomplishing the sale of these bonds according to the spirit, as well as the letter, of the law. The act providing for the appointment of a fiscal agent or broker gives ample power to the officers of this state to protect the state against such a transaction as seems to be feared. This act provides that—

"No compensation, expenses or other sum shall be paid to said broker or fiscal agent unless the bidder procured by him shall actually purchase the whole or a part of said bonds at a price of not less than par and accrued interest, and then only coincident with delivery of said bonds to such purchaser and payment therefor by him. Payments made to said broker or fiscal agent shall be made on claims approved by the state treasurer as head of the department or institution, as required by general law, and passed upon and approved by the state board of examiners."

It will thus be seen that, until the bonds are actually sold and paid for, such broker or fiscal agent would not be entitled to payment of such allowance as might be agreed upon between him and the state treasurer, and if it should appear that the transaction was one by which the purchaser of the bonds was directly or indirectly to receive the benefit of the commission allowed to the fiscal agent, it would not only be within the power, but it would be the duty, of the officers of this state having to do with the allowance of said claim to reject it; and we

must assume that said officers will act in the interest of the state of Idaho, and will use all diligence to prevent the accomplishment of any such unlawful purpose, if it should be attempted.

It would seem also that the defendant bases his objection in part upon the assumption that in no event could a sale of said bonds be made above par, or at a premium. While it may be admitted that probably a sale might not be made above par just at this time, this court cannot assume, as a matter of law, that a sale cannot be so made, either now or at any time in the future.

[2] While these reasons seem to us sufficient to warrant the holding of this act valid as to the appointment and payment of a fiscal agent or broker, it may be well to cite a few decisions of other courts in which similar questions have been passed upon. The defendant has cited a number of cases in which courts have held that, under a provision for the sale of bonds at not less than par, a commission to a broker or fiscal agent which was found to be claimed in the interest of the purchaser of the bonds could not legally be paid, for the reason that such a transaction amounted to a sale of such bonds at less than par. We think there can be no question that this holding is correct, and, as we said above, if it should be found in this case that the purchaser was to receive any commission allowed to a broker or fiscal agent, no legal payment of such commission could be made to such broker or fiscal agent, or to any person for him.

In *Armstrong v. Ft. Edwards*, 159 N. Y. 315, 53 N. E. 1116, *Manitou v. First National Bank*, 37 Colo. 344, 86 Pac. 75, *Davis v. City of San Antonio* (Tex. Civ. App.) 160 S. W. 1161, and *Miller v. Park City*, 126 Tenn. 427, 150 S. W. 90, Ann. Cas. 1913E, 83, the implied authority of cities to pay a commission for the sale of bonds under a provision of law requiring that such sale should be made at not less than par has been upheld, and sales under such conditions have been held not to have been made below par.

In *Miller v. Park City*, supra, in upholding a sale as not below par when the commission was paid out of the proceeds of the bond sale, the court said:

"It is needless to say that, if charges of this kind are sought to be made the cover for an actual sale at less than par, or if they are grossly unreasonable and attended by marks of bad faith, the court would not hesitate to declare such transactions fraudulent and void."

And this appears to be the universal holding of the courts upon this point.

In the case of *Mayor, etc., of New York v. Sands*, 105 N. Y. 210, 11 N. E. 820, in discussing the implied power of the comptroller to employ an agent and pay him a commission of one-half of 1 per cent. in making sale of \$15,000,000 of bonds, which re-

sulted in the payment of a premium of 4½ per cent. on said bond sale, the court said:

"It is a matter of common knowledge that such loans, in all countries of the world, are usually negotiated through agencies outside of the regular financial authorities of the government making the loans."

And the court calls attention to the fact that during the Civil War the federal government used such agencies in raising the large sums that were required by the government during that period, and that without such assistance it would have been difficult, if not impossible, to effect the desired loans. And in the same case the court further says:

"The necessity of incurring some expenses in the negotiation of the loans and placing the bonds authorized to be issued is, in view of the universal practice in such cases, too plain to admit of dispute, and it is obvious that, unless the comptroller was vested with power to pay them, the whole purpose of the act might be defeated at its outset."

The Supreme Court of Minnesota, in the case of *State v. West Duluth Land Company*, 75 Minn. 456, at page 467, 78 N. W. 115, 117, said:

"Under the provisions of section 4 of chapter 289, supra, a sale of the bonds issued thereunder at less than par value was forbidden. The bonds now under consideration, \$140,000 in amount, were turned over to a broker for sale under a written contract with the board of county commissioners. In this contract it was stipulated that the broker should pay for lithographing and printing the blank bonds, for legal advice and services, and all other expenses incident to a sale, for which and as compensation in full, he was to receive the sum of \$14,000, 10 per cent. of the face value of the bonds sold. On these facts we are asked to hold that there was a plain violation of section 4, and that the bonds are void. There might be cases where the facts would very conclusively show that an agreed compensation of 10 per cent. for the sale of the bonds was a palpable evasion of such a section, but we have no such case before us. We cannot say, as a matter of law, that under the conditions of this contract there was a violation of section 4, which forbids a sale of the bonds at less than par."

The case most nearly in point to which our attention has been directed is one decided by the Supreme Court of Missouri in which it was held that the board of fund commissioners of that state, which was authorized to issue and sell three and a half million dollars of state bonds at not less than par, had implied power to employ a broker and pay him a commission out of proceeds of said bonds for his services in making sale thereof at not less than par. In that case the court said:

"The question, therefore, is, Can a contract to pay a commission for procuring purchasers for these bonds be made by the board? We

think so. First, it is a conceded fact that the defendants have tried to find purchasers and have failed. This might have been expected, owing to the exceedingly low rate of interest (3½ per cent.) which the bonds bear, and owing to the further fact that the members of such board are not in position to find purchasers, as would be some established brokerage company, with a clientèle all over the country. Such boards are not usually in touch with the great mass of persons who invest in such securities. A large issue of bonds of this character might be sold to the clientèle of any large brokerage firm, in small quantities to each client. Such companies usually have and can find persons among their customers who could be easily induced to take one or more of such bonds, even at a low rate of interest, but this would require work. What a brokerage firm could do in this way, the usual board charged with the sale of low rate bonds could not do. * * *

"We are therefore of opinion * * * (5) that under such facts there is from the legislative acts, supra, a clearly implied power, which authorizes such board to enter into a contract with some financial agent to procure for such board a purchaser or purchasers who will take such bonds at their par value, and in such contract to agree to pay and pay such agent, out of the proceeds of the sale, a reasonable commission for the services rendered." *Church v. Hadley*, 240 Mo. 690, 145 S. W. 8, 39 L. R. A. (N. S.) 248.

[1] "Except as limited by constitutional provisions, the Legislature has absolute control over the finances of the state; and its power as to the creation of indebtedness or the expenditure of state funds, or making appropriations, is plenary, and the exercise of this power cannot be controlled or reviewed by the courts. The Legislature is, however, bound by all constitutional limitations, although in determining whether the conditions or contingencies specified in the Constitution as justifying the contraction of a debt or the making of an appropriation exist, the Legislature has large discretion, and its action is not subject to judicial control unless such discretion has been plainly abused." 36 Cyc. 882.

"Power of a municipality to issue and sell bonds carries with it the implied power to secure such reasonable and necessary assistance as may be requisite to bring about an advantageous sale, and to this end the municipality, acting in good faith, may employ a broker regularly engaged in the business. And its power is not confined to the employment of a broker only. It may employ any person, although not a regular broker, that the municipality may in good faith consider able to assist it in selling and disposing of the bonds." 2 Dillon, *Municipal Corporations*, § 895.

In the case at bar it is not a question of implied power of the state treasurer to employ a broker or fiscal agent; that power is expressly conferred upon him by the act of the late Legislature known as Senate Bill No. 319. We think there can be no question

as to the power of the Legislature to adopt this plan in aid of the sale of said bond issue, and to make the necessary appropriation therefor, and therefore hold said act not in conflict with the Constitution of this state. We also hold that the payment of such commission would not reduce the selling price of said bonds below par, nor raise the interest rate on said bonds above 5 per cent.

While we hold Senate Bill No. 319 to be a valid act of the state Legislature requiring the state treasurer to employ a fiscal agent or broker to assist in making sale of said bond issue, if he shall find that it cannot be sold without incurring such expense, we think some degree of discretion is given to said treasurer as to the exact time when it shall be necessary, if at all, to employ the services of such fiscal agent or broker, for, manifestly, it would be unreasonable to hold that, if it appeared to the treasurer possible to make such sale without incurring this expense, he would still be required to proceed at once to the employment of a fiscal agent, and thus incur an expense that could reasonably be avoided. Since it does not appear from the petition that said treasurer will not proceed as directed by said Senate Bill No. 319, after he shall be satisfied that a sale cannot be made otherwise, and after he has been satisfied that he can proceed legally under said Senate Bill No. 319, and since it does not appear from said petition that a sale can be made even with the aid of a fiscal agent or broker, the demurrer should be, and is, hereby sustained. The alternative writ should be quashed, and the peremptory writ denied.

It is so ordered.

RICE, C. J., and BUDGE and McCARTHY, JJ., concur.

LEE, J. (dissenting). I cannot concur in the majority opinion. It is admitted that the bonded indebtedness of the state, which the Legislature was authorized to create under the limitations placed upon it by article 8, § 1, of the Constitution, had reached the maximum amount which it could create without submitting the proposal for additional bonded indebtedness to a referendum vote of the people, when the fifteenth session of the Legislature enacted chapter 193, Laws 1919, p. 578. This provision of the Constitution authorizes the Legislature to submit a proposal for additional bonded indebtedness for two purposes: First, "in case of war, to repel an invasion, or suppress an insurrection," and secondly, "for some single object or work to be distinctly specified." The fifteenth session authorized the submission of a proposal to issue \$2,000,000 of 20-year 5 per cent. road bonds, which should be sold for not less than par, to a referendum vote, and this proposal was submitted and approved at the November, 1920, general elec-

tion. It is now claimed that, because of the changed financial conditions, these bonds cannot, at this time, be sold at par, and for the maximum rate of interest fixed in the proposal. Accordingly, the sixteenth session, by chapter 61, Laws 1921, directed the state treasurer to employ a fiscal agent or broker to procure or assist in procuring a bidder for these bonds, who will buy them at par, and the maximum rate of interest, and this act appropriates \$97,500 to compensate such broker or fiscal agent for his services in procuring such bidder. The legislative acts of both the 15th and 16th sessions above referred to should be considered and construed in connection with said article 8, § 1, of the Constitution, because they are legislative enactments to carry out its provisions in the matter of authorizing the state to increase its bonded indebtedness. It is evident that the expenditure of \$97,500 directed to be made by the 16th session for the purpose of procuring a broker or fiscal agent who will secure a purchaser for these bonds upon the terms which the referendum vote authorizes, results in doing that which the original proposal authorized by the 15th session did not contemplate, and which it forbids; that is, the selling of these bonds below par, or at a higher rate of interest than 5 per cent.

It will not be questioned that the Legislature has absolute control over the finances of the state, and that its power over the creation of indebtedness or the expenditure of state funds is plenary, and that the exercise of this power cannot be controlled or reviewed by the courts, except as limited by the Constitution. But the Legislature is bound by all constitutional limitations, and where it exceeds such limitations its acts are subject to judicial control. *Nougues v. Douglass*, 7 Cal. 65; *In re Appropriations by the General Assembly*, 13 Colo. 316, 22 Pac. 464.

"Neither the Legislature nor the officers and agents of the state, nor all combined, can create a debt or incur an obligation for or in behalf of the state, except to the amount and in the manner provided for in the Constitution." *People v. Supervisors*, 52 N. Y. 556, at 563; *People v. May*, 9 Colo. 80, 10 Pac. 641; *People v. Johnson*, 6 Cal. 499; *Williams v. Louisiana*, 103 U. S. 645, 26 L. Ed. 595; *Cooley on Constitutional Limitations*, 76, 77.

By said act of the fifteenth session a definite, certain proposal was submitted to the voters, which was:

"Shall a bond issue of \$2,000,000 be authorized for the laying out, surveying and constructing of state highways?"

It further provides for the payment of the bonds authorized to be issued under said act, and the interest which should accrue thereon, according to its strict terms; that said bonds should be sold at not less than par, and upon the best terms offered, and at the lowest rate of interest named by any

bidder; that the expense of printing or lithographing and securing suitable bonds, with interest coupons attached, for the purpose of carrying out the provisions of said act, should be paid out of the moneys raised from the sale thereof as an expense incident to the laying out, surveying, and constructing of said system of highways; and that the act should be published in one newspaper in each county throughout the state for a period of three months next preceding the general election.

If the Legislature, after having provided for the submission of a definite proposal of this kind, and after such proposal has been submitted and approved by a referendum vote, may at a subsequent session increase the amount of the indebtedness by a direct appropriation, under the pretense of making an appropriation to employ a fiscal agent to find a purchaser for said bonds, then the constitutional limitation as to the amount of such indebtedness and the manner of creating it is, to all practical intents and purposes, ineffectual. This provision of the Constitution does not admit of any substantial change in the proposal to create additional indebtedness, after it has been approved and ratified by a referendum vote.

There is nothing in the act making the appropriation which forbids the purchaser from receiving this amount; if not directly, then it may be paid indirectly, as far as the terms of the act go, under the claim of paying it as compensation to a fiscal agent. It must be apparent that this is only an indirect method of disposing of these bonds below par, at a higher rate of interest than that fixed by the proposal as submitted and approved, and in effect nullifies the limitation placed upon the power of the Legislature by the Constitution. For this reason, chapter 61, Laws 1921, so far as it attempts to authorize an additional expenditure of \$98,000 for the sale of this road bond issue, should be declared unconstitutional.

(82 Okl. 74)

IN RE TRADESMEN'S STATE BANK OF OKLAHOMA CITY. (No. 10119.)

(Supreme Court of Oklahoma. May 24, 1921.)

(Syllabus by the Court.)

1. Taxation \S 386(1)—In assessing banks tax is levied against corporation's stock in hands of stockholders.

In assessing state or national banks, the assessment is not against the corporation upon its moneyed capital, surplus, and undivided profits, but the tax is levied against the shares of stock in the hands of stockholders, and the officers of the corporation act as the agent of the stockholders, both in listing the shares of stock for taxation and in paying the taxes levied against said shares of stock.

2. Taxation \S 386(2)—Bank stock to be assessed at its true value.

The shares of stock in a state or national bank are to be assessed at their true value, which may or may not coincide with their book value.

3. Taxation \S 386(2)—No deduction in determining value of bank stock for investments in exempt securities.

In determining the value of shares of stock in a national or state bank for the purpose of taxation, no deduction is to be made on account of the capital of the corporation invested in securities, which are exempt from taxation.

Pitchford, J., dissenting.

Appeal from District Court, Oklahoma County; Geo. W. Clark, Judge.

Proceedings to assess the Tradesmen's State Bank of Oklahoma City for taxes for the year 1917. Upon appeal from a denial of reductions by the county board of equalization, the assessments were reduced and the County appeals. Reversed and remanded.

Forrest L. Hughes, Co. Atty., and M. S. Singleton, Asst. Co. Atty., both of Oklahoma City, for plaintiff in error.

Abernathy & Howell, of Oklahoma City, for Tradesmen's State Bank.

MCNEILL, J. This appeal involves the assessment of the Tradesmen's State Bank for the year 1917. The president of the bank made a return for the assessment to the assessor, and claimed certain exemptions, which were disallowed by the assessor. The president of the bank filed a complaint before the board of equalization of Oklahoma county, praying that the assessment made by the county assessor be reduced in the sum of \$20,000, for the reason \$20,000 of the capital stock of the bank was invested in "depositors' guaranty fund warrants" on January 1, 1917. The case was submitted to the board of equalization upon an agreed statement of facts; it being agreed that the capital stock and surplus of the bank amounted to \$105,000 and the assessment was for that amount, less the value of real estate assessed at \$27,380, and less \$3,200 invested in state funding bonds, making the assessment at \$74,420 and it was agreed the bank had invested \$20,000 of the capital stock in "depositors' guaranty fund warrants." It was contended that the \$20,000 invested in said warrants was exempt from taxation, and should be deducted from the amount of the assessment, which claim was disallowed by the county board of equalization, and an appeal was taken to the district court of Oklahoma county, and the cause was there submitted upon the agreed statement of facts presented to the board of equalization, and the trial court held that the amount of the capital stock invested in said warrants was not taxable, and deducted

that amount from the assessment, and ordered and adjudged the assessment be made in the sum of \$54,420, and further found the bank had paid the taxes in the sum of \$1,632.86, and ordered the county treasurer to pay to the bank the sum of \$559.29, the amount of taxes illegally collected. From said judgment the county has appealed.

[1-3] The identical questions involved herein have been passed upon by this court, since the filing of the appeal herein in three separate and distinct cases, to wit: Board of Equalization v. First State Bank, 77 Okl. 291, 188 Pac. 115; Brown v. Hennessey State Bank, 78 Okl. 141, 189 Pac. 355; Board of Equalization of Kingfisher County v. People's National Bank, 79 Okl. 312, 193 Pac. 622. In the last case cited this court stated as follows:

"In assessing state or national banks, the assessment is not against the corporation upon its moneyed capital, surplus, and undivided profits, but the tax is levied against the shares of stock in the hands of stockholders, and the officers of the corporation act as the agent of the stockholders, both in listing the shares of stock for taxation, and in paying the taxes levied against said shares of stock.

"The shares of stock in a state or national bank are to be assessed at their true value, which may or may not coincide with their book value."

"In determining the value of shares of stock in a national or state bank for the purpose of taxation, no deduction is to be made on account of the capital of the corporation invested in securities, which are exempt from taxation."

The assessment is levied against the shares of stock in the hands of the stockholder, and there is no contention that the value of the shares of stock were not of the value for which they were assessed. The bank contends the only question submitted to the trial court was whether the warrants were assessable. This position is untenable. The question involved was whether a deduction should be made from the assessment, on account of the capital stock being invested in these securities, and this is what the court decided, and this is what the court did—ordered the assessment reduced. This was error.

The error committed by the county assessor was in deducting from the assessed valuation the sum of \$3,200, purported to have been invested in state funding bonds.

For the reasons stated the judgment of the court is reversed, and the cause remanded, and to take such further proceedings not inconsistent with the views herein expressed.

HARRISON, C. J., and JOHNSON, MILLER, and NICHOLSON, JJ., concur.
PITCHFORD, J., dissents.

STATE ex rel. KETCHUM v. DISTRICT COURT OF TULSA COUNTY et al.
(No. 12170.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Courts \Leftrightarrow 478—Court first acquiring jurisdiction of specific property retains it as against other courts of concurrent jurisdiction.

Where in an action a petition has been filed to enforce a lien against specific property, process issued and served as required by law in a court of competent jurisdiction, the property involved in the action is brought into custodia legis, subject to the power and control of the court, and no other court of co-ordinate or concurrent jurisdiction can, in an action commenced while the property is in such a situation, deprive the court, which has already acquired the right of control and possession of such property, of its jurisdiction; and the control of said property and jurisdiction of the court in which the action is first filed is not dependent upon actual physical possession of said property, but the court in which said action is first commenced is entitled to the possession of the res, because its possession of the same is indispensable to the exercise of its jurisdiction to the end that the res may be impressed by its decree.

2. Prohibition \Leftrightarrow 10(1)—Writ lies where intolerable conflict of jurisdiction has arisen between concurrent courts.

In an original proceeding in this court for a writ of prohibition, where it appears that a conflict of jurisdiction has arisen between two courts of concurrent jurisdiction over the subject-matter, and jurisdiction has been lawfully acquired by one court, and it appearing that an intolerable conflict of jurisdiction is existing, this court will issue a writ of prohibition prohibiting the unlawful exercise of jurisdiction by the court which is unlawfully interfering with the jurisdiction of the court that first lawfully acquired jurisdiction of the subject-matter.

Original proceedings by the State, on the relation of H. E. Ketchum, for a writ of prohibition to prevent the District Court of Tulsa County and Owen Owen, Judge, from proceeding in an action wherein C. L. Kimble was plaintiff and the Red Diamond Oil Company and others defendants, and W. L. Larkin was receiver, and interfering through said receiver with the jurisdiction of the District Court of Okmulgee County in an action wherein H. E. Ketchum was plaintiff and A. P. McBride and another defendants. Alternative writ made permanent.

Graham & Rollins, of Okmulgee, for relator.

West, Sherman, Davidson & Moore, of Tulsa, for respondents.

KENNAMER, J. This is an original action in this court wherein the relator made ap-

plication for a writ of prohibition prohibiting the district court of Tulsa county, Owen Owen, judge, respondents herein, from hearing, entertaining, passing upon, proceeding with, trying, and deciding any and all motions or proceedings in cause No. 18299 pending in the district court of Tulsa county. The alternative writ was by this court issued on the 5th day of April, 1921, as prayed for in the original application of the relator herein. The respondents having filed response as directed by the preliminary writ, and said cause having been submitted to the court upon the proceedings and exhibits, it appears from the record that H. E. Ketchum, relator herein, commenced an action in the district court of Okmulgee county on or about the 9th day of November, 1920, to foreclose a materialman's lien upon the north half of the southeast quarter of section 35, township 15 north, range 12 east, and the north half of the southwest quarter of section 36, township 15 north, range 12 east, Okmulgee county, against A. P. McBride and the Red Diamond Oil Company; that summons was duly issued after the filing of his petition in said court, and that the defendants filed answer in said cause on the 9th day of December, 1920; that a judgment was rendered in favor of the plaintiff against the defendant on the 23d day of February, 1921, decreeing the plaintiff a lien and foreclosure of the same; that on the 26th day of January, 1921, subsequent to the filing of said action by plaintiff herein for a foreclosure of his lien, C. L. Kimble filed an action in the district court of Tulsa county against the Red Diamond Oil Company, a common-law trust, operating under a declaration of trust, Albert P. McBride, Jesse P. McBride, I. E. McBride, J. S. Hale, Gustaf A. Anderson, trustees, pleading two distinct causes of action. The first cause of action was for the recovery of \$12,483.50 for money alleged to have been advanced to the trustees of said Red Diamond Oil Company at their instance and request. The second cause of action was for the recovery of \$5,040.76 with interest upon a promissory note; that on the same day the said C. L. Kimble filed his action as herein set forth he filed his petition applying to the court for an order appointing a receiver to take charge of the property of the Red Diamond Oil Company, basing his right for the appointment of a receiver upon the following grounds: That the Red Diamond Oil Company and said trustees of such are insolvent, and that by reason of the financial condition of said company and trustees they are unable to get any advancement of money for the immediate protection of its properties; that several suits are now pending against the Red Diamond Oil Company and its trustees; that the assets of the Red Diamond Oil Company consist largely and principally of oil and gas leases located in

the states of Oklahoma and Texas; that said leases are of uncertain and doubtful value, alleging the indebtedness of said company to be about \$154,524.26; that said trustees were letting the property go to waste and being destroyed; that, unless a receiver be appointed to handle said property under the direction of the court for the benefit of the creditors the plaintiff, with other creditors, would suffer irreparable injury and damage; that on the next day after the filing of said petition on January 27, 1921, praying for the appointment of a receiver, Hon. Owen Owen, judge of the district court of Tulsa county, entered an order appointing W. L. Larkin receiver for the Red Diamond Oil Company and its trustees, directing him to take charge of all the properties and assets of whatsoever kind and character and wheresoever located belonging to said defendants. The order recites that the appointment is made for the reason that the said defendants are unable to meet and pay their obligations as they become due and are insolvent, and that no protest has been filed or made to the appointment of said receiver.

It appears from the record that H. E. Ketchum, the plaintiff in this action and applicant for the writ of prohibition, was not a party to the action in Tulsa county wherein W. L. Larkin was appointed receiver. It appeared upon the hearing of this matter upon the response filed herein that the receiver, after his appointment, took possession of the property in controversy, and upon the sheriff of Okmulgee county attempting to levy upon said lands the receiver had the sheriff or deputy sheriff of Okmulgee county cited before the district court of Tulsa county for contempt of court for interfering with the possession of said receiver over the property in controversy.

In this action two grounds are urged why the writ of prohibition should issue. The first is that the order of the court appointing the receiver is void for the reason the court was without jurisdiction to make the appointment upon the ground of insolvency, and that the court exceeded its jurisdiction in making the appointment. The second is that, if the order appointing the receiver is valid, the district court of Okmulgee county acquired jurisdiction of the property in controversy prior to the time the action was commenced in the district court of Tulsa county for the appointment of the receiver, and that, the jurisdiction of the district court of Okmulgee county of the property in controversy, having been acquired prior to the time the action was commenced in the district court of Tulsa county, the district court of Tulsa county, through its receiver, is without power or jurisdiction to interfere with the jurisdiction of the district court of Okmulgee county in the foreclosure proceeding.

We are of the opinion that it is only neces-

sary to decide the question as to a conflict of jurisdiction between the two courts for the proper determination of this action.

In the case at bar, assuming that the court had the power under its general jurisdiction to appoint a receiver, we are then presented with the question of what effect would the appointment of the receiver have upon the action pending in Okmulgee county in a court of co-ordinate or concurrent jurisdiction to foreclose the lien upon property located within the jurisdiction of the Okmulgee county district court. It is undisputed that the action to foreclose the lien was commenced prior to the time of the filing of the action for the appointment of a receiver; that service of summons had been made and answer filed in the action in Okmulgee county. An action to foreclose a lien is a proceeding in rem, and jurisdiction attaches in a proceeding in rem when the bill is filed and process issued thereon. 27 Cyc. 323.

It was contended by counsel for the respondents in this cause that the district court of Tulsa county first acquired possession of the property through its receiver and will retain it to the exclusion of every other court. We cannot concur in this contention. Counsel for respondent cited many authorities in their brief, and in the oral argument of the cause the case of *Knott v. Evening Post Co.* (C. C.) 124 Fed. 342, was presented with a great deal of force as sustaining the contention of the respondents, but upon an examination of this authority we find that the opinion was rendered in the Circuit Court for the Western District of Kentucky by District Judge Evans, but the action was appealed to the Circuit Court of Appeals for the Sixth Circuit, 130 Fed. 821-824, 65 C. C. A. 158, and in a very able opinion by Circuit Judge Severens the cause was reversed and the following rule announced:

"Held, that the state court had first acquired jurisdiction of the subject-matter of the administration of such corporation's assets, though it had not first taken physical control thereof, and hence was entitled to their surrender by the receiver of the federal court."

* * * To avoid such conflict, most liable to arise between the federal and state courts, it has come to be settled, as we think, that, wherever a state or federal court has lawfully taken jurisdiction of a case for the purpose of subjecting assets within its territory to the charge or disposition which the law applicable to the case requires, such assets are thereby brought in custodia legis, subject to the power and control of the court, and that no other court of co-ordinate jurisdiction can, in a suit commenced while the assets are in that situation, lawfully deprive the court, which has already acquired the right of control, of the possession of them. This because the possession of the res is indispensable to the exercise of its jurisdiction by the court to the end that it may be impressed by its decree. It does not seem to us important that a receiver had not

actually been appointed. An appointment of a receiver would rest upon consideration of convenience, and might be made at any time during the progress of the case if occasion should arise. The conversion of the assets might be made without the employment of a receiver at all. Besides, the appointment goes upon the ground that the court has acquired control of the assets. He is a mere agent of the court. The possession is that of the court, and not his own. It is quite true that in many cases the rule has been stated in terms no broader than to include an actual possession by the court consequent upon a seizure. But it is seen that generally in such cases the exigency did not make it necessary to go beyond that limit. When the question we are now considering has been actually presented, the decisions have been quite uniformly in accord with the rule which we have indicated as the correct one. *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. Ed. 839; *Riggs v. Johnson*, 6 Wall. 166, 18 L. Ed. 768; *Farmers' Loan Company v. Lake St. R. Company*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, where Mr. Justice Shiras, expressing the opinion of the court upon this subject, said: 'Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trust, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to federal and state courts.'

"This subject has been much discussed in two cases in this circuit, which are canvassed in the briefs of counsel here (*Powers v. Blue Grass Building & Loan Association* [C. C.] 86 Fed. 705, and *Phelps v. Mutual Reserve Fund Life Association*, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717), in both of which cases Judge Lurton delivered the opinion, in the first at the Circuit and in the latter for this court. The facts in neither of these cases presented the very questions we now have before us, for in the *Powers* Case the state court was acting as an adviser of an assignee, and was not proceeding for the purpose of affording relief to a plaintiff. The assignee was not an officer of the court, and the possession of the res by the court was not necessary to the object of the application."

In the case of *Merritt et al. v. American Steel Barge Co.*, 79 Fed. 231, 24 C. C. A. 530, the Circuit Court of Appeals of the Eighth Circuit, in an opinion by Circuit Judge Thayer, announced the rule to be:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts

whose jurisdiction embraces the same subjects and persons. *Freeman v. Howe*, 24 How. 450; *Peck v. Jenness*, 7 How. 612, 624, 625; *Taylor v. Carryl*, 20 How. 583, 596, 597; *Wiswall v. Sampson*, 14 How. 52; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 302, 5 Sup. Ct. 135; *Riggs v. Johnson Co.*, 6 Wall. 166, 196; *Central Trust Co. of New York v. South Atlantic & O. R. Co.*, 57 Fed. 3. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of process is entitled to retain it to the end, without interference or hindrance on the part of any other court. And this rule, in its application to federal and state courts, being the outgrowth of necessity, is 'a principle of right and of law,' which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of the litigants. *Gates v. Buckl*, 12 U. S. 69, 4 C. C. A. 116, and 53 Fed. 961; *Chittenden v. Brewster*, 2 Wall. 191; *Orton v. Smith*, 18 How. 263, 265; *Union Trust Co. v. Rockford*, R. I. & L. R. Co., 6 Biss. 197, 24 Fed. Cas. 704; *Owens v. Railroad Co.*, 20 Fed. 10; *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443."

[1] In the case at bar from the time of the filing of the petition to foreclose the lien and the issuance and service of process the Okmulgee county district court acquired exclusive jurisdiction over the property in controversy, and the district court of Tulsa county is without jurisdiction to interfere or hinder the enforcement of the judgment of the district court of Okmulgee county, and the receiver appointed by the Tulsa county court, if valid, is without authority to in any way interfere with the proceedings in the Okmulgee county district court, except he may appear and make application to be made a party to such action for the purpose of presenting any defense that may be made against the enforcement of the lien, such as the defendant may have made.

[2] It is therefore ordered that the district court of Tulsa county be, and is hereby, prohibited from in any way interfering with the foreclosure proceeding in the district court of Okmulgee county, and that the alternative writ of prohibition issued herein shall be made permanent.

It is so ordered.

HARRISON, C. J., and KANE, JOHNSON, MILLER, and NICHOLSON, JJ., concur.

GADDIS v. WILLIAMS et al. (No. 9888.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Action \S 38(5)—In action on a series of notes each one constitutes a separate cause of action.

In an action on a series of promissory notes, each note constitutes a separate cause of action.

2. Action \S 53(3)—Justices of the peace \S 44(9)—Suit on one or more separate notes for the same transaction held not a splitting of the cause of action.

Though in fact all of the notes were given in consideration of one transaction and the notes all matured before an action is brought to recover on any of the notes, the holder of the notes may bring his action in the justice court on one or more of the notes, so that the aggregated amount does not exceed the jurisdiction of the justice of the peace, and the fact that all of the notes are due does not constitute a splitting of a cause of action.

3. Justices of the peace \S 171(1)—Separate actions appealed to the district court are tried de novo under the same jurisdiction as the justice court.

Where two separate actions are brought by the same plaintiff against the same defendant in the justice court, and each action is appealed to the district court, the actions are tried de novo, and the district court does not have any greater or different jurisdiction than is conferred on the justice court.

4. Justices of the peace \S 188(3)—Rendition of judgment on consolidation of actions by district court in excess of jurisdiction of justice court held improper.

Where the district court consolidates such actions so appealed and renders a judgment for an amount in excess of the jurisdiction of the justice court, *held*, that the district court did not have jurisdiction to render such judgment, and the same is void.

Appeal from District Court, Washington County; R. B. Boone, Judge.

Separate actions by J. J. Williams and J. Matt Gordon against Bert L. Gaddis on 12 notes. Judgment for plaintiffs before justice of the peace, and defendant appealed to the district court. The actions were consolidated, judgment was rendered against defendant, who thereupon appeals. Reversed and remanded.

Rowland & Talbott, of Bartlesville, for plaintiff in error.

Chas. W. Pennel, of Bartlesville, and Eugene Forbes, of Weatherford, for defendants in error.

MILLER, J. This action was commenced in the justice court of J. E. Hickey, a justice of the peace of Bartlesville township, Washington county, by the plaintiffs, J. J.

Williams and J. Matt Gordon, filing two separate actions in the justice court against Bert L. Gaddis. Each one of these actions was brought on six separate causes of action to recover on six separate promissory notes of \$25 each, except one note which was for \$33. In each action pending in the justice court judgment was rendered for the plaintiffs and against the defendant. The defendant appealed each of said cases to the district court of Washington county, and, as so appealed, they became cases No. 4505 and No. 4506. The district court of Washington county, over the objection of the defendant, made an order consolidating the two cases and rendered judgment for the sum of \$308 and interest. The defendant filed a motion for a new trial, which was overruled, saved his exceptions to all the proceedings of the court, and perfected this appeal. For convenience the parties will be referred to as they appeared in the court below.

The defendant makes five assignments of error. In the first assignment of error the defendant complains that the giving of the several notes arose out of one transaction and exceeded the jurisdiction of the justice of the peace, as the aggregate amount of the 12 notes was \$308. The bringing of two separate actions when each and all of the notes were due constituted a splitting of causes of action.

[1, 2] We do not agree with this contention. Each note was a separate cause of action. Bringing two separate actions on the 12 notes did not constitute a splitting of causes of action.

In *Nesbitt v. Independent District of Riverside*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562, Mr. Justice Brewer, in stating the case said:

"That all of the said five bonds and the coupons attached belong to the same series and were issued at the same time, under the same circumstances and part of the same transaction."

In the opinion he states:

"Now, the present suit is on causes of action different from those presented in the suit at Des Moines. Bonds 16, 17, and 18 were not presented or known in that suit; and while bonds 14 and 15 were presented, alleged to be the property of plaintiff, and judgment asked upon six coupons attached thereto, yet the cause of action on the six coupons is distinct and separate from that upon the bonds or the other coupons. Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise

to pay the coupon is as distinct from that to pay the bond as though the two promises were placed in different instruments, upon different paper."

See *Reayes v. Turner*, 20 Okl. 492, 94 Pac. 543; *Albaugh Bros. Dover Co. v. White*, 26 Okl. 24, 108 Pac. 360, Ann. Cas. 1912A, 1283; *Matheny v. Preston Hotel Co.*, 140 Tenn. 41, 203 S. W. 327.

[3] The next assignment of error is that the district court erred in consolidating the two causes, and when so consolidated was without jurisdiction to render a judgment therein for the reason that it exceeded the jurisdiction of the justice court. We agree with counsel's contention on this question.

Section 5467, Revised Laws of Oklahoma of 1910, relating to appeals from justice courts, provides in part as follows:

"* * * No notice of appeal shall be required to be filed or served, and the case shall be tried de novo in the appellate court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed."

In the case of *Hesser v. Johnson*, 13 Okl. 53, 74 Pac. 320, we quote paragraph 1 of the syllabus:

"Where an action is appealed from a justice of the peace to the district court, the district court takes merely appellate jurisdiction, and no original jurisdiction, and can hear and determine the case only as a case within the jurisdiction of a justice of the peace."

In the case of *Matheny v. Bank of Nashville*, 61 Okl. 123, 160 Pac. 92, this court said:

"The jurisdiction of the county court upon appeal from a replevin action in the justice's court must be determined by the laws in force applicable to the jurisdiction of a justice's court, as the county court upon appeal can acquire no greater jurisdiction than that possessed by the justice's court."

[4] Section 5352, Revised Laws of Oklahoma 1910, provides in part as follows:

"Under the limitations and restrictions herein provided, justices of the peace shall have original jurisdiction of civil actions for the recovery of money only, and to try and determine the same where the amount claimed does not exceed two hundred dollars."

Under this provision of the statute, the justice of the peace could not have rendered judgment for \$308 and interest. The district court on the appeal could not acquire any greater or different jurisdiction than the justice of the peace had.

While the authorities above cited do not decide the question presented here, the principles therein laid down are applicable, and it is clear to us that the district court committed reversible error in consolidating the

two actions and rendering judgment for an amount in excess of the jurisdiction conferred upon the justice courts. If the plaintiffs had desired that one judgment should cover the entire amount they claimed to be due the district court was open for them to bring their action in that court in the first instance.

As this case will have to be reversed and sent back for a new trial, it is probable that the other errors complained of will not again occur; therefore it is not necessary to pass upon them at this time.

The judgment of the district court of Washington county is reversed, and cause remanded, with instructions to grant a new trial in accordance with the views herein expressed.

JOHNSON, ELTING, KENNAMER, and NICHOLSON, JJ., concur.

(82 Okl. 2)

PLEASANT HILL OIL CO. v. VOORHEES
et al. (No. 10106.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Statutory provisions.

An appeal from the judgment of a justice of the peace shall be complete upon the filing and approval of the undertaking.

2. Statutory provisions.

All further proceedings before the justice of the peace in the case shall cease and be stayed on the filing of the undertaking with said justice and its approval.

3. Statutory provisions.

When such appeal is dismissed by the appellate court, the cause shall be remanded to the justice of the peace to be thereafter proceeded with as if no appeal had been taken.

4. Justices of the peace §162(1)—Justice cannot issue execution on judgment if appeal bond filed and approved and before remand.

A justice of the peace does not have jurisdiction to issue an execution on a judgment rendered by him after the appeal bond has been filed and approved and before such cause has been remanded back to the justice of the peace by the appellate court.

5. Justices of the peace §135(4)—Attempt to levy void execution or to collect under judgment may be enjoined.

Such execution so issued when the justice of the peace does not have jurisdiction to issue the same is void, and injunction is the proper remedy to enjoin a levy under such void execution, or the issuing of any further executions, or an attempt to collect such judgment so appealed from.

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

Action by the Pleasant Hill Oil Company against F. D. Voorhees and others for an injunction. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Chas. B. Steele, of Okmulgee, and Edwin A. Ellinghausen and John G. Ellinghausen, both of Sapulpa, for plaintiff in error.

Grace Arnold and W. D. Cope, both of Drumright, for defendants in error.

MILLER, J. This action was commenced in the superior court of Creek county by the Pleasant Hill Oil Company, a corporation, for the purpose of obtaining an injunction against F. D. Voorhees and defendant A. J. Bell as justice of the peace, and Thomas Sutherland as constable, to enjoin the issuing and levying of an execution on a judgment in favor of F. D. Voorhees rendered in the justice court before A. J. Bell. The parties will be referred to as they appeared in the court below.

The facts as disclosed by the record are as follows:

On June 13, 1916, F. D. Voorhees as plaintiff filed his bill of particulars in the court of R. G. Clements, a justice of the peace of Drumright, in Creek county, against the Pleasant Hill Oil Company, to recover damages the said F. D. Voorhees claimed to have sustained by reason of the wrongful acts of the Pleasant Hill Oil Company in evicting the plaintiff from his residence. Thereafter A. J. Bell was elected justice of the peace as successor to R. G. Clements. Various continuances were had in this case, and on March 24, 1917, the cause having been regularly set for trial, and the defendants failing to appear, a default was taken before A. J. Bell, justice of the peace, but, owing to the fact that the papers had been lost, the said justice of the peace took the case under advisement for three days, and this statement appears in his order:

"This court further finds that he will withhold rendition of judgment upon this finding until March 27th, 1917, awaiting a further search for the files."

Thereafter, and on March 27, 1917, the said A. J. Bell, justice of the peace, rendered judgment in favor of the plaintiff, F. D. Voorhees, and against the defendant, Pleasant Hill Oil Company, for the sum of \$103.15. The record of the justice of the peace shows that an appeal was asked and granted and the bond approved. This bond was approved by A. J. Bell, justice of the peace, and is so certified by him on his justice docket. This entry on the docket is not dated, but evidence was introduced on the injunction proceedings in which A. J. Bell, justice of the peace, testified that according to his recollection it was on the evening of the 27th that the bond

was filed. John R. Hadley, president of the Pleasant Hill Oil Company, testified that it was on the 27th, the date the judgment was rendered, that he filed the appeal bond with A. J. Bell as justice of the peace. A. J. Bell further testified the appeal was taken to the county court of Creek county, and that within 10 days he mailed the papers in the case, together with the appeal bond and transcript of the record, to the clerk of the county court at Sapulpa. There can be no question but what the Pleasant Hill Oil Company filed its appeal bond and designated the court to which the appeal was taken within the 10 days after judgment was rendered.

John R. Hadley further testified that some time thereafter he went to the county court at Sapulpa to find out when the case would be set for trial, and was then informed that the papers had not arrived in that court. He left word with Judge Frazier, the county judge, requesting that he be notified when they came. He afterwards made further inquiry, but the papers were not there. It is admitted that the papers in the appeal never did arrive in the office of the clerk of the county court of Creek county.

Thereafter the attorneys for F. D. Voorhees made repeated demands upon the Pleasant Hill Oil Company to get their appeal lodged in the appellate court and threatening, if they failed to do so, that execution would be issued by the justice of the peace. Pursuant to these demands and the failure of the Pleasant Hill Oil Company to comply therewith, the plaintiff, Voorhees, demanded and caused an execution to be issued by A. J. Bell, justice of the peace, and placed it in the hands of Thomas Sutherland as constable to be executed according to law. This action was brought for the purpose of enjoining the constable from levying said execution and enjoining the justice of the peace from issuing any further executions on said judgment and enjoining F. D. Voorhees from attempting further to collect said judgment so rendered by the said A. J. Bell as justice of the peace on March 27, 1917.

A temporary injunction was granted by the superior court of Creek county, and a trial was had on the petition of the plaintiff herein for a permanent injunction. At the close of plaintiff's testimony, defendants demurred to the evidence. The demurrer was sustained, and judgment vacating the temporary injunction and denying permanent injunction was rendered against the plaintiff. From this judgment the plaintiff appealed, and assigns five specifications of error. These may all be summed up in one question: Did the justice of the peace have jurisdiction to issue the execution? It certainly did not.

The trial court fell into the error of trying to decide where jurisdiction was in the case of Voorhees against the Pleasant Hill Oil Company. That is not the question that confronted the trial court, neither is it the ques-

tion that confronts this court, and we are not expressing any opinion on that.

Counsel for plaintiff in error cite a number of authorities, some of which bear upon this question, but none of which have decided the exact question presented here under a similar state of facts. Counsel for defendants in error say they are unable to cite any decisions or opinions in point with the conditions and circumstances like the case at bar, although a diligent search has been made.

Section 5465, Revised Laws of 1910, relating to appeals from the justice of the peace, is as follows:

"In all cases not otherwise specifically provided for by law, either party may appeal from the final judgment of the justice of the peace to the district, superior or county court of the county, and the party appealing shall advise the justice, of the court to which the appeal is to be transferred, and the justice shall thereupon enter upon his docket an order specifying the court having jurisdiction of such appeal. The appeal bond hereinafter provided for shall also designate the court to which the appeal is taken."

[1] It appears that the justice of the peace did not enter upon his docket an order specifying the court having jurisdiction of such an appeal, but this was not the fault of the appellant, and the failure of the justice to so enter the order on his docket does not defeat the appeal, for section 5467, Revised Laws of 1910, provides:

"The appeal shall be complete upon the filing and approval of the undertaking or statement and affidavit. The justice shall immediately make out a certified transcript of his proceedings in the cause, and shall, within twenty days from the rendition of the judgment, deliver or transmit to the clerk of the county, superior or district court of his county the said transcript, the undertaking on appeal and all the papers in the cause; all further proceedings before the justice of the peace in the case shall cease and be stayed on the filing of the undertaking with said justice; no notice of appeal shall be required to be filed or served, and the case shall be tried de novo in the appellate court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed."

The Supreme Court of Kansas, in the case of *St. Louis-San Francisco Ry. Co. v. Hurst*, 52 Kan. 609, 35 Pac. 211, says:

"An appeal from the judgment of a justice of the peace is complete upon the filing and approval of the appeal bond or undertaking within 10 days from the rendition of the judgment."

In *Anderson v. Haslett*, 81 Kan. 532, 106 Pac. 296, the syllabus reads:

"Where a party desires to appeal from a judgment of a city court, and within ten days

from the rendition of the judgment filed with the clerk of such court a bond conditioned as required by law, with sufficient surety, he has done all that is required of him to perfect his appeal, and cannot be deprived of his rights by the failure or neglect of the judge of such court to approve the bond until after the time for appeal has expired.

"Where the judgment appealed from is rendered in a justice court, the filing of a sufficient bond with the justice is all that is required to perfect the appeal."

In the Chicago, R. I. & P. Ry. Co. v. Moore, 34 Okl. 199, 124 Pac. 989, paragraph 3 of the syllabus reads:

"An appeal from a judgment of a justice of the peace is perfected upon the filing and approval of the appeal bond or undertaking within 10 days from the rendition of judgment, and when such bond, accompanied by a transcript of the justice of the peace, and all the papers in the case, is received by the county court, said court is thereupon vested with jurisdiction of the action."

Under these sections of the statute and the Kansas and Oklahoma authorities above cited, it is clear that the Pleasant Hill Oil Company had appealed to the county court of Creek county from the judgment of the justice of the peace when it filed its appeal bond and the same was approved by the justice of the peace.

[2] Section 5467, supra, then provides:

"All further proceedings before the justice of the peace in the case shall cease and be stayed on the filing of the undertaking with said justice."

If all further proceedings are stayed, the hand of the justice is stayed from issuing an execution.

[3] Section 5469, Revised Laws of 1910, provides in part as follows:

"If the appeal be dismissed the cause shall be remanded to the justice of the peace, to be thereafter proceeded in as if no appeal had been taken."

[4] This makes it very clear that, when the appeal has once been taken, the hand of the justice is stayed until the appeal has been dismissed by the court to which it is appealed and remanded back to the justice court. This appeal had never been remanded back; therefore the hand of the justice was stayed, and he could not issue the execution. The attempt on the part of the justice of the peace to issue an execution when by the statutes all proceedings were stayed was a nullity, and its act was coram non judge and void.

[5] The plaintiff in this case invoked the proper remedy, and the permanent injunction should have been granted.

The judgment of the superior court of

Creek county is reversed, and the cause remanded, with instructions to overrule the demurrer to the evidence and grant the permanent injunction.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(82 Okl. 67)

TAYLOR et al. v. CALLAHAN. (No. 10151.)

(Supreme Court of Oklahoma. May 24, 1921.)

(Syllabus by the Court.)

1. Indians \S 16(1)—Guardian of minor allottees held authorized to make and county court to approve agricultural lease for one year.

Section 6 of the Act of May 27, 1906 (35 Stat. 313), conferred upon the county courts of this state jurisdiction over the person and property of minor allottees of the five civilized tribes, and the guardian of said minors appointed by the county court, have authority to lease for agricultural purposes the homestead allotment of the mother inherited by said minors, said minors being born since March 4, 1906, and the county court had authority to approve the agricultural lease for one year executed by the guardian.

2. Indians \S 16(1/2)—Lease by guardian of Creek minors held not void as an overlapping lease.

A lease made by a guardian of Creek minors of their inherited lands in July, 1917, for agricultural purposes for the year 1918, and approved by the county court, is not void as an overlapping lease, when it is not disclosed that the land had been leased for 1917, and nothing in the record to disclose that the lease executed in July, 1917, was not executed at the usual and customary time for leasing lands for agricultural purposes in that vicinity for the year 1918.

3. Sufficiency of petition.

Petition examined, and held to state facts sufficient to state a cause of action in favor of plaintiff, and it was not error to overrule a general demurrer thereto.

Appeal from Superior Court, Okfuskee County; John L. Norman, Judge.

Action by Sam Callahan against L. C. Taylor and another, to recover real estate. Judgment for plaintiff on demurrer, and defendants appeal. Affirmed.

Rowe & Phillips, of Okemah, for plaintiffs in error.

Huddleston & Stephenson, of Okemah, for defendant in error.

McNEILL, J. This action was commenced in the superior court of Okfuskee county by Sam Callahan, to recover possession of certain lands occupied by L. C. Taylor and Thomas Bass. The petition alleged the land

was duly allotted to Judy Scott, a full-blood Creek Indian, as her homestead; that, in April, 1917, Judy Scott died, and left two minor children, Thomas Washington, age 1 year, and George Washington, age 3 years, who inherited said land; that John Artusle, the duly appointed and acting guardian of said minors, on the 10th day of July, 1917, for a valuable consideration made, executed and delivered to plaintiff an agricultural lease upon said land for the year 1918, and the lease was presented to the county court of McIntosh county, where the guardianship proceedings were pending, and on the 13th day of July, 1917, the county court made an order approving said lease. Plaintiff alleges that, by virtue of said lease contract, he was entitled to possession of said lands from the 1st of January, 1918, to the 31st day of December, 1918, and defendants were unlawfully withholding possession thereof. A copy of the lease and the order of the county court approving said lease were attached to and made a part of the petition. To this petition the defendants filed a demurrer, upon the ground the petition did not state facts sufficient to state a cause of action in favor of the plaintiff and against the defendants. The demurrer was overruled by the court, and the defendants excepted to the ruling of the court, and elected to stand upon their demurrer, and refused to plead further; and the court rendered judgment for plaintiff. From said judgment the defendants have appealed to this court.

[2] The only question for consideration upon appeal is whether the court erred in overruling the demurrer. Plaintiffs in error state this is an overlapping lease and void for the reasons stated in the case of *Brown v. Van Pelt*, 64 Okl. 109, 166 Pac. 102. It being their contention that, the original allottee being a full-blood Creek Indian, and the land being her homestead, she could not in July, 1917, lease the land for agricultural purposes for the year 1918, and the same restrictions are now upon the land inherited by the minor children born since March 4, 1906. This position is not well taken, if we concede, which we do not, that the same restrictions are upon the homestead inherited by the minors. Plaintiff's position is still untenable, for this court held the original allottee might lease the homestead. In the case of *Mullen v. Carter*, 173 Pac. 512, the tenth syllabus reads as follows:

"Under Act May 27, 1908, restricted homestead allotments may be leased for the ensuing crop year during existence of unexpired lease, the new lease to begin at the expiration of the existing lease, if made near the termination of the existing lease, and if necessary in the course of cultivation."

Plaintiff in error attempts to assume that *Brown v. Van Pelt*, supra, holds that a lease

entered into in July for the ensuing year would be overlapping, and void, but the court made no such holding, and stated as follows:

"It seems to us that the time of making the lease during the existence of a prior valid lease would depend upon many circumstances, and it would be hard to make a rule applicable to all cases. In those sections of this state where wheat is the principal crop, it would be important to make arrangements for the succeeding crop year much sooner than in those sections of the state where cotton and corn are the principal crops."

[1] There is nothing in the petition to disclose that the lease was not made at the usual and customary time in that vicinity to contract for leases for the ensuing year. Section 6 of the Act of May 27, 1908 (35 Stat. 313), provides that the county court should have jurisdiction over the persons and property of the minor allottees of the five civilized tribes. Therefore the court would have authority, in proper proceedings, to approve the agricultural leases for one year on the homestead of deceased allottee inherited by the minors born since March 4, 1906.

[3] The petition stated a cause of action, and it was not error for the court to overrule a demurrer thereto.

The judgment of the court is therefore affirmed.

HARRISON, C. J., and PITCHFORD, MILLER, and NICHOLSON, JJ., concur.

(81 Okl. 294)

BROCKHAUS v. HEATON. (No. 10104.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 1001 (1)—Verdict supported by competent evidence not disturbed.

In a civil action, triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal.

Appeal from District Court, Woodward County; J. C. Roberts, Judge.

Action by J. M. Heaton against H. A. Brockhaus. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Nichols and S. M. Smith, both of Woodward, for plaintiff in error.

W. H. Springfield, of Woodward, for defendant in error.

JOHNSON, J. This is an appeal from the district court of Woodward county; Hon. J. C. Roberts, Judge.

On April 5, 1917, J. M. Heaton, as plaintiff below, commenced an action against H. A. Brockhaus, as defendant below, to recover damages for the breach of the terms of an agricultural lease on certain premises situated in said county, for the year 1917, which case, being tried to a jury, resulted in a verdict and judgment therein in favor of the plaintiff in the sum of \$250. The defendant filed a timely motion for new trial, which being overruled by the court, the defendant regularly commenced this proceeding in error to reverse said judgment.

For convenience the parties will hereinafter be referred to as plaintiff and defendant as they respectively appeared in the trial court.

The parties entered into a written contract for the lease on the premises, and the plaintiff charged in the petition that the defendant breached the contract on failure and refusal to place him in possession of the land in time to make a crop for the year covered by the lease, and on account of such failure he was deprived of the use of the premises for that year.

The plaintiff offered his lease in evidence and testified in his own behalf, the facts fully sustaining his cause of action, and introduced other witnesses corroborating his testimony. The defendant testified in his own behalf, his testimony conflicting more or less with that of the plaintiff, and at the conclusion of the evidence the court submitted the case to the jury by appropriate instructions.

The specifications of error of the defendant are general and go to the question of the court's ruling upon admitting and rejecting evidence, his rulings thereon being against the defendant, and in certain paragraphs of the court's instruction to the jury.

The only authorities cited by the defendant in his brief is the case of Nikkel v. Conaway, 27 Okl. 405, 112 Pac. 981, section 2239, 3 Elliott on Contracts, and section 4580, 5 Elliott, and Clark v. Rhoads, 79 Ind. 342, as supporting the defendant's claim that the instructions of the court on the measure of damages were erroneous.

We have examined the instructions of the court in the instant case on the measure of damages, and find that the same were correct under the facts of this case, and we think that the same was not in conflict with the principles announced in the authorities cited by counsel, nor was the jury misled thereby. The amount of the verdict was not excessive, and was fully sustained by the evidence.

We have likewise examined all the assignments of error made by the defendant going to the other questions and find that they are without merit. We have examined the entire record, and find that this case comes within the rule announced by this court that

in a civil action, triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown, in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal. Bunker v. Harding et al., 174 Pac. 749; Blasdel v. Gower, 173 Pac. 644; Shawnee National Bank v. Pool, 167 Pac. 904; Chicago, R. I. & P. Ry. Co. v. Pruttitt, 170 Pac. 1143.

The judgment of the trial court is therefore affirmed.

HARRISON, C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

(81 Okl. 294)

JOHNSTON v. BURNETT et al. (No. 2409.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Indians §15(1) — Deed pursuant to contract in violation of restrictions void, although restrictions removed.

Where a Choctaw Indian, prior to the act of Congress of April 26, 1906, enters into a contract for the sale of a part of his allotment, the alienation of which was restricted at the time of entering into the contract, thereafter obtains the removal of his restrictions, and pursuant to said contract executes a deed for said land, held, that such deed is void, and does not pass title.

2. Indians §15(1) — Effect of act of Congress as to invalidation of deeds stated.

Section 19 of the Act of Congress of April 26, 1906, is not retroactive, but it does render invalid any deed made by a Choctaw Indian after the passage of such act if said deed was made in carrying out a contract for the sale of his restricted lands, entered into before the passage of such act.

3. New trial §72 — Motion based on insufficiency of evidence searches record, and will be granted if judgment against weight of evidence.

In an action invoking the equitable aid of the court to set aside a deed, and a motion for a new trial is filed setting up as one of the grounds that the judgment of the court is not supported by the evidence, such motion searches the entire record, and where it appears that the judgment is clearly against the weight of the evidence, such judgment will be reversed.

Appeal from District Court, Grady County; Will Linn, Judge.

Action by Albert Johnston, a Choctaw Indian, against John J. Burnett and others, to recover a part of a surplus allotment of plaintiff. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

B. C. Wadlington and A. Wayne Wadlington, both of Ada, for plaintiff in error.

Thos. B. Losey, of Chickasha, and James L. Brown, of Oklahoma City, for defendants in error.

MILLER, J. This action was commenced in the district court of Grady county by Albert Johnston as plaintiff against John J. Burnett, Edward C. Davis, and D. A. Davis as defendants, to recover a tract of 60 acres of land located in Grady county, which was allotted to Albert Johnston as a member of the Choctaw Tribe of Indians. Trial was had to the court without a jury, and judgment rendered in favor of the defendants and against the plaintiff. Plaintiff appealed. The parties will be referred to as they appeared in the court below. The undisputed facts are as follows:

The land in controversy in this action was a part of the surplus allotment of the said Albert Johnston, which he received as a part of his distributive share of the lands of the Choctaw Tribe of Indians. It was duly conveyed to him by allotment deed or patent, bearing date of December 28, 1905, which was thereafter approved by the Secretary of the Interior on March 27, 1906, and was filed for record with the Superintendent of the Five Civilized Tribes on April 2, 1906.

On March 10, 1906, Albert Johnston entered into a written contract with E. C. Davis, one of the defendants herein, for the sale of the 60 acres of land in controversy herein, whereby he agreed to sell and convey to said E. C. Davis said land in consideration of \$600, \$100 of which was paid in cash and \$500 to be paid as soon as title was accepted. September 25, 1906, the restrictions of Albert Johnston on the sale of the above-described lands were removed by the Secretary of the Interior to take effect in 30 days, which would be October 25, 1906. October 24, 1906, Edward C. Davis conveyed by quitclaim deed to the said Albert Johnston all rights he had in and to said lands, and specifically mentioned and leased all rights under the contract of March 10, 1906. October 27, 1906, Albert Johnston conveyed by warranty deed to D. A. Davis, one of the defendants herein, the said land for a purported consideration of \$750, and on the same day and immediately thereafter said D. A. Davis and Fannie Davis, his wife, conveyed said land by warranty deed to Edward C. Davis for a purported consideration of \$900. On January 24, 1908, Edward C. Davis conveyed said land by warranty deed to John J. Burnett, one of the defendants herein. These lands were under restriction and inalienable at the time of making the contract of March 10, 1906, and until October 25, 1906, which was 30 days after the removal of the restrictions of Albert Johnston.

[1] The plaintiff contends that the deed executed by Albert Johnston on October 27,

1906, was a part and parcel of the same transaction as the making of the contract on March 10, 1906, and was done for the purpose of carrying into effect said contract; that the conveyance to D. A. Davis was merely a makeshift; that he was a go-between the said Albert Johnston and Edward C. Davis; that all of said transactions were absolutely void, and that said defendant John J. Burnett had notice of all of them; and that the recording of the instruments filed in said cause was sufficient to impart notice to the said John J. Burnett. After a careful examination of the record, we agree with the contentions of plaintiff. The plaintiff makes several assignments of error; but, as they are not discussed separately in the brief of either plaintiff or defendants, it will not be necessary to discuss them separately here.

Section 11, Act Cong. June 28, 1898 (30 Stat. 498), provides as follows:

"Provided further, that the lands allotted shall be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held."

Section 29 of the Original Choctaw-Chickasaw Allotment Agreement, adopted as section 29 of the act of Congress of June 28, 1898, provides in part as follows:

"All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homestead for minors to be made as provided herein in case of allotment, and the remainder of the land allotted to said member shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.

"That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void."

Section 15 of the Choctaw-Chickasaw Supplemental Agreement of the Act of Congress, approved July 1, 1902 (32 Stat. 642) reads:

"Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said land be sold except as herein provided."

Section 19 of the act of Congress of April 26, 1906 (34 Stat. 144), reads in part as follows:

"And every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void."

The oral testimony offered in this case discloses the following state of facts:

Albert Johnston testified: He was a member of the Choctaw Tribe of Indians by blood, and the allottee of the land in controversy. He was acquainted with Edward C. Davis, commonly known as Ed. Davis. He entered into the contract for the sale in March, 1906, and received an advance payment of \$100 at the time of signing the contract. He did not know D. A. Davis, had no dealings with him, and did not know the deed he signed was made to D. A. Davis. All of his dealings were with Ed. Davis. Ed. Davis came to Roff, Okl., about 30 days before the making of the deed on October 27th, took the witness to Chickasha, and requested him to stay there until he could make the deed; that is, until the 30 days had expired after the removal of the restrictions. That he signed the deed in compliance with the terms of the contract he had made in March, and that Ed. Davis charged him \$80 for board for the time he kept him at Chickasha, and paid him \$420. This made up the \$600 provided for in the contract. He stated he did not know that the consideration in the deed was \$750, and that all he received was the \$100 paid in March and \$420 paid in October and his board for a month. The quitclaim deed executed by Edward C. Davis on October 24, 1906, was never delivered to this witness. That he knew nothing about it; never heard of it until about the time of the trial of this case.

D. A. Davis testified: That he did not know Albert Johnston and had no dealings with him. That he bought the land through his brother, Edward C. Davis, and a Mr. Stone, who was in partnership with Edward C. Davis in the real estate business. He made the deal for the land on the morning of October 27, 1906, and received the deed in the afternoon of the same day. He did not pay Albert Johnston anything for the land. He contracted to pay \$750 for the land with his brother, Edward C. Davis, and Mr. Stone, but he never paid any money to any one. He and his wife on the afternoon of the day they received the deed executed a deed to his brother, Edward C. Davis, in consideration of \$900, and that he received \$150 profit. His brother paid him the \$150 profit, and he supposed his brother settled with Johnston. That his wife came to an office in Chickasha on the afternoon of the day he was to receive the deed so they could immediately execute the deed to Edward C. Davis.

Edward C. Davis testified: He bought the land from D. A. Davis, and that D. A. Davis bought the land from Albert Johnston. Ed. Davis and Stone were in the real estate busi-

ness together, and they sold the land to D. A. Davis, and the title he had he obtained by buying the land from his brother. That witness made a contract with Albert Johnston on the 10th day of March, 1906, and had it recorded, and paid him \$100. The Indian agreed to pay him the \$100 back if he would sell the land for him, and the \$100 was charged as commission against the Indian. That he thinks Albert Johnston got \$600 for the land and paid \$100 commission. That he (witness) got \$50; Nick Wooderidge, another Indian, got \$50; and Stone got \$50. That they deducted \$150 from the \$750 recited in the deed, and that he paid Albert Johnston \$600 in money, clothes, and other things. His brother, D. A. Davis, did not deal with the Indian at all, but that he and Stone dealt with the Indian. He did not remember whether he had told Albert Johnston about quitclaiming the land back to him or not.

This trial was had on the 6th day of November, 1917, and the court rendered judgment in favor of the defendants on this testimony. This testimony clearly shows the deed was executed pursuant to the contract of March 10, 1906, and for the specific purpose of carrying out said contract. We do not see how a court can reach any other conclusion.

[2] It is contended that the inhibition on the contract is the act of April 28, 1906. The contract was made prior to that date, and this statute is not retroactive.

In *Simmons v. Whittington*, 27 Okl. 356, 112 Pac. 1018, paragraph 1 and 2 of the syllabus read:

"A deed conveying, or a contract for the sale of, a portion of a surplus allotment, made by a Choctaw Indian by blood before the removal of restrictions upon her power to alienate same, in violation of Act Cong. June 28, 1898, c. 517, § 29 (30 U. S. St. at L. p. 507), and of Act of Congress July 1, 1902, c. 1362, §§ 15, 16 (32 U. S. St. at L. p. 643), is void.

"The act of Congress, approved April 21, 1904 (33 U. S. St. at L. p. 204), authorizing the removal of all restrictions upon the alienation of allotted lands of members of the Five Civilized Tribes by blood, except minors and except as to homesteads, upon approval of the Secretary of the Interior under such rules and regulations as he may prescribe, authorizes the Secretary of the Interior to provide by general rule that no order removing the restrictions of any such allottee shall become effective until 30 days after its date; and a deed executed by an allottee after the date of the approval of the order removing restrictions upon the power of the allottee to alienate, but before the expiration of 30 days from the date of such order and approval, is void."

Goodrum v. Buffalo, 162 Fed. 817, 89 C. C. A. 525, the court says:

"The language of the act and the patent could not have been more exact and clear to express the purpose and policy of the government to deny the power and right of these allottees

to dispose of the lands in any manner until after the stated period of 25 years. As the greater includes the lesser, no contract, agreement, or obligation in form entered into by the allottee or his heirs within the limitation period could possibly have the effect to operate as, or result in, a transfer of the title to these lands to a third party. There is but one opinion among the courts, with the single exception of the ruling in said United States Court of the Indian Territory, as to the construction of such acts of Congress and patents made thereunder, and that is that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian allotments during the period of such limitation are abortive; and this for the palpable reason that it is a period of absolute disability on the part of the Indian to alienate his lands."

The act of Congress of April 26, 1906, is not retroactive. In an opinion by Rosser, C., *Casey v. Bingham*, 37 Okl. 484, 132 Pac. 663, it says in paragraph 3 of the syllabus:

"The provision of Act April 26, 1906, c. 1876, § 19 (34 St. at L. 144), that 'every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void,' was not retroactive, and did not affect deeds executed prior to its passage."

In this case the deed on which the defendants rely for their title was made subsequent to the passage of the act of Congress of April 26, 1906, and the deed is void. If this had been an independent transaction, with no reference whatever to the contract of March 10, 1906, it would present a different question. It is clear to us that the inequity of the March contract was sought to be covered up by the ruse in making the deed to D. A. Davis. The deed having been made after the act was passed and pursuant to the contract made before the passage of the act and in violation of the plain provisions of the act, it clearly falls within the decision of this court in the case of *Folsom v. Jones*, 173 Pac. 649:

"A deed conveying, or a contract for the sale of, a portion of a surplus allotment, made by a Choctaw Indian by blood before the removal of restrictions upon his power to alienate same, in violation of Act Cong. June 28, 1898, c. 517, § 29 (30 U. S. St. at L. 507), and of Act Cong. July 1, 1902, c. 1862, §§ 15, 16 (32 St. at L. 642, 643), is void.

"A deed to the surplus allotment of a full-blood Choctaw Indian, executed May 14, 1906, after the order of removal of restrictions against the alienation thereof, made in pursu-

ance of a contract to convey such lands 'as soon as the time arrives when they [the allottee and wife] can lawfully do so,' entered into prior to the removal of restrictions, is void as to the grantee therein by reason of section 19 of the act of Congress of April 26, 1906 (chapter 1876, 34 Stat. at L. p. 144).

"In an action brought by a full-blood Choctaw Indian to recover the possession of his surplus allotment attempted to be conveyed by him pursuant to an agreement made void by section 19 of the act of April 26, 1906 (34 Stat. at L. 144), the petition need not allege a tender or offer to return the consideration received on account of such invalid conveyance."

In *Mann v. Brady*, 80 Okl. 299, 196 Pac. 346, this court said:

"The policy of the government is to exercise a protecting control over the Indian and his lands, and any contract, made in disregard of that policy, which cannot be carried to full fruition because of such governmental protection, is void."

[3] Where an action is tried to the court, and the judgment of the trial court is clearly against the weight of the evidence, and is not supported by the evidence, it is the duty of this court to set aside such judgment.

In *Cudjo v. Smith et al.*, 196 Pac. 668, this court said:

"In an action invoking the equitable aid of the court to set aside a deed, and a motion for a new trial is filed setting up as one of the grounds that the judgment of the court is not supported by the evidence, such motion searches the entire record; and, where it appears that the judgment is clearly against the weight of the evidence, such judgment will be reversed."

The judgment of the trial court is reversed, with instructions to render judgment in favor of the plaintiff for the land in controversy and quieting his title thereto, and render judgment in favor of the plaintiff for the value of the rents and profits in accordance with the agreed statement of facts, and against each and all of the defendants, as against this amount, defendants are entitled to a set-off of the amount paid Johnston for the land, together with interest, and render judgment in favor of defendant John J. Burnett, and against defendants D. A. Davis and Edward C. Davis, on account of a breach of their warranty for the amount paid by him as the purchase price of said land, together with interest as provided by law.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(32 Okl. 69)

REECE v. BENGE et al. (No. 10184.)

(Supreme Court of Oklahoma. May 24, 1921.)

(Syllabus by the Court.)

1. Indians \Rightarrow 15(1)—Will of Cherokee citizen of half blood, before selection of allotment, held ineffectual to convey allotment. .

A will of a Cherokee citizen of the half blood, before his allotment had been selected, was ineffectual to convey said allotment.

2. Indians \Rightarrow 15(1)—Wills \Rightarrow 25—Rights of Cherokee Indian to make will stated.

A member of the Cherokee Tribe of Indians had power to make a will prior to the Act of April 26, 1906, but prior to said time he had no right to alienate his allotment by will.

3. Indians \Rightarrow 15(1), 18—Descent of allotments held governed by law at time of issuance of certificate; will held ineffectual to convey interest in allotment prior to issuance of certificate.

B., a half-blood member of the Cherokee Tribe of Indians, made a will in 1902, attempting to convey the lands of the Cherokee Nation and the improvements thereon occupied by him, and thereafter died in 1902, and thereafter his executor selected the lands occupied by him as his allotment. *Held*, at the time of his death the deceased was not seized of an inheritable estate of the lands thereafter allotted to him, or his heirs, and descent of said allotment is cast at the date the certificate of allotment is issued, and the law in effect at that particular time governs in the devolution of said allotted land. *Held*, further, that the will was ineffectual under the facts above stated to convey any interest in the allotment or the improvements thereon.

Appeal from District Court, Muskogee County; R. P. De Graffenreid, Judge.

Action by G. W. Benge and others against Jennie Reece and others. Judgment for plaintiffs on demurrer, and defendant named appeals. Affirmed.

R. M. Mountcastle, of Ft. Gibson, and Joseph C. Stone, Charles A. Moon, and Francis Stewart, all of Muskogee, for plaintiff in error.

Malcolm E. Rosser and Villard Martin, both of Muskogee, for defendants in error.

MCNEILL, J. This action was commenced in the district court of Muskogee county by G. W. Benge et al. against Jennie Reece et al. for possession of an undivided three-sevenths interest in and to certain lands. The petition alleged that the plaintiffs were the owners of an undivided three-sevenths interest in and to the land described, being the allotment of Samuel Houston Benge, deceased, and that plaintiffs were his heirs, and inherited an undivided three-sevenths interest, and were entitled to possession.

The defendant Jennie Reece filed an answer, alleging in substance the following facts:

That Samuel Houston Benge was a half-blood Cherokee citizen of the Cherokee Nation, and his name appeared opposite roll No. 4499. On the 24th day of October, 1902, he died. That at the time of his death he and his wife, Nancy Benge, were in possession of the land described in this controversy, occupying the same as a home. That he had improved and cultivated said land, and as such citizen he was entitled under the original Cherokee Agreement to have the land scheduled and patented to him as his allotment. That on April 17, 1902, he executed a good and valid will, and devised and bequeathed to the defendant Jennie Reece the land and improvements, subject to a life estate to his wife, Nancy Benge. That said will had been probated. A copy of the will is attached to the answer.

It is further alleged that after the death of Samuel Houston Benge in November, 1904, the lands described were selected by the executor of the estate of Samuel Houston Benge, deceased, as his allotment, and patent was duly issued and executed and acknowledged in the name of Samuel Houston Benge, deceased. The defendant contends that by virtue of the will she became the owner of said land, subject to the life estate of Nancy Benge, and that Nancy Benge died in 1917, and defendant was the sole owner of said land and improvements.

Plaintiffs filed a demurrer to said answer, which was sustained by the court, and the court decreed that plaintiffs were the owners of three-sevenths interest in said land, and Jennie Reece, also, being an heir, was the owner of one-seventh interest in said land. From said judgment, Jennie Reece has appealed.

Plaintiff in error Jennie Reece asserts there are two questions involved: First. Was a Cherokee citizen capable of making a valid will to convey his allotment, where the will was made and the deceased died prior to enrollment and prior to the selection of his allotment? Second. Was said citizen capable of making a will which would have the effect of passing title to the improvements prior to the selection of the allotment?

[1, 2] The first question is not briefed by plaintiff in error, and she has apparently abandoned that position; but the two questions are so closely associated together that it is necessary to consider the decisions of this court relating to the first question in order to properly consider the second question. This court in the case of *Semple v. Baken*, 39 Okl. 563, 135 Pac. 1141, stated:

"A will of a member of blood of the Choctaw Tribe of Indians, made during or before the year 1904, before she has been enrolled as a member of the tribe, and before her allotment

has been selected, was ineffectual to convey her allotment."

In the case of *Chouteau v. Chouteau*, 49 Okl. 105, 152 Pac. 373, it was held:

"A full-blood Creek Indian had the power to make a will prior to Act April 26, 1906, 34 Stat. 145, c. 1876, § 23; but prior to this law he had no right to alienate his allotment by will."

See, also, *Wilson v. Greer*, 50 Okl. 387, 151 Pac. 629; *Lynch v. Franklin*, 37 Okl. 60, 130 Pac. 599

[3] The will in the instant case was executed in April, 1902, and the allottee died before his allotment was selected. By applying the principle announced in the case cited heretofore, the will was ineffectual to convey any interest in the allotment. It is admitted that Samuel Houston Bengé, prior to the time of his death, occupied the identical land, which was a part of the lands of the Cherokee Nation, and built improvements upon the lands, and it is contended the improvements were his personal property, and the will would convey his personal property.

The substance of the decision of this court in the case of *Chouteau v. Chouteau*, supra, was that a member of the Five Civilized Tribes had power to make a will prior to the Act of April 26, 1906 (34 Stat. 137), and the same would convey whatever property he could convey, but he could not convey his allotment by will prior to April 26, 1906. The will in the instant case was made prior to the Cherokee Agreement, which was approved July 1, 1902 (32 Stat. 716), but the allottee died after the agreement was in force and effect, so that his rights to alienate or convey the property depends upon law as it existed at the time of his death. It is contended the improvements under the Cherokee Agreement at the time of his death was personal property separate and distinct from the real estate or the allotment thereafter selected for him. Section 9 of the Cherokee Treaty or Agreement, provided for the appraisal of the lands at their true value, but said appraisal should be made without reference to improvements which might have been located thereon.

Section 11 of the Agreement provided how the lands should be allotted and selected, and contained the following provision:

"Which land may be selected by each allottee so as to include his improvements."

It was not compulsory that the allottee select lands upon which he had improvements, but he was left free to select or be allotted other lands, although he was given the right to select lands upon which his improvements were situated. Section 20 of the Agreement provided, if any person who

died subsequent to the 1st of September, 1902, and before receiving his allotment, the allotment should be selected by his duly appointed administrator or executor, and the lands allotted descended to his heirs according to the laws of descent and distribution. In the case of *McDonald v. Ralston*, 166 Pac. 405, it was held that, if a Creek citizen died before receiving an allotment, at the time of his death he was not seized of an inheritable estate in the lands afterwards allotted to him or his heirs, and the descent of such allotment is cast at the date of the certificate of allotment is issued, and the law in effect at that particular time governs in the devolution of said allotted lands. No provision was made in the Cherokee Agreement for the removal of the improvements upon the lands of the Cherokee Nation by the person, who had placed them upon the lands, when said member did not select said lands as his allotment, but permitted them to remain as part of the land.

Whether the will would be sufficient to have transferred the allottee's interest in the improvements, and given the plaintiff herein, or her mother, the right to have selected said land as their separate and individual allotment, it is unnecessary to determine for they did not exercise said right, but permitted the lands to be allotted to the deceased allottee, and when so allotted the lands, with all the improvements, descended as of the date of the certificate to the heirs. It therefore follows that allottees who died before receiving their allotment, not being vested with an inheritable estate, and the descent of the allotment was cast at the time the certificate of allotment was issued, and no provision made for the removal or sale of the improvements at the date of the certificate of allotment, the improvements would be considered a part of the land and descend as such. Section 14 provided that the lands allotted should not be incumbered, taken, or sold to satisfy any debt or obligation, or be alienated by the allottee or his heirs before the expiration of five years from the date of ratification of the act. The purpose of this section was to grant to the allottee or his heirs the land free from all incumbrance, and when the land was once allotted it included the land with all the improvements thereon.

We therefore are of the opinion that the will did not have the force and effect of separating the improvements from the land, and passed title thereto; but the land, with the improvements, descended to the heirs on the date of the certificate of allotment, and the court did not err in sustaining the demurrer to the petition.

HARRISON, C. J., and PITCHFORD, MILLER, and NICHOLSON, JJ., concur.

(52 Okl. 71)

HENRYETTA SPELTER CO. et al. v.
GUERNSEY et al. (No. 9997.)

(Supreme Court of Oklahoma. May 24, 1921.)

*(Syllabus by the Court.)*1. Pleading \S 347—Judgment on pleadings held erroneous where issue of fact presented.

Plaintiff sued for possession of an electric motor, basing the action upon a title note containing a mortgage clause descriptive of the motor sought to be recovered. Defendant answered by unverified general denial, and by alleging further that they held possession under a prior mortgage which had been legally foreclosed, and that they were purchasers in good faith and for a valuable consideration at said foreclosure sale, and that they had no knowledge of plaintiff's lien. Plaintiff replied to the answer, and thereafter filed motion for judgment on the pleadings, which motion was sustained. *Held*, the court erred in rendering judgment on the pleadings.

2. Pleading \S 343—Motion for judgment on pleadings should be denied where issue of facts presented.

Where an issue of fact is presented by the pleadings, it is error to sustain a motion for judgment thereon.

3. Pleading \S 343—Judgment on pleadings erroneous where plaintiff files reply to new matter in answer.

Where plaintiff files reply to new matter set up in defendant's answer, thus putting in issue the new matter in defendant's answer, it is error to render judgment on the pleadings.

4. Pleading \S 291(1)—Unverified general denial held to admit execution of written instrument, but not matters extraneous thereto.

Under section 4759, Revised Laws 1910, a general denial unverified admits the execution of a written instrument, but admits only its execution and whatever legal effect the instrument may have, but does not admit any matter extraneous to the instrument itself.

Appeal from District Court, Okmulgee County; M. L. Bozarth, Judge.

Action by George T. Guernsey and another, as receivers for the Independence Brick Company, against the Henryetta Spelter Company and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Joseph P. Rossiter and Hummer & Foster, all of Henryetta, for plaintiffs in error.

McCrory, Johns & Shackelford, of Okmulgee, for defendants in error.

HARRISON, C. J. This cause is here upon a transcript, being an appeal from a judgment on the pleadings. It is in the nature of a replevin action, having been brought for possession of a certain electric motor, or for judgment for the value thereof fixed at \$557.48.

Defendants in error were plaintiffs below, and will be so designated here. Plaintiffs in error will be referred to as defendants.

Plaintiffs sued defendants for possession of the motor in question, basing their right to same upon a certain title note, which contained a mortgage clause covering the motor and retaining title to same until the note was paid, the note, which was attached to and made part of plaintiffs' petition, being as follows:

"\$557.48. Independence, Kan., May 16, 1914.

"Five months after date, for value received, I promise to pay Geo. T. Guernsey, trustee for Independence Brick Company, or order, the sum of five hundred fifty-seven and $\frac{48}{100}$ dollars, at the office of the Independence Brick Company, Independence, Kansas, with interest thereon at the rate of 10% per annum from date until paid, interest payable at maturity.

"This note is given for one 50 H. P. General electric motor and base, general description

3 phase, 60 cycle, 2,200 volts, 514 R. P. M. A.	
C. type	\$441 18
One paper pulley.....	14 30
100 new extra coils and supplies.....	70 00
4 dry press trucks.....	32 00

Total\$557 48

"And the express condition of the purchase and sale of said property for which this note is given is that the title to said property shall be and remain in the said Geo. T. Guernsey, trustee for Independence Brick Company, until said note shall be fully paid, and that the owner of said note shall at the maturity of said note, or at any time thereafter, or at any time before said maturity, when it shall deem itself insecure, have the right and is hereby authorized through itself or its agents to take possession of said property or any part thereof and without notice to any maker thereof, to sell the same or any part thereof at public or private sale, in its discretion, and from the proceeds of such sale to pay all costs of getting possession of such property and of making such sale, and to apply the balance of such proceeds on said note, and any remainder unpaid on such note shall be a balance owing thereon for the consideration of the use of said property, which balance the maker hereof agrees to pay.

"P. O. Address Henryetta, Okl.

"S. J. Allen."

The petition was duly verified.

The defendants filed an answer consisting of an unverified general denial, and of the additional allegations that the motor in question belonged to them by virtue of a prior mortgage covering the same motor, and by virtue of their purchase of said motor at a foreclosure sale which had been duly made in satisfaction of said mortgage. The mortgage, the notice of foreclosure sale, proof of posting notice, and return of sale were each attached to and made part of defendant's answer. The mortgage covered the following described property, to wit:

"All the buildings, tools, machinery, engines, motors, presses, equipment, and improvements belonging to said company located on block two (2) in Duden & Nelson's addition to the

city of Henryetta according to the plat of said addition of record.

"Also especially covering and including all increase of the above described stock."

The notice of chattel mortgage sale was as follows:

"Notice is hereby given that, in pursuance of a chattel mortgage given by the Henryetta Pressed Brick Company to John Smith and J. B. Swan, dated the 15th day of April, 1914, and filed in Okmulgee county, state of Oklahoma, upon which default has been made as follows: The debt secured has not been paid and upon which the amount due at this date is sixteen hundred and seventy-five dollars (\$1,675.00)—I will sell the property secured by said mortgage or so much thereof as will satisfy the said debt, with \$25.00 attorney's fee, and all costs of sale, according to the terms of said mortgage at public outcry to the highest bidder, on the 16th day of October, 1915, at ——— o'clock p. m., at the present location of the Henryetta Pressed Brick Company on block two (2) in Duden & Nelson's addition to the city of Henryetta, in this county; the said property being described as follows, to wit: All the buildings, tools, machinery, engines, motors, presses, equipment and improvements belonging to said company located on block two (2) in Duden & Nelson's addition to the city of Henryetta, according to the plat of said addition of record.

"Given and posted in the said county of Okmulgee, state of Oklahoma, this 6th day of October, 1915. John Smith and J. B. Swan, Mortgagees, by R. B. F. Hummer, Their Attorney."

The proof of posting notices was as follows:

"State of Oklahoma, Okmulgee County—ss.:

"I, R. B. F. Hummer, being first duly sworn according to law, upon oath state that I posted true and correct copies of the above notice in five (5) public places in the city of Henryetta, Okla., as follows: One posted in the United States post office; one in the entrance to the old post office building; one in the entrance of the Hudson Building; one in the entrance to the opera house; and one in the entrance to the Steckleberg Building. Said notices were posted by me at said places on the 6th day of October, 1915. R. B. F. Hummer.

"Subscribed and sworn to before me this 16th day of October, 1915.

"[Seal.] E. W. Smith, N. P.
"My commission expires July 8, 1919.
[Seal.]"

And the return of sale was as follows, to wit:

"On this the 16th day of October, 1915, at 2:30 p. m. at the location of the Henryetta Pressed Brick Company on block two (2) in the Duden & Nelson addition to the city of Henryetta, Okmulgee county, Okla., sale was had of the property described in the within notice, sale being conducted by J. O. Hamilton, and bids received as follows:

C. H. Kellogg.....	\$ 800 00
William Williamson.....	850 00
Smith & Swan, by J. B. Swan.....	1,000 00

"Whereupon, the bids being closed, the property was sold to Smith & Swan for the sum of \$1,000.00. R. B. F. Hummer, Attorney."

Plaintiffs filed a reply to defendants' answer, the reply consisting of a general denial.

Upon the issues thus made, the plaintiffs filed motion for judgment on the pleadings, and the court sustained it and rendered judgment against defendants for the return of the property or for the payment of \$557.48, with interest at 10 per cent. from date of plaintiffs' title note, May 16, 1914.

Defendants ask a reversal upon the ground that the pleadings presented controverted issues of fact not determinable from the pleadings themselves, and that the court erred in rendering judgment on the pleadings.

Plaintiffs claim that their petition being based upon a written instrument and being duly verified, and defendants' answer being unverified, and being based upon a mortgage which did not describe nor include the same motor described and included in plaintiffs' title note, constituted no defense to plaintiffs' action, and that therefore the judgment should be affirmed. It is evident that the court rendered judgment in favor of plaintiffs on the assumption that plaintiffs' note described the motor which defendant had in his possession, and that the mortgage which defendant relied upon did not describe the motor he was using and holding.

[1] From an examination of the pleadings we must hold that the court erred in rendering judgment thereon.

The plaintiffs' right to possession depended necessarily upon the description of the motor contained in their title note, and upon the fact that defendants wrongfully retained possession of the identical motor. The petition alleged that defendants had possession of the motor described in their title note, and had come into possession of same and wrongfully withheld possession of same under "an unauthorized and void sale," and that defendants had full knowledge of plaintiffs' lien upon the motor and title to same at the time of said sale.

But defendants alleged that their note and mortgage was given one month prior to the date of plaintiffs' title note, and about three months prior to the recording of plaintiffs' title note, and that they were innocent purchasers in good faith and for a valuable consideration. They further alleged that default was made in payment of their mortgage at maturity, and that thereupon defendants caused said chattel mortgage to be foreclosed according to law, and alleged facts showing that the sale of said property was duly made according to law. It further appears from defendants' answer that the motor which they had in their possession was the one which they had purchased at the mortgage sale, and which had been used by the

Henryetta Pressed Brick Company on block 2 of Duden & Nelson's addition to the city of Henryetta.

It is evident, therefore, so far as disclosed by the pleadings, that the motor which plaintiffs claimed was the same motor which defendants purchased at the foreclosure sale, for both parties alleged such to be the fact. And it is also apparent from defendants' answer that the motor which they purchased at the foreclosure sale was the same motor described and included in their mortgage. Hence the motor described in plaintiffs' title note and the motor described in defendants' mortgage must have been one and the same; there being no allegation as to any other motor, nor as to there being more than one. This being true, the court could not determine which party was entitled to the motor, until it determined first from extrinsic evidence the issues of fact as to whether defendants' mortgage was a valid and prior mortgage, whether it had been foreclosed according to law, whether the sale was void, and whether defendants were purchasers in good faith for a valuable consideration, and without knowledge of plaintiffs' lien, all of which facts were put in issue by defendants' answer and plaintiffs' reply to the new matter therein.

[2, 3] The rule that where pleadings present an issue of fact it is error to sustain a motion for judgment on the pleadings has been definitely settled by this court (see *Smith v. Moon Buggy Co.*, 169 Pac. 875; *Franklin v. Ward*, 174 Pac. 244), and in *Peck v. First National Bank*, 50 Okl. 252, 150 Pac. 1039, it is specifically held that it is error to render judgment on the pleadings after plaintiff has replied to the new matter set up in defendants' answer.

[4] The facts that plaintiffs' action was based upon a written instrument, and that their petition was verified, and that the defendants' answer was not verified, had no further effect under section 5017, Rev. L. 1910, than to admit the mere execution and regularity of the title note sued upon. Defendants' unverified general denial did in legal effect admit the due execution of plaintiffs' title note, but did not admit the allegations of any facts extraneous to the written instrument itself. *Hastings v. Hugo National Bank*, 197 Pac. 457, not yet [officially] reported.

So, when defendants alleged that they owned the motor which they had in their possession, and that they had purchased same for valuable consideration at a valid foreclosure sale which was had under a valid and prior mortgage, they stated a complete defense against plaintiffs' right to take their motor away from them.

Therefore assuming, without deciding, that plaintiffs' petition stated a cause of action against defendants, we must hold that the

new matter set up in defendants' answer stated a defense to plaintiffs' petition.

The judgment is reversed, and cause remanded for retrial.

PITCHFORD, McNEILL, MILLER, and NICHOLSON, JJ., concur.

(82 Okl. 60)

GARRISON COAL CO. v. SEMPLE.
(No. 10206.)

(Supreme Court of Oklahoma. May 24, 1921.)

(Syllabus by the Court.)

1. Sales \S 201(2)—Rule that delivery by consignor to carrier for account of consignee is delivery to consignee may be changed by contract.

That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary, but this rule is not controlling where the parties have contracted differently.

2. Trial \S 232(1)—Instructions covering law as to each phase of case sufficient.

An examination of the instructions given discloses the court clearly and fairly covered the law as to each particular phase of the case, and under the law this is sufficient.

3. Appeal and error \S 1001(1)—Judgment supported by competent evidence not disturbed.

In a law case, where there is competent evidence or inferences that the jury can justifiably draw therefrom which reasonably supports the judgment rendered, this court will not disturb such judgment.

Appeal from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by C. Y. Semple against the Garrison Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. A. Paul, of Oklahoma City, for plaintiff in error.

Wilson, Tomerlin & Threlkeld, of Oklahoma City, for defendant in error.

McNEILL, J. C. Y. Semple commenced this action in the district court of Oklahoma county against Garrison Coal Company, a corporation, to recover damages for a breach of a contract for the sale of certain wheat. The petition alleges that on August 22, 1916, plaintiff entered into a contract in writing to purchase of defendant two capacity cars of No. 2 new wheat at \$1.58 per bushel, basis, delivered at Stuyvesant Docks, New Orleans, La., New Orleans weights and grades, delivery to be complete upon arrival at destination and after inspection and weighing, shipment to be made within 20 days from date

of contract for export, the defendant to pay all exchange, inspection, weighing, and trackage charges, if any, and certain discounts to apply on lower grades, in the event that the wheat should grade lower. It is alleged the first car was shipped on or about August 30, 1916, and the second car was shipped on or about September 20, 1916, and the defendant attached bills of lading to drafts drawn on the plaintiff, and plaintiff relying upon the contract and agreement and bill of lading that wheat of the grade and quality set forth would be delivered to the plaintiff at Stuyvesant Docks, New Orleans, and would be properly inspected and weighed paid the drafts as aforesaid. It is further alleged that the respective cars arrived at destination in December, 1916, at which time an inspection thereof disclosed that said wheat was rotten, and that plaintiff refused to accept the same and offered to return the bills of lading and demanded that defendant make delivery of the wheat of the quality called for in the contract in order that the plaintiff might fulfill his contracts for sale of like wheat, all of which the defendant failed and refused to do.

It is further alleged on January 6, 1917, plaintiff was compelled to go into the open market and purchase wheat at the market price of \$2.03 per bushel, in order to meet his own contracts. It is further alleged that subsequently, by agreement, without prejudice to the rights of either party, the rotten and unmerchantable wheat was sold at \$1.50 per bushel, and by reason of the failure to comply with its contract plaintiff suffered damages in the amount of \$1,583.17.

The plaintiff filed an amended petition setting forth and pleading the customs and usages of grain dealers in Oklahoma and throughout the United States relative to making purchases and sales of grain and reaffirming his original allegations, and filed a further amendment alleging the customs and usages among grain dealers relative to the grading and weighing at destination of shipments, such as here involved, alleging that the official grain inspector and weigher was the usual and customary individual who performed such duties.

Defendant answered by general denial, and a further defense that he delivered the wheat to plaintiff and delivered the bill of lading, and plaintiff accepted the wheat upon its arrival and paid the purchase price, and the wheat arrived in New Orleans on the 8th and 30th of September, respectively, but plaintiff negligently and carelessly permitted the wheat to remain in the possession of the railroad and elevator companies until the 15th and 18th of December, before attempting to unload it, and that the weather conditions were such that the plaintiff knew the wheat would be damaged, and, if plaintiff had used ordinary care in the handling of said

wheat, no damage would have resulted; that, if the wheat was damaged, it was caused by plaintiff's own negligence and carelessness.

Upon these issues the case was tried to a jury, and the jury returned a verdict in favor of the plaintiff for the full amount. Motion for new trial was filed and overruled, to which defendant excepted, and the court rendered judgment in favor of the plaintiff and against the defendant upon the verdict of the jury. From said judgment this appeal is prosecuted.

The evidence disclosed that the original transaction between the parties relating to the sale of the wheat was by a conversation over the phone on the 20th or 21st of August, and plaintiff on August 22, 1916, wrote a letter of confirmation of the purchase, which letter was delivered to the defendant. The letter referred to the purchase over the phone and purported to be a confirmation of said conversation regarding the sale and detailed the terms of the contract, the kind and character of wheat to be shipped, and how the same should be shipped and to whom. It contained the further provision:

"It is distinctly understood the destination weights and grades are to govern. Reasonable margins shall at all times be left in drafts to cover possible shortages in weights, grades, etc., at destination. * * * No shipments to be made until routing instructions have been received. All bills of lading shall show such routing, * * * mailing invoices to the office on which your draft is drawn so they will reach said office without or before draft is presented. * * * It is understood by shippers or sellers that this contract is only completed after such shipments are received, graded, and weighed at destination. * * * I reserve the right on failure to perform this contract on part of shipper to extend time, cancel or buy in for account of seller, without previous notice. The receipt of this contract by shipper, without immediate notice to C. Y. Semple of error, shall be binding in all its terms."

On August 21st the defendant herein wrote a letter of confirmation of sale and delivered to plaintiff, which said letter was as follows:

"We confirm sale to you by phone Kammerdeiner, Mr. Creamer talking, of 2 cars 60 cap Bushels, Sack — To grade Wheat at 1.58 per bushel, basis f. o. b. New Orleans, Delivered—shipment within 2 weeks days Dest. weights Dest. grades to govern."

For reversal plaintiff in error discussed all the assignments of error under one heading, to wit, that the court erred in overruling motion for new trial. It is first asserted by plaintiff in error that "the title to the wheat was in plaintiff upon delivery of bill of lading to him."

[1] The Supreme Court of the United States, in discussing this question in the case of *U. S. v. Andrews*, 207 U. S. 229, 28

Sup. Ct. 100, 52 L. Ed. 185, announced the law as follows:

"That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary. That, where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question. Certain also is it that when on the delivery of goods to a carrier bills of lading are issued for the delivery of the goods to the consignee or his order, the acceptance by the consignee of such bills of lading constitutes a delivery. Of course, the presumption of delivery arising from the application of any or all of these elementary rules would not control in a case where by contract it clearly appeared that, despite the shipment, the goods should remain at the risk of the consignor until arrival at the point of ultimate destination."

Under this heading plaintiff in error argues that, the title having vested in the plaintiff, subject, however, only to certain margins, weights, and grades and inspection thereof, if any loss occurred by reason of any improper delivery of the wheat, the carrier, and not the Garrison Coal Company, would be liable. It is further suggested that the wheat reached New Orleans shortly after being shipped, but was not unloaded, because of negligence of plaintiff. This argument presents questions of fact that were properly submitted to the jury by the court in instructions Nos. 5, 6, and 7. The court properly submitted to the jury the questions of fact as contended by both plaintiff and defendant, and the force and effect of letters of confirmation and the force and effect of the bills of lading, and the question of whether the plaintiff exercised reasonable diligence in unloading the wheat and in ascertaining the grade and condition of the wheat. These questions were all properly submitted to the jury under proper instructions, and the finding of the jury upon these questions of fact, the evidence being conflicting, is binding upon the court.

[2] Plaintiff in error does not complain of any particular instruction given by the court, but bases his argument upon the theory above announced and as to the measure of damages: An examination of the instructions given discloses the court clearly and fairly covered the law as to each particular phase of the case, and under the law this is sufficient. *Moorehead v. Daniels*, 57 Okl. 298, 153 Pac. 623.

The theory of defendant in error is different from that of plaintiff in error. If plaintiff in error's theory is correct, the defendant in error could not recover, but the jury by their verdict did not find the facts to be as plaintiff in error alleged or construed them

to be, but found them to the contrary, and there is sufficient evidence to support the finding of the jury of the questions of fact submitted.

[3] This court in a long line of decisions has stated:

"In a law case, where there is competent evidence or inferences that the jury can justifiably draw therefrom which reasonably supports the judgment rendered, this court will not disturb such judgment." *Baker-Hanna-Blake Co. v. Paynter-McVicker Gro. Co.*, 174 Pac. 265.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

HARRISON, C. J., and PITCHFORD, MILLER, and NICHOLSON, JJ., concur.

(32 Okl. 82)

ARMSTRONG v. PHILLIPS et al.
(No. 11448.)

(Supreme Court of Oklahoma. March 8, 1921.
Rehearing Denied May 31, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1008(2), 1009(4)—On waiver of jury findings of fact not disturbed if supported by competent evidence and in equitable cases unless clearly against weight of evidence.

Where, in a case properly triable to a jury, a jury is waived, and the case is tried to the court, the findings of the court in favor of one of the parties will, upon review here, be given the same weight as the verdict of the jury, and the findings of fact will not be disturbed where there is competent evidence reasonably tending to support such findings, and "in a case of purely equitable cognizance the findings of the trial court will not be disturbed on appeal unless the same are clearly against the weight of the evidence.

2. Indians \S 15(1)—Alienation statute held not to relate to property other than allotted.

The provisions of the act of Congress of May 27, 1908, removed the restrictions on the alienation of the allotments of minor Cherokee Indians having less than one-half Indian blood, and provided that such allotments may be sold under the order and supervision of the probate courts of the state, and in no other way; but necessarily no question arising under the act relates to any property acquired by such allottees otherwise than by and through the allotment of the lands belonging to the tribe, because the act does not purport to deal with any property except that.

3. Indians \S 15(1)—Statute qualifying Indian minors to deal as adults applies to female of three-eighths Indian blood; district court's judgment under statute authorizing minors to deal as adults held not subject to collateral attack.

Section 1, art. 1, c. 13, Session Laws 1909, authorized female persons of the age of 18

years, being otherwise qualified thereto, owning real estate, to mortgage, convey, or otherwise dispose of or make any contract relating to real estate or any interest therein. Section 3832 et seq. of Wilson's Rev. & Ann. Statutes of Oklahoma 1903 provides that the district court for the several counties shall have authority to confer upon minors the rights of majority, so that every act done by the person so authorized shall have the same force and effect in law as if done by persons at the age of majority. *Held*, that this provision applies to a female of three-eighths Indian blood; (b) that the judgment of the district court in a proceeding brought under these provisions of the statute conferring such majority rights is not subject to collateral attack, and confers upon her the right to contract in relation to any property acquired by her otherwise than by and through the allotment of the lands belonging to such Indian Tribe only, but does not apply to allotted lands or to trust funds derived therefrom.

4. Mortgages \S 38(2)—Plaintiff has burden of showing that deed absolute is mortgage.

Where a party plaintiff sues to cancel her deed, absolute upon its face, and to recover the land, alleging that such conveyance was intended to operate as a mortgage, and offers to return the purchase price with accrued interest, and the defendant is a subsequent vendee, and pleads that he is an innocent purchaser for value and without notice, the burden of proving that the instrument was intended to operate as a mortgage is upon the plaintiff, and the evidence must satisfy the high standard of probative force requiring that the same must be cogent, convincing, clear, and satisfactory; otherwise such proof must fail, and the defendant will be entitled to retain the land and to full and complete relief.

5. Sufficiency of evidence.

Record examined, and *held*, that the judgment of the court is not clearly against the weight of the evidence, and the same is affirmed.

(Additional Syllabus by Editorial Staff.)

6. Action \S 20—Proceeding for removal of disabilities is a "special proceeding," and not an "action."

A proceeding for the removal of the disabilities of minority is not an action as defined in section 4644, Rev. Laws 1910, but is a special proceeding as defined in section 4645.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Special Proceedings.]

Appeal from District Court, Washington County; Preston A. Shinn, Judge.

Suit by Minnie Armstrong against Frank Phillips and others. Judgment for defendants, and plaintiff appeals. **Affirmed.**

Norman Barker, of Bartlesville, B. T. Hainer, of Oklahoma City, and McGuire & Devereux, of Tulsa, for plaintiff in error.

Rowland & Tolbott, John H. Kane, and R. H. Hudson, all of Bartlesville, and Burford,

Miley, Hoffman & Burford, of Oklahoma City, for defendants in error.

JOHNSON, J. This is the second appeal to this court in this cause, and involves the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 6, township 26, range 13 east, containing 40 acres, situated in Washington county, Okl.

The record discloses that the original petition was filed in the district court of Washington county on February 15, 1917. It alleges, in substance, that Minnie B. Armstrong was a three-eighths Cherokee Indian; that on May 15, 1909, she purchased from one John Hildebrand the land in this litigation; that said land was purchased from moneys received by her as the proceeds derived from her restricted allotted and inherited lands, and from no other source; that on February 28, 1910, she conveyed said land to Arthur Armstrong, who thereafter leased for oil and gas purposes to A. H. Huling and J. C. Bixler, who later assigned to McCandless, Beatty, and Congdon; that on June 19, 1915, Arthur Armstrong conveyed said lands to Frank Phillips, who had developed the same for oil and gas, and had removed large quantities of oil therefrom; that her deed to Arthur Armstrong was made without the supervision of the county court of Washington county, and was therefore void. Copies of all instruments were attached, and plaintiff prayed for cancellation of said deed, that her title be quieted, and that she recover \$25,000 damages for oil and gas taken from the land.

On March 17, 1917, defendant Frank Phillips filed motion to strike portions of plaintiff's said petition, which motion was by the court sustained, and on May 13, 1917, plaintiff filed an amended petition. In this amended petition plaintiff abandons the theory that said lands were purchased with moneys derived from her allotted lands. She alleges that she is the owner of the lands, and that the defendant Frank Phillips unlawfully keeps her out of possession thereof. She further alleges that on the 8th day of June, 1908, she executed a deed to said lands, to one V. J. Knisley, but that said deed was void for the reason that she was at that time a minor, and for the further reason that said deed was obtained by fraud; that while the title stood in Knisley's name he mortgaged the land to the Citizens' Bank & Trust Company, of which Frank Phillips was president; that Knisley's title was set aside by the court, but that the bank was threatening to foreclose its mortgage, and because of such threats she conveyed the land to Arthur Armstrong to procure money to pay said mortgage; that her deed to Arthur Armstrong was intended as a mortgage; and that the bank and Frank Phillips had knowledge of these facts. She prays for cancellation of all conveyances, but offers to redeem from the alleged mortgage to Arthur Armstrong.

On May 24, 1917, plaintiff filed a second amended petition. In this second amended petition, she still makes no reference to any claim that the land was purchased with moneys derived from her allotment. She joins the Lewcinda Oil Company as party defendant, alleging that Phillips had leased the lands to said company, and that the company had knowledge that her deed to Arthur Armstrong was a mortgage. She alleges that said deed was void, because of her minority, and further alleges that said deed was intended as a mortgage, and offers to redeem therefrom.

The defendant Frank Phillips filed an answer which was subsequently adopted by each of the other defendants. The answer denied all the allegations of the petition, alleged ownership in Phillips and the Lewcinda Oil Company, denied knowledge of any mortgage transactions between plaintiff and Arthur Armstrong, and set up proceedings in the district court of Washington county for the removal of plaintiff's disabilities of minority and decree of the court removing disabilities and conferring upon plaintiff the rights of majority and the right to do business as an adult person.

The answer further alleged that after the removal of her said disabilities, and on February 2, 1909, plaintiff purchased certain lots near Bartlesville (referred to throughout the proceedings as the Gilkey lots), and that on May 15, 1909, she traded the lots to Hilderbrand for the land in question. The answer pleaded estoppel, laches, and that the action was not brought within one year after majority, and pleaded the one, two, and three year statutes of limitations. The answer also pleaded estoppel by reason of plaintiff's knowledge of operations on the lands by the defendants, and the expenditure of large sums of money in the development of the lands for oil and gas, the plaintiff standing by without objections from the time defendants purchased the land until a long time after the development and production of oil.

Plaintiff filed a reply, alleging that the proceedings conferring the rights of majority upon plaintiff were void, for the reason that the court was without jurisdiction to confer the rights of majority upon her. She denied the allegations of laches. She admits the purchase of the Gilkey lots, and alleges that she paid \$300 for said lots, which sum she says was "proceeds from her individual allotment set aside to her as a Cherokee minor," admits that she exchanged the lots for the Hilderbrand land, but says that she paid an additional consideration of \$250 cash which she says was also derived from her allotment.

Upon these pleadings the case went to trial, and at the close of plaintiff's evidence demurrer thereto, interposed by defendants, was sustained by the court. The case was brought to this court, and the judgment of the trial court was reversed; this court hold-

ing that plaintiff's evidence upon the mortgage question was sufficient to withstand a demurrer. 76 Okl. 192, 181 Pac. 715. Upon rehearing the original opinion was modified, the court still holding that, as against a demurrer to the evidence, the proof was sufficient upon the mortgage question, and that the burden rested upon defendants to show that they were innocent purchasers for value. 76 Okl. 192, 184 Pac. 109.

Upon the return of the case to the lower court, plaintiff filed a supplemental petition, making Phillips Petroleum Company a party defendant, which company filed an answer adopting the answer of the defendant Frank Phillips.

Upon the issues thus joined, the case was tried to the court, and judgment was rendered for the defendants. Upon plaintiff's request, the court made complete findings of fact and conclusions of law.

The plaintiff assigned fifteen specifications of error, but the same were argued in the brief filed by plaintiff's counsel under four propositions which are as follows:

"(1) That the pleadings and testimony plainly show that the plaintiff in error is a member of the Cherokee Tribe of Indians, and that the property involved in this controversy was purchased from moneys derived by her guardian as a bonus for an oil and gas mining lease on her Cherokee Indian allotment during her minority, that, as such minor, her allotted lands were restricted, and that the investment by her guardian of rentals for an oil and gas mining lease in the lands in question embraced such lands within her restricted Indian estate, and that the whole became and was charged with the trust of her guardianship during her minority.

"(2) The deed was a mortgage and the defendant in error had notice of it.

"(3) That plaintiff in error was imposed upon by defendant in error.

"(4) The proceedings to confer majority rights were void."

The plaintiff in her second amended petition, in which she made the allegations of her original petition and first amended petition parts of her second amended petition, and by the exhibits attached to her second amended petition made her first cause of action one in ejectment to recover the lands in controversy, and joined therewith her second cause of action, in which she sought equitable relief in the way of cancellation of conveyances made by her to her vendee, and for an accounting, and that the conveyance by her of the lands in controversy to her grandfather be declared a mortgage instead of a deed absolute, and that her title to said lands be quieted, and for a receiver, and for injunctive relief, or, she having tendered the amount of the mortgage and interest, that the instrument be held subject to be foreclosed with her right of redemption declared.

By the several separate answers of the defendants and the plaintiff's reply thereto issues were properly joined between the parties defendant and plaintiff respectively. The record discloses that at the commencement of the trial a jury was waived.

The trial court made separate findings of fact and conclusions of law, and rendered a general judgment that the plaintiff take nothing, and that the defendants have and recover their costs, awarding execution therefor.

[1] It is the established rule of this court that in a law action the findings of fact by the trial court will not be disturbed when there is evidence reasonably tending to support such findings, and that in a cause of purely equitable cognizance the findings and judgment of the trial court will not be disturbed unless clearly against the weight of the evidence. *Swan v. Duncan*, 78 Okl. 305, 190 Pac. 678; *Parker v. Tamm*, 78 Okl. 103, 188 Pac. 1074; *Curtis v. Harris*, 76 Okl. 226, 184 Pac. 574; *Barnett v. Barnett*, 78 Okl. 249, 189 Pac. 743; *Elwood Oil & Gas Co. v. Gano*, 76 Okl. 287, 185 Pac. 443.

The findings of the court are as follows:

"(1) The court finds that the plaintiff, Minnie B. Armstrong, was born November 25, 1893; that she is on the Cherokee Rolls, and is of three-eighths Indian blood.

"(2) The court finds that on the 5th day of June, 1908, the district court of Washington county, Okl., entered a decree revoking the disabilities of minority of said plaintiff herein, and that the plaintiff, her father and mother, were present in court at the time said order and decree was made.

"(3) The court finds that the lands involved in this suit were not at any time and are not now a part of her Indian allotment.

"(4) The court finds that the plaintiff was on the 15th day of May, 1909, the owner of several city lots in the Gilkey addition to the city of Bartlesville, Okl., and that some of said land was used in payment by her for the purchase of the lands involved in this action."

"(5) The court finds that there is not sufficient evidence to warrant the finding that the purchase money paid for the Gilkey lots was derived from trust property, and therefore finds that said funds were not derived from trust property.

"(6) The court finds that on the 28th day of February, 1910, the plaintiff, Minnie B. Armstrong, executed and delivered to her grandfather, Arthur Armstrong, a warranty deed to the lands involved in this action, said deed reciting as a consideration therefor, the sum of \$1,400, and that said deed upon its face purported to convey all the right, title, and interest of the said Minnie B. Armstrong. The court is unable to determine from the evidence whether said deed was intended by the parties as an absolute conveyance, or as a mortgage, but finds that there is not evidence to overcome the presumption that the same was intended as a deed absolute.

"(7) The court finds that on the 26th day of November, 1910, Arthur Armstrong and his wife, Maggie Armstrong, executed to A. H.

Huling and J. C. Bixler an oil and gas mining lease covering said tract of land, and thereafter the said Arthur Armstrong made, executed, and delivered to Washington county, Okl., a deed of right of way for highway purposes across said tract of land, and thereafter the said Arthur Armstrong listed said lands with real estate agents in the city of Bartlesville, Okl., for sale, and otherwise exercised full ownership and control over said lands.

"(8) The court finds that on the 19th day of June, 1915, the said Arthur Armstrong, acting through M. D. Parr, a real estate agent in the city of Bartlesville, Okl., made, executed, and delivered to Frank Phillips, one of the defendants herein, his certain warranty deed covering the lands in question, the said Frank Phillips paying therefor the sum of \$700.

"(9) The court finds that the said Frank Phillips, at the time he purchased said land from the said Arthur Armstrong, had no notice, actual or constructive, of any agreement between Minnie B. Armstrong and Arthur Armstrong that said deed of February 28th, 1910, was to be considered as a mortgage, and that the said Frank Phillips was an innocent purchaser for value, without notice of any defect in the title of said land.

"(10) The court further finds that the other defendants herein derived their title from defendant Frank Phillips.

"(11) The court further finds that the plaintiff, Minnie B. Armstrong, attained her majority on the 25th day of November, 1911, and that this action was commenced on the 15th day of February, 1917, and more than five years after plaintiff reached her majority.

"The court therefore concludes as a matter of law:

"(1) That the decree of the district court of Washington county, Okl., dated June 5, 1908, conferring majority rights upon the plaintiff, was a valid judgment of said court, and empowered her to sell and convey the lands involved in this action and to make a good and sufficient warranty deed thereto.

"(2) That the said Frank Phillips, being an innocent purchaser for value, without notice, acquired all the right, title, and interest of the said Arthur Armstrong and the said Minnie B. Armstrong in and to said lands.

"(3) The court further finds that this action is barred both by the statute of limitations of the state of Oklahoma and by the laches of the plaintiff.

"(4) The court finds the issues generally in favor of the defendants and against the plaintiff.

"It is therefore ordered, adjudged, and decreed by the court that the plaintiff take nothing by this action, and that the defendants have and recover their costs herein, for which let execution issue."

All of the foregoing findings of fact, numbered from 1 to 11, inclusive, except No. 9 thereof, are, we think, purely findings of fact, and from an examination of the entire record we cannot say that such findings are clearly against the weight of the evidence, and under the rule announced in the cases cited supra such findings are approved.

The ninth finding, we think, is a mixed

question of fact and law, and the same will be hereafter discussed.

From the findings of fact it is shown that the plaintiff was a duly enrolled Cherokee Indian of three-eighths blood; that she was born November 25, 1893; that the land in controversy was not part of her allotment, and was not purchased by the proceeds in any way arising from her allotment; that she conveyed the same by absolute deed to her grandfather, Arthur Armstrong, on February 28, 1910; and that the deed from Arthur Armstrong to the defendant Frank Phillips was dated June 19, 1915.

[2] Counsel's first contention that the land in controversy was restricted, and that the provisions of Act Cong. May 27, 1908, c. 190, 35 Stat. 312, applied, is without merit. There is no contention that the land was her allotment and, as the trial court specifically found that the purchase money paid for the Gilkey lots was not derived from trust property, said act has no application. Such has been the uniform holding of this court as announced in the case of *Cochran v. Teehee*, 40 Okl. 392, 138 Pac. 563, wherein it was said:

"Necessarily no question arising under the act relates to any property acquired by the allottees otherwise than by and through the allotment of the lands belonging to the tribe, because the act does not purport to deal with any property except that."

In the case of *Kirkpatrick v. Burgess*, 29 Okl. 121, 116 Pac. 764, this court said:

"Under the statutes of the state, as we have noted them above, the mere marriage of the minor, except as to allotted lands, qualifies him to sell his land; hence the necessity of any supervision on the part of the probate court or of any guardian does not exist."

We find, and so hold, that the land in controversy not being the plaintiff's allotment nor purchased with Indian trust funds, her status as to her power to alienate the same was the same as though she was not of Indian blood, and that the act of May 27, 1908, supra, has no application. *Jefferson v. Winkler*, 26 Okl. 660, 110 Pac. 755; authorities cited supra.

We will next consider the plaintiff's specification, "that the proceedings to confer upon the plaintiff in error the right of majority are void," and the alleged reasons, that "no title is given to the proceedings in said notice, the process does not run in the name of the state of Oklahoma, it is not under the seal of the court, neither is it signed by the clerk and dated the day it was issued." In the consideration of the questions it should be borne in mind that this is not an ordinary civil action, with adverse parties, as defined in section 4644 of the Statutes of 1910. It is a "special proceeding" as defined in section 4645.

[8] Section 4644 provides:

"An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

It is clear that under this definition a proceeding for the removal of the disabilities of minority is not "an action," as thus defined.

Section 4645 provides:

"Every other remedy is a special proceeding."

It is clear, therefore, that a proceeding for the removal of the disabilities of minority is a "special proceeding."

Section 4646 provides:

"Actions are of two kinds, first, civil; second, criminal."

Section 4703, directing the procedure for the commencement of a civil action, provides that:

"A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon."

Under this section it is necessary to the commencement of a civil action that:

"(a) A petition be filed in the office of the court clerk.

"(b) A summons be issued thereon."

There is no such requirement in the Statutes with reference to the commencement of a special proceeding.

The law as it existed at the time of the rendition of the decree of the district court of Washington county, which plaintiff in error seeks to attack, appears at section 3832 et seq. of Wilson's Rev. & Ann. Statutes of Oklahoma of 1903.

Section 3832 provides:

"That the district courts for the several counties * * * shall have authority to confer upon minors the right of majority concerning contracts, and to authorize and empower any person who is a resident of the county, and under the age of twenty-one years, to transact business in general, and any business specified and with the same effect as if such act or thing were done by a person above that age; and every act done by a person so authorized shall have the same force and effect in law as if done by persons at the age of majority."

Under this section we think there cannot be any question as to the jurisdiction, power, and authority of the district court "to confer upon minors the rights of majority concerning contracts," and "to authorize and empower any person who is a resident of the county, and under the age of twenty-one years, to transact business in general," so that "every act done by a person so author-

ized shall have the same force and effect in law as if done by persons at the age of majority."

In order to obtain the rights of majority, section 3833 of said Statutes of 1903 provides that the minor, by his or her next friend, shall file in the district court a petition "setting forth the age of the minor petitioner," that petitioner is, and has been for at least one year, a bona fide resident of the county, and the cause for which petitioner seeks to obtain the rights of majority. And said section further provides:

"And the district court being satisfied that the said petitioner is a person of sound mind and able to transact his or her affairs, and that the interests of the petitioner will be thereby promoted, may, in its discretion, order and decree that the petitioner be empowered to exercise the rights of majority for all purposes mentioned in this act."

Section 3834 of said Statutes provides that:

"The petition mentioned in the foregoing section shall not be filed until notice of such application shall have been given by publication in some newspaper printed in the county where such petition is to be filed, and if there be none, then in some newspaper having a general circulation in the county, for two consecutive weeks prior to the filing of the said petition."

The Statutes say nothing about a "summons" or a "writ" or "process." It does not require any action of any kind of the clerk of the court. It clearly negatives the idea of any action on the part of the clerk. In fact, it is the specific, mandatory provision of section 3834 that the petition provided for in section 3833 shall not be filed until the notice provided for in section 3834 has been given. It nowhere provides that the clerk shall give this notice. And there is nothing on file in his office to call forth any official action of any kind on his part. From all of which it seems perfectly clear that the notice required to be given by the provisions of section 3834 is not a writ or process within the meaning of section 19, article 7, of the Constitution, or of section 5319 of the Revised Laws of 1910.

The statute does not specify by whom the notice shall be given, but clearly it is the intention of the statute that the notice shall be given by the petitioner. In this case the notice shows for itself that it was signed by the minor, by her father, as her next friend, and by her attorney. There is no suggestion that the notice was not duly published as required by the statute.

The statute of Arkansas on this subject (section 1119, Sand. & H. Dig.) is practically identical with our statutes, *supra*. The same is as follows:

"They [circuit courts] shall have the power to authorize any person who is a resident of

the county, and under twenty-one years of age, to transact business in general, and any particular business specified in like manner, and with the same effect as if such act or thing was done by a person above that age; and every act done by a person so authorized shall have the same force and effect in law and equity as if done by a person of full age."

The case of *Young v. Hiner*, 72 Ark. 299, 79 S. W. 1062, was a case where John Rollison, a minor, had neither father nor mother living. While abiding in Huntington, in the Greenwood district, in Sebastian county, he went to Ft. Smith with O. M. Harwell, an attorney, and filed his petition in the Sebastian circuit court for the Ft. Smith district, asking that his disabilities as a minor be removed. On the hearing the minor appeared and testified that he was 18 years of age, when in fact he was only a few months past 15, which, he says, he was prompted to do by Harwell. Order was entered removing his disabilities. He conveyed certain lands that belonged to him to Mrs. Martha L. Hiner, who afterwards sold and conveyed said lands to others. The said minor's guardian thereafter filed the said suit to set aside said conveyances, on the grounds of fraud, and on the ground that the court was without jurisdiction of the person of the minor, and therefore the order of the court was void.

Paragraphs 1 and 2 of the syllabus of said case are as follows:

"(1) The jurisdiction of a circuit court over the person of a minor whose disability it orders removed, as authorized by Sand. & H. Dig. § 1119, cannot be collaterally attacked on the ground that the minor was not a resident of the district.

"(2) Where a minor appears in proceedings under Sand. & H. Dig. § 1119, to remove his disability, and testified to his age, he thereby, being a resident of the district, subjects himself to the court's jurisdiction."

And in the opinion the court says:

"John Rollison appeared before the circuit court at the time his petition was presented and heard, and testified, for the purpose of securing the relief asked, that he was 18 years old. He thereby appeared in the proceeding, and, being a resident of the district, subjected himself to the jurisdiction of the court."

The journal entry of the district court of Washington county, conferring majority rights upon the plaintiff, is as follows:

"Now on this 5th day of June, A. D. 1909, the same being one of the days of the regular June term, A. D. 1908, of this court, begun and holden at Bartlesville, in the county of Washington, state of Oklahoma, this cause coming on to be heard before me, Thos. L. Brown, judge of said court, in open court, in the courtroom in said city, county, and state aforesaid, upon the petition of said Minnie B. Armstrong for the removal of her disabilities as a minor, and asking to be declared of full age for all

(198 P.)

legal intents and purposes and to be capacitated to transact business for herself the same as an adult, and it appearing to the court upon the proofs taken at said hearing that said minor is now 16 years of age, and that she had been and is now a resident of the county and state aforesaid, such residence having been continuous therein for more than one year next before the filing of said petition, and that said minor has graduated from the public schools of the city of Bartlesville, and holds a certificate or diploma of such graduation, which was duly offered in evidence and presented to and inspected by the court on such hearing, and that said minor is conversant with the English language and understands the methods of business as commonly practiced in this community, and is qualified and competent to attend to business for herself, the same as any other adult, and it further appearing that the said ward is living with her father and mother, who appeared in open court with her and were in favor of the prayer of her petition being granted, and that due notice has been given as required by law for the hearing of such petition, as appears from the proof of publication attached to and filed with said petition, and duly submitted to said court, and the court being fully advised as to the facts and the law governing the same: Now, therefore, it is hereby ordered, considered, and adjudged by the court that said petition of said minor, Minnie B. Armstrong, be, and the same is hereby, wholly approved and confirmed in all things, and it is further ordered, considered, and adjudged by the court that all the rights of majority be, and the same is hereby, fully and finally conferred and bestowed upon said Minnie B. Armstrong, and she is hereby authorized and empowered by this judgment of the court to possess full authority and power the same as any other adult or person of full age and majority to transact any and all business with the same force and effect and consequence as if such acts and things and business were done and performed by a person who had attained the age of 18 years as provided by the majority of females under the law and statutes in force in this state.

"Witness my hand as such judge and the seal of this court at Bartlesville, Okl., this the 5th day of June, A. D. 1908. T. L. Brown, Judge of the Above-Styled Court. Attest: John B. Churchill, Clerk of the Above-Styled Court. [Seal.]"

[3] We think the contention of plaintiff that the judgment was void is without merit. We think the same was valid, and not subject to collateral attack, and that the same conferred upon the plaintiff full and com-

plete power and authority to make contracts and to transact business of any character whatsoever, to the same extent as an adult person, except as to her allotted lands. Stat. 1893, p. 375; S. L. 1895, p. 180; Boykin v. Collins, 140 Ala. 407, 37 South. 248.

[4,5] The propositions that the plaintiff's deed to her grandfather was intended as a mortgage, and as to whether or not the defendant Frank Phillips was an innocent purchaser, will be considered together.

The trial court, in its sixth finding, in effect, found that the deed of the plaintiff to her grandfather was not intended by the parties to be a mortgage; that the evidence was not sufficient to overcome the presumption that the same was intended as a deed absolute. And the court found in paragraph 8 that the defendant Frank Phillips was an innocent purchaser for value, without notice, of any defect in the title of said land.

We cannot say, from an examination of the record, that these findings of the court were clearly against the weight of the evidence, and the same are therefore approved.

On the former appeal in this case, 76 Okl. 194, 181 Pac. 715, 184 Pac. 109, that on the mortgage question raised herein, this court correctly held that under the facts of this case, section 4021, Rev. Laws 1910, was the applicable provision. It reads:

"When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the register of deeds of the county where the property is situated."

It is not contended that the provision of this section was complied with; hence the defendant Frank Phillips' right to recover herein was full and complete, as the trial court held, and was not limited to the right to recover the purchase price of the land with accrued interest, and to have the deed foreclosed as a mortgage.

The judgment of the trial court is therefore affirmed.

HARRISON, C. J., and MILLER, KENNAMER, and NICHOLSON, JJ., concur.

(81 Okl. 291)

McALISTER v. KLEIN et al. (No. 9636.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Sales \S 22(5)—Printed statement in proposal that it is for immediate acceptance may be waived by bidder.

Where a person, in making a bid or proposal for the furnishing of structural steel, makes such proposal in writing on a stock form of letter head which contains printed matter at the bottom, to the effect that "This proposal is made for immediate acceptance," the person submitting such proposal by his acts or by oral agreement may waive such printed statement.

2. Sales \S 22(4)—Statement in acceptance of proposal to furnish steel held not to constitute new proposal or to vary terms of proposal made.

Where a manufacturer of structural steel for the erection of bridges submits his proposal to furnish the steel for certain bridges to the contractor having the contract for the erection of such bridges, makes an oral statement to such contractor at the time of submitting said proposal that he does not carry in stock some of the sections of steel specified in the contract, and the contractor states to him that he thinks he can get the engineer to change his drawings so that the sections of steel carried by such manufacturer can be used, held, that a letter of acceptance of such proposal containing the clause, "There may be some small changes that will affect the tonnage, the price for any such additions or deductions to be the same as the tonnage price used in your proposal as per our oral agreement," does not thereby constitute a new proposal, or vary the terms of the proposal as made by such manufacturer.

3. Sales \S 22(3)—Mailing letter held to constitute acceptance of proposal to furnish steel.

If a manufacturer of structural steel makes a proposal to a contractor to furnish certain steel for the erection of bridges by said contractor, and the nature of their dealings is such that the contractor is to submit his acceptance through the United States mails, and he writes a letter of acceptance, places it in an envelope addressed to such manufacturer at his regular post office address, and deposits said letter in the United States post office with the postage prepaid thereon, this constitutes an acceptance, whether the manufacturer receives said letter or not.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

Action by W. C. McAlister against J. B. Klein and William Klein, individually, and as partners, under the firm name of J. B. Klein Iron & Foundry Company, to recover damages for a breach of contract. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

R. E. Stephenson, of Hugo, for plaintiff in error.

Shirk, Danner & Fowler, of Oklahoma City, for defendants in error.

MILLER, J. This action was commenced in the district court of Oklahoma county by W. C. McAlister, as plaintiff, against J. B. Klein Iron & Foundry Company, a partnership composed of J. B. Klein and William Klein, as defendants, to recover damages for the breach of a contract in failing to furnish certain structural steel for the erection of five bridges in Bryan county, Okl. The case was tried to a jury, and the verdict was in favor of the defendant. Plaintiff filed his motion for a new trial, which was overruled by the court, and judgment rendered on the verdict in favor of the defendant, to reverse which judgment the plaintiff perfected this appeal. For convenience, the parties will be referred to as they appeared in the court below. The facts are as follows:

The plaintiff, on or about November 20, 1915, entered into a contract with the board of county commissioners of Bryan county, Okl., for the construction of five bridges within said county. The defendants have their place of business and post office address at Oklahoma City. About the 29th of November, 1915, the plaintiff came to Oklahoma City and submitted to the defendants blueprints of these five bridges, and asked for estimates of the price at which the defendants would furnish the steel for these bridges. Defendant J. B. Klein took the blueprints and figured the estimate, and submitted a proposal in writing on November 29, 1915. The estimated cost of the steel for the bridges amounts to \$3,068.05. The letter in part states:

"These bridges to be made according to your drawing and to receive one shop coat of paint before shipment.

"We agree to start shipping this material within six weeks from date order is received and to make complete shipment within three weeks from date first shipment is made."

This letter was written on a stock form of letter head which contained certain printing on the top and bottom. At the bottom it had one clause reading as follows:

"This proposal is made for immediate acceptance and upon the understanding that if accepted the following conditions are agreed to:"

The conditions agreed to then provide that it shall be subject to strikes or delays beyond defendants' reasonable control. This letter was handed by defendant J. B. Klein, personally, to plaintiff, McAlister. The plaintiff and defendant had some conversation both at the time the blueprints were submitted and at the time the proposal in the form of the letter above referred to was made by defendant to the plaintiff. The plaintiff took this letter or proposal home with him, and on December 8, 1915, wrote the following letter

addressed to J. B. Klein Iron & Foundry Company, Oklahoma City, Okl., and deposited the same in the post office at Hugo, with the postage prepaid thereon:

"Gentlemen: I herewith accept your proposal dated November 29th, 1915, for furnishing the bridges for Bryan county as per plans and specifications. There may be some small changes that will affect the tonnage, the price for any such additions or deductions to be the same as the tonnage price used in your proposal as per our oral agreement.

"I will send you the blueprints as soon as I can agree with engineer as to the changes which will be within the next two or three days.

"Yours truly."

On December 18, 1915, the plaintiff wrote the following letter which was addressed to the defendants at Oklahoma City, Okl., and deposited it in the United States post office at Hugo, with the postage prepaid thereon:

"Gentlemen: I am mailing you under separate cover plans of the Bryan county bridges. The only changes to be made in these bridges from the original plan is in the rails of the 80-ft. span bridge where you will use 2½x2x3-16 instead of the 3x2x3-16 as shown on the plan; and you shall use 8-ft. 18-lb. I's on the two 45-ft. spans for top chord instead of the 6-ft. 22½-lb. as shown on the plans.

"I am enclosing herewith a copy that part of the specifications relating to this work which has to do with the fabrication of the bridges.

"Kindly acknowledge receipt of same.

"Yours very truly."

Defendants claim they never received either of these letters or the plans and specifications, and therefore there was no contract. They further claim that the letter of December 8th does not constitute an acceptance, but is a counter proposition. The plaintiff makes six assignments of error. These may all be disposed of on the question of giving and refusing to give certain instructions.

Plaintiff testified he told defendants in the conversation with J. B. Klein on November 29, 1915, that he had sent blueprints to other manufacturers of structural steel, and would not be able to give him a definite answer on his proposal for about 10 days; that he would write him as soon as he had heard from the other companies; that defendant J. B. Klein answered that "this would be all right, or words to that effect."

[1] If that is true, defendants thereby waived the printed statement on their letter head to the effect that this was for immediate acceptance, and this should have been submitted to the jury under proper instructions.

[2] The letter of acceptance written by plaintiff on December 8, 1915, when viewed in the light of the testimony of J. B. Klein, does not vary the written proposal made by him. His testimony on direct examination is, in part, as follows:

"Q. Did you give Mr. McAlister an estimate for certain bridges in Bryan county along the latter part of November, 1916? A. Yes sir.

"Q. In whose office did you prepare that estimate? A. Why I gave him that estimate. I met him in Lisle-Dunning's Construction office, I think, and took that and went over to my office, and figured them, and then I handed him the estimate personally myself.

"Q. To Mr. McAlister? A. Yes, personally I did.

"Q. Who was present when you figured those plans? A. I don't think anybody was.

"Q. Was any one present when you gave that estimate to Mr. McAlister? A. If I remember, a girl was there.

"Q. Who was it? A. Yes; Mr. Lisle was there, or Mr. Dunning, I don't know which one; I think it was Mr. Lisle, of the Lisle-Dunning Construction Company.

"Q. Was there any conversation between you and Mr. McAlister with reference to the steel that was to be used, or if there was to be any difference and it was to be used the same as designated on the plans? A. Yes, sir.

"Q. In whose office was the conversation? A. I couldn't tell whether or not it was at that time or when leaving there when I put in my bid, it was one time there—I don't know whether it was in that office or in my office when he handed me the plans.

"Q. Was there any one present when that conversation occurred? A. I couldn't tell whether or not anybody overheard us.

"Q. Did you have any conversation about the—or tell the substance of that conversation? A. Well, it was to the effect that some section of the steel called for which I couldn't carry, and I mentioned that fact to him.

"Q. Did he make any reply to that? A. He stated that that could be substituted.

"Q. Did you point out to him what features and prices on it that you didn't have in stock? A. Well—yes, sir—well, that was feature there, there were some angles and sections for the beam there.

"Q. What was said? A. Well, he said we could use our stock; he said he would submit the engineer's drawings, the county engineer's drawings, and he would get him to O. K. that, and then he could put in this other stuff; that was what he told me in giving his order."

It is clear from this testimony that there was an oral agreement about some small changes in the dimensions of the steel, and plaintiff was entitled to have this submitted to the jury under proper instructions. The evidence shows that the defendants wrote a letter on January 6, 1916, to the Virginia Bridge & Iron Company, at Memphis, Tenn., which indicated that defendants had received the plans and specifications. This letter stated they had a contract to furnish the steel for these five bridges. On January 20, 1916, they wrote the Virginia Bridge Company of Dallas, Tex., which also discloses they had the plans and specifications. Some time after this, J. B. Klein found the plans and specifications in his office in Oklahoma City, when urged by the plaintiff to make a search for them.

[3] We think the court committed reversible error in refusing some of the instructions asked for by the plaintiff, and as this case will have to be reversed, and a new trial granted, we refrain from discussing the evidence further than is absolutely necessary to pass upon the question involved. Under all the evidence in this case the trial court should have given instruction No. 3 asked for by the plaintiff, which is as follows:

"You are instructed that if you believe and find from the evidence in this case that defendants, on November 29, 1915, submitted to plaintiff a written proposal or offer to furnish the iron work for certain bridges in Bryan county, which plaintiff was under contract to construct, and if you further believe and find from the evidence that it was mutually understood between said parties that plaintiff's acceptance of said proposal was to be sent through the mails, and that plaintiff thereafter and on the 8th day of December, 1915, accepted said offer in writing, and deposited his acceptance in the United States mail, properly addressed, and covered by sufficient postage, the contract was then complete, regardless of whether said acceptance was received by defendants or not."

'See *Tayloe v. Merchants' Fire Insurance Co.*, 9 How. 390, 13 L. Ed. 187; *Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; *Trounstone v. Sellers*, 35 Kan. 417, 11 Pac. 441; *Egger v. Nesbitt*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596.

Instruction No. 12, as given by the court, we think fairly covered the measure of damages under section 2852, Revised Laws of Oklahoma, 1910.

The judgment of the trial court is reversed, and this cause remanded, with instructions to grant a new trial.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(81 Okl. 250)

STINCHCOMB et al. v. OKLAHOMA CITY.
(No. 9852.)

(Supreme Court of Oklahoma. May 10, 1921.)

(*Syllabus by the Court.*)

1. Eminent domain §=70, 74—Taking of private property for public use controlled by constitutional provision; such provision strictly construed; no property can be taken for public use without compensation.

The taking of private property for public use is the exercise of sovereign power, and is controlled in this state by the provisions of section 24, art. 2, of the Bill of Rights of our Constitution, and these provisions must be construed strictly in favor of the owner and against the condemning party, and until the compensation has been paid to the owner, his property cannot be disturbed, nor his proprietary rights

divested. Hence there can be no legal taking under the Constitution until the compensation, as fixed by the commissioners, is either paid to the owner of the property or into court for him.

2. Eminent domain §=124—Damages must be fixed as of date of payment of compensation, and not as of time of report of commissioners, and failure to so charge is a "substantial" violation of right.

In a condemnation proceeding to take private property for public use, in which commissioners were appointed, and on March 9, 1917, the said commissioners filed their report as such commissioners, fixing the amount of the damage due to the owner for such taking, and afterwards under written stipulation the amount of the award is paid to the owner by the condemning party, and in pursuance of said stipulation, and on April 25, 1917, said award was paid to the owner, by the condemning party, the trial court gave to the jury, trying said cause on appeal from said award, the following instruction: "You are instructed that under the evidence in this case the appropriation of the land of the defendants took place on the 9th day of March, 1917, and that in fixing the damages suffered by the defendants you are to fix them as of that date"—the said instruction being excepted to by the owner of the land, and the same is brought to this court on appeal, and is assigned and argued as error in this court, *held* that the giving of said instruction wherein the time of the appropriation of the owner's property and fixing the time as of which the value of the property is to be estimated to be as of the date of the filing of the report of the commissioners, and on, to wit, March 9, 1917, instead of fixing the time of the appropriation of the property and as of which the value of the property taken is to be estimated, to be the date that the money was paid to the owner, and on, to wit, April 25, 1917, constitutes a substantial violation of a constitutional right of the owner of the property condemned, and is therefore reversible error. Section 6005, Rev. Laws 1910 (citing Words and Phrases, Second Series, "Substantial").

Appeal from the District Court, Oklahoma County; John W. Hayson, Judge.

Proceedings by the city of Oklahoma City against Lee Stinchcomb and another to condemn property for waterworks purposes. From the judgment, defendants appeal. Reversed and remanded.

See, also, 197 Pac. 437.

G. A. Paul and T. G. Chambers, both of Oklahoma City, for plaintiffs in error.

Charles H. Ruth and O. L. Price, both of Oklahoma City, for defendant in error.

ELTING, J. This suit is the outgrowth of a condemnation proceeding commenced in the district court of Oklahoma county, Okl., by the city of Oklahoma City, to condemn 83.77 acres of land belonging to the plaintiffs in error, Lee Stinchcomb and Sarah A. Stinchcomb, to be used by the city for con-

structing a system of waterworks to be used by said city.

The petition for condemnation by the city was filed on the 2d day of February, 1917. Commissioners were appointed and took the oath of office on March 6, 1917, and on March 9, 1917, said commissioners filed their report in the district court, wherein they allowed the sum of \$5,711.60 as the value of the land taken and the additional sum of \$500 resulting as consequential damages by reason of the appropriation, making a total of \$6,211.60.

On the 2d day of April, 1917, the defendants below filed their demand for a jury trial. Before said cause was tried a stipulation was entered into by the parties whereby the city paid the amount of the award directly to the defendants without prejudice to the rights of either party, and in lieu of the payment of the award to the clerk. The payment was made on the 25th day of April, 1917. The cause came on for trial the 20th day of September, 1917, before Hon. John W. Hayson, Judge.

On the 25th day of September, 1917, the jury returned a verdict in favor of the defendants below, plaintiffs in error herein, in which were fixed the sum of \$7,539.30 for the land taken and \$2,460.70 for damages to the remainder, making the total amount of the verdict \$10,000. A motion for a new trial was filed, and the same was overruled. Appeal to this court was prayed for.

The petition in error contains the following assignments of error:

"First. That the said court erred in overruling the motion of plaintiffs in error for a new trial.

"Second. That the judgment of the court is not sustained by the law.

"Third. That the judgment of the court is not sustained by the evidence."

The plaintiffs in error, defendants below, have perfected their appeal in this court by filing a case-made and their petition in error. They have also filed a brief in support of their petition in error.

The plaintiffs below, defendants in error herein, have not filed their brief and have shown no cause to this court for such failure.

To get the contentions of the plaintiffs in error set forth herein, we will quote the following portion of the plaintiffs in error's brief, found on pages 5 and 6:

"The lower court in the trial of this case, among other instructions, gave instruction No. 8, directing the jury to consider the 9th day of March, 1917, as the date of the appropriation and the date upon which to fix the amount of the damages then due to the defendants, said instruction No. 8 being as follows: 'You are instructed that under the evidence in the case the appropriation of the land of the defendants took place on the 9th day of March, 1917, and that in fixing the damages suffered by the defendants you are to fix them as of that date.' To the giving of this instruction the defendants

excepted for the reason that, as we understand the law of eminent domain, it was an erroneous instruction.

"The commissioners who were appointed on the 6th day of March, 1917, did file their report on the 9th day of March, 1917. At the time the condemnation proceeding was begun the defendants had some 50 acres planted in wheat, and on the 9th day of March the same was about 2½ months from maturity. (See R. p. 80). This wheat, on the 9th day of July, 1917, was sold for the sum of \$5,073.11. (See R. p. 421.) And for the purpose of ascertaining what the value of the growing crop was at the time of taking dates become a very important matter, for the wheat was ready to mature on or about the 25th day of May, 1917, so that the value of the wheat on March 9, 1917, would have been an entirely different value than on April 25, 1917, the date when, as defendants contend, the city appropriated this land to public use.

"The court below denied the defendants the right to show the value of the wheat on the 25th day of April, 1917, and, as heretofore stated, limited the jury in the consideration of the damages to be allowed to the defendants by express instruction, to the time of the filing of the report by the commissioners appointed in the condemnation proceeding. The defendants maintain that this was error of law occurring upon the trial, to which they duly excepted."

The following is section 24 of article 2 of our Constitution, pertaining to the taking of private property:

"Sec. 24. Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. * * * The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use of which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question."

In their brief the plaintiff in error rely upon the following portion of the above-quoted section of the Constitution as being determinative of the time when the damage should be estimated, the time of appropriation, and that being the time of payment:

"Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested."

The court, in his instruction to the jury, and being instruction No. 8, and which is particularly complained of by the plaintiffs in error, fixed the 9th of March, 1917, as the date as of which the damages are to be fixed as suffered by the defendants below, plaintiffs in error herein.

The plaintiffs in error contend that the damages suffered by the defendants below, plaintiffs in error herein, should be fixed as of April 25, 1917, the date that the moneys were paid to the landowner.

The question raised herein is one which it does not appear that this court has as yet ever decided, unless it be held to have been decided in the case of *Edwards v. Thrash*, hereinafter cited and quoted.

[1] In addition to the section of the Constitution heretofore quoted, sections 1400 and 1401 of the Revised Laws of 1910, vol. 1, are also relative to the taking of private property for public use. The chapter is on corporations and railroads, and section 1404 makes them applicable to all corporations having the right of eminent domain. These statutory provisions are binding unless found to contravene the provisions of the Constitution. Section 1401 provides that the owner is entitled to his compensation when possession of property condemned is taken.

The inference to be drawn from this would be that any entrance upon the property by the one condemning before payment of award would be a trespass.

Justice Williams, in the case of *Edwards v. Thrash*, 26 Okl. 485, 109 Pac. 837, 138 Am. St. Rep. 975, discussing the cited provision of the Constitution on taking of private property for public use, uses the following language:

"Whilst the first clause of section 24, art. 2, supra, provides that private property shall not be taken or damaged without just compensation, an accompanying clause in the same section provides that, until compensation shall be paid to the owner or into court for the owner, the property of the owner shall not be disturbed or the proprietary rights of the owner divested. Does this latter clause require compensation to be paid to the owner or into the court for the owner where the damages are merely consequential? The word 'disturb,' according to Mr. Webster, means 'to interrupt a settled state of,' and according to the same authority 'proprietary' means 'belonging or pertaining to a proprietor, considered as property, owned'; and the words 'the property shall not be disturbed or the proprietary rights of the owner divested' seem to mean that possession thereof shall not be taken, nor his property taken, nor shall the title thereof be divested, until compensation therefor has been first paid to the owner or into court for the owner. This was the controlling construction in the state of Missouri

at the time of the adoption of this clause in the Oklahoma Constitution, and, when there was no such provision in force in any other state where a contrary construction prevailed, that of the highest court of Missouri should be especially persuasive."

The crop of wheat, as we gather from the record, was upon the land actually taken by the city, and the measure of damages that seems to have been followed was the value of the lands taken as a fee. We find the following rule laid down in the note found on page 750 of 15 Cyc.:

"If the owner recovers damages measured by the entire value of the property he is not entitled, in addition, to the amount of the rental."

See *Ireland v. Metropolitan El. Ry. Co.*, 52 N. Y. Super. Ct. 450.

We find the following on pages 758 and 759 of 15 Cyc.:

"In determining the compensation or damages to which a person is entitled whose land or a part thereof has been taken under the power of eminent domain, it is proper to consider the value of crops, trees, grass, etc., growing on the land at the time of the taking and thereby injured or destroyed. So a lessee is entitled to the value of crops which are injured or destroyed by the appropriation of the leased premises for a public improvement."

[2] Hence the rule for recovery seems to be, as we deduce it from the statement of these two propositions, the market value of the land taken at the time of the taking, and, in arriving at such market value, the growing crops may be taken into consideration in fixing that value. Hence the condition of the crops at the time of the taking is an important factor to be considered.

The rule seems to be laid down in 15 Cyc. p. 719, in the following language:

"The fundamental doctrine that private property cannot be taken for public use without just compensation requires that the owner shall receive the market value of his property at the time of the taking. Upon this the courts are well agreed, but, owing to the diversity of the various statutes in the several states, there is much apparent conflict upon the question of what constitutes a taking within the meaning of the rule. Generally speaking, the land may be regarded as taken at that moment when by the terms of the statute the owner is divested of his title and it vests in the condemning party."

The following is from 15 Cyc. pp. 785, 786:

"It is a rule of universal application that title does not pass out of the owner and vest in the condemning party until payment of compensation for the property taken, where payment before taking is expressly required by the Constitution, or where the Constitution requires as a prerequisite to the taking that payment shall be made to the owner or into court for him, or where the charter of the condemning

company or general statutes relating to eminent domain contains the express provision that title shall remain in the owner until compensation is paid. So under Constitutions which contain no express requirements that payment shall precede taking, but prohibit the taking of private property for public use without just compensation, title does not pass before payment, except where the statute expressly provides that title shall pass before compensation and make adequate and certain provision for such compensation. Where the award has been paid and accepted, title or an easement, as the case may be, vests in the condemning party."

See, also, authorities cited in the notes under the above quotation from the text of Cyc.

The following is note 73 found on page 785, 15 Cyc.:

"Where an appeal is taken from the award of appraisers, payment to the clerk of the damages awarded operates only as a license to the railroad company to take possession of the lands so appropriated. The title thereto does not vest in the company until it has fully paid the damages finally assessed and adjudged in favor of the owner upon the final determination of the appeal. *Terre Haute, etc., Ry. Co. v. Crawford*, 100 Ind. 550; *Lake Erie, etc., Ry. Co. v. Kinsey*, 87 Ind. 514."

To the same effect are the following cases: *Rees v. Chicago*, 38 Ill. 322; *Jones v. Miller*, (Va.) 23 S. E. 35; *Southern Ry. Co. v. Gregg*, 101 Va. 308, 43 S. E. 570; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 307, 73 Am. Dec. 575; *California Southern Ry. Co. v. Colton Land & Water Co.*, 2 Pac. 38.¹

The taking of private property for public use being against the will of the owner and by force of law, the provisions of the law must be strictly complied with. See, in this connection, *Watkins v. Board of Commissioners of Stephens County*, 174 Pac. 523; also case of *Bensley et al. v. Mountain Lake Water Co.* heretofore cited.

If the rule established by the Indiana cases is accepted as the true rule, and that the nature of the right acquired by the condemning corporation up until just compensation is determined by the jury is merely a license, and that title does not become fixed until the compensation is finally determined and paid, we can see no reason why the owner could not show the condition of his crops and bearing on the question of value up until the time of trial, because there would be no final taking until that time, under this rule. We are, however, not deciding that proposition. The plaintiff in error is not contending that he is entitled to show the condition of the crop after the 25th of April, but only up until that time.

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 64 Cal. xvii.

The rule seems to be discussed fully in the following case: *Lafferty v. Schuykill River East Side Ry. Co.*, 124 Pa. 297, 16 Atl. 889, 3 L. R. A. 124, 10 Am. St. Rep. 587:

"When a railroad company locates its lines of road over the lands of private owners, it secures thereby a right to enter upon and occupy the land covered by such location.

"The actual entry cannot be made until the damages accruing to the owner shall be paid or secured; but the means for ascertaining the damages are provided by law, where the parties cannot agree upon them; and the owner cannot prevent the exercise of the right of eminent domain by the company.

"But while the owner has notice, by the location of the road over his lands, of the purpose of the company to appropriate so much as the line of the road covers, he has no notice of the time when actual possession will be required. He may doubtless abandon the land covered by the line as located to the company and proceed to have his damages assessed; or he may wait for the company to take the initiative and continue meantime to occupy and cultivate it. If he takes the latter branch of the alternative, the crops planted after the location and before notice or bond given by the railroad company are proper subjects for compensation.

"The reason for this is that it may be months or even years after the location of the line before the company will be ready to enter upon the land for purposes of construction or to take the steps necessary for the assessment of damages, and the owner has a right to remain in possession until actual appropriation of his land by the company. This was held in *Gilmore v. Pittsburgh Railroad Company*, 104 Pa. 275, and has been recognized in other cases.

"If, therefore, *Krider* had made no lease of his land, but continued to cultivate it himself, he would have been entitled to claim damages as well for the loss of growing crops as for the injury done to the land, provided the crops had been planted before bond given or notice of an intent to enter upon the construction of the road."

Also the case of *Gilmore v. Pittsburgh, etc., Ry. Co.*, 104 Pa. 281:

"The whole work in constructing the road on the land of the plaintiffs was in the month of June, 1879. Corn and potatoes were then growing on it. They were probably planted in April or May. Their destruction in making the road was claimed as an item of damage. The evidence covered by the second assignment appears to have been admitted under the view that no damages should be allowed for this item, if the plaintiffs knew when planting them that stakes indicating location had previously been set there, and the defendant was engaged in constructing the road on adjoining lands.

"This is a misapprehension of the law, under the undoubted facts of the case. Conceding that stakes had been set on the ground either in 1868 or 1860, or not until 1871, or at each time, as it is shown two lines were run, the defendant thereby acquired no right to take possession and occupy the lands. Actual payment of damages or security therefor duly approved must precede the taking. The plaintiffs were under no legal obligation to refrain from using

their property by reason of any expectation that the defendant might afterwards take it. Although the compensation is usually called damages, yet it is in fact the consideration or price of a privilege purchased. Until the company made a permanent location, it was not liable for damages under the statute. When these crops were planted it had not made such location, nor had it given the required security. The bond was not filed until in June, 1879; whether before or after the land was taken, or when the bond was approved, does not appear. The defendant acquired no right to the possession until the security was approved by the court of common pleas. If the plaintiffs had refrained from using their lands for the eight or ten years which intervened between the running of the first line and the final location of the road, it is very clear they could not have recovered damages for that interval of time. Until final location was made, the defendant was not in position to compel a sale of the privilege. Without payment or security it has no right to take possession. Prior thereto the plaintiff's full right to the enjoyment of their property remained unimpaired. It follows the court erred in receiving the evidence covered by the second assignment."

It might be suggested that since the plaintiff in error, defendant below, has failed in his brief to set out from the record and proofs such a state of facts as indicate that the giving of the instruction No. 8, complained of, worked material injury to the plaintiff in error, and that, since he failed to do this, this court can, therefore, act upon the presumption that no material injury was done, and hence that the error was harmless.

We do not, however, view this to be the law. Our statute on harmless error is section 6005, R. L. 1910, vol. 2, and reads as follows:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

We have not examined the entire record. We have examined it partially. The record is very long. A great deal of proofs were given pro and con upon the value of the land. We cannot say from what examination we have made that the instruction was harmless, and did not probably result in a miscarriage of justice. They proved that the wheat made something over 23 bushels per acre. Who can say that the limiting of the jury to March 9, 1917, did not probably result in a miscarriage of justice.

This provision of the statute has this alternative provision:

"Or constitutes a substantial violation of a constitutional or statutory right."

Our contention is that this last provision is imperative and exclusive of the preceding provision. The question raised by this assignment of error is that a substantial constitutional right of this plaintiff in error was violated by this instruction, and the only question is: Was it a substantial violation? 4 Words and Phrases, New Series, p. 750, defines "substantial" as follows:

"'Substantial' means 'belonging to a substance; actually existing; real; . . . not seeming or imaginary; not illusive, real; solid; true; veritable.' Elder v. State, 50 South. 374, 162 Ala. 41, citing Webst. Int. Dict."

The following is from 37 Cyc. p. 507:

"As used in reference to the right of a party to an action to appeal from an order affecting a substantial right, an essential legal right, not merely a technical one; something to which, upon proved or conceded facts, a party may lay claim as matter of law, which a court may not legally refuse, and to which it can be seen that the party is entitled, within the well-settled rules of law; some legal right to which the party who appeals claims to be entitled; a legal right; one which is protected by law. Substantial Right; Law Depriving Accused of an Ex Post Facto, see Constitutional Law, 8 Cyc. 1081."

Under the above definition of a substantial right it would seem that what is meant by a substantial violation of a statutory or constitutional right would be a violation of a right granted by statute or by constitutional provision, and is such a right that a party in interest may invoke it, and upon the request the court has no discretion but to grant it, and hence the refusal to grant the request is error, and it would seem this is so without regard to whether the refusal did or did not affect the interests of the one asking it.

The plaintiff in error contends, in his brief, that this instruction was prejudicial. If the Constitution means that the property cannot be taken by the city until compensation therefor has been paid nor the proprietary rights disturbed, nor title taken without the compensation being first paid, then why is it not a substantial invasion of a constitutional right of this plaintiff when the jury is denied the right to consider the value of said land up until the title passed?

The following is instruction No. 6, given by the trial court:

You are instructed that, in determining the fair market value of the land taken. It is your duty to take into consideration the value of the growing wheat crop upon the land, and in determining the value of said crop you are instructed that the wheat crop was a part of the real estate at the time that it was taken, but it would be your duty to determine and fix what was the reasonable market value of said growing wheat crop at the time the land was taken

in order to determine the fair market value of said growing wheat crop at the time the land was taken in order to determine the fair market value of the land. And in this connection you are instructed that certain evidence has been permitted to go to you with reference to the cost of preparing the ground and sowing the crop and the amount of the yield. This evidence was permitted to go to you only for the purpose of determining the fair market value of the land at the time that it was taken, and the value of the crop actually harvested would not be the measure of damages, but the measure would be the fair market value of said growing crop together with the land in the condition it was at the time it was taken by the plaintiff.

"Given and excepted to by Deft.

"John W. Hayson, Judge."

In this instruction the court gives the measure of damages and instructs the jury as to what is to control them in considering the growing crop. Referring to the proofs that were permitted to go to the jury pertaining to said crop, the court tells the jury that, in considering the crop for the purpose of estimating the value of the land taken, he instructs them to consider the reasonable market value of the growing wheat crop at the time the land was taken in order to determine the fair market value of the land.

Then the court follows this instruction up by giving the objectionable instruction No. 8, by fixing the time of the taking or appropriation of the land to be at a time entirely different under the facts in this case than that which the Constitution says that there can be a legal taking; hence the giving of instruction No. 8 cannot be held to be in good reason anything but a substantial violation of a substantial constitutional right of the plaintiff in error herein.

If the wheat crop had matured prior to April 25, 1917, the plaintiff in error would have had the right to have harvested and disposed of said crop. He had the proprietary right to and owned the wheat crop until April 25, 1917. It is the duty of this court, as the writer of this opinion views it, to interpret the rights of this plaintiff in error, under this constitutional provision, and apply the correct rule. The market value should be determined as of the date of the taking, and under our Constitution the taking is not until the money is paid.

The rule, when fixed by this court, might sometimes work to the advantage of the condemning party and sometimes to the advantage of the owner of the property, and, when the rule is fixed by this court, then it is as much the constitutional right of one party and a matter of right to invoke the rule as the other, and as either may deem involves his interest, and, when either so invokes it,

they are entitled to it as a matter of strict legal right.

We quote the following from the case of *Twin Lakes H. Gold Min. Syndicate v. Colorado M. Ry. Co.*, quoting from page 6 of 16 Colo., from page 260 of 27 Pac.:

"It is ably urged in argument that the third and fifth instructions were erroneous in the clauses where it was said that the value of the land taken and the damages to the residue should be assessed 'in accordance with the situation of the property and conditions existing at that time,' viz. at the date of filing the petition. The language in our Code of Civil Procedure, § 253, is: 'In estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisalment shall be allowed and awarded,' etc. The statute is imperative, and the instruction is in violation of it, and technically incorrect. In view of what, according to the record, 'the evidence tended to show,' we cannot say the error was harmless. Whether or not there was any change of value between the date of the petition and the time of trial is not shown. As it was erroneous, and counsel for plaintiff in error insist that it was prejudicial, the judgment should be reversed and the cause remanded."

See, also, *Chicago, K. & N. Ry. Co. v. Broquet*, 47 Kan. 571, 28 Pac. 717.

If the city desired that the damages should have been estimated as of March 9, 1917, the date the commissioners filed their report, and they had gone to the clerk of the court and paid the amount of the award to the clerk of the court on that day, then they would be in a position to invoke the rule, but they did not pay the money until April 25, 1917, and we have a right to presume that possibly the prospects of the wheat crop at that time had something to do with the city making the payment on that date. They could have delayed making the payment until they were ready to take possession of the property to begin the improvement. But, if they had done so and delayed beyond the harvest of the wheat crop, the crop would have gone to the owner of the land.

To repeat, we have not examined this entire record with the view to determining whether or not this instruction was a harmless error, and we do not think that we are required to do so under the state of this record, since we hold that instruction No. 8 was in contravention of a substantial constitutional right of the plaintiff in error, and therefore that the case should be reversed, and the same is reversed and remanded for a new trial not inconsistent with this opinion.

HARRISON, C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

Ex parte DENNISON. (No. A-3989.)

(Criminal Court of Appeals of Oklahoma.
June 14, 1921.)

(*Syllabus by Editorial Staff.*)

1. Habeas corpus \Leftrightarrow 85(1)—Burden is on petitioner to show himself entitled to bail.

Upon an application for bail by writ of habeas corpus after commitment for a capital offense by an examining magistrate, the burden is upon petitioner to show facts sufficient to entitle him to bail when these facts do not appear from the evidence adduced on the part of the prosecution; and, if the court is of opinion that evidence is insufficient to create a reasonable doubt of petitioner's guilt of a capital offense, bail will be refused.

2. Habeas corpus \Leftrightarrow 85(1)—Evidence insufficient to show one accused of murder entitled to bail as of legal right.

On an application for habeas corpus to be admitted to bail by one charged with murder, evidence held insufficient to show that petitioner was entitled to bail as matter of legal right.

Application by Cy Dennison for writ of habeas corpus to be admitted to bail. Writ denied, and bail refused.

Joe S. Eaton and E. M. Carter, both of Okmulgee, for petitioner.

S. P. Freeling, Atty. Gen., W. C. Hall, Asst. Atty. Gen., and James Heflin, Co. Atty., of Okmulgee, for the State.

PER CURIAM. In this proceeding petitioner, Cy Dennison, has presented to this court a verified petition, wherein he alleges that he is unlawfully imprisoned and restrained of his liberty in the county jail of Okmulgee county, Okl., by Lon Kuhn, sheriff of said county; that the cause of his restraint is that he has been committed to said county jail by an examining magistrate upon a preliminary examination held by him at Okmulgee, Okl., on the 26th day of May, 1921, upon information or complaint charging petitioner with the murder of one Robert Burden on the 16th day of May, 1921; that thereafter, on the 27th day of May, 1921, the county attorney of Okmulgee county, Okl., filed in the superior court of Okmulgee county an information purporting to charge this petitioner, together with Roy Massingale and Calvin Shipman, with the crime of murder hereinbefore referred to.

Petitioner avers that he is not guilty of the crime of murder as charged in the information, and that upon the evidence introduced at the preliminary examination, together with affidavits filed in support of the petition, it is shown that the proof of his guilt of the crime of murder is not evident nor the presumption great, and that therefore petitioner is entitled to be let to bail.

It is also shown that petitioner applied to

the district court of Okmulgee county to be admitted to bail, and that upon a hearing of his said application on May 31, 1921, bail was denied by said court.

The application is submitted on a transcript of the evidence taken before the justice of the peace at the preliminary hearing, together with further evidence taken before the district judge of Okmulgee county, and also upon affidavits filed in this court.

The testimony for the state upon the preliminary examination, and on the application for bail before the district court, shows that on the night of the 16th of May, 1921, Robert Burden, a peace officer, was shot and killed at a time he was attempting to arrest two men who had held up and robbed, in the city of Okmulgee, one J. R. Harrison and Harrison's wife of about \$5,000 worth of diamonds, and at the time of the attempted arrest the robbers were apprehended fleeing from the immediate scene of the robbery with the spoils upon their persons and before any division of the same had been made between them. The evidence discloses that the officers informed the robbers that they were officers, and of their purpose to arrest them, upon which the robbers immediately proceeded to shoot and kill the said Burden and also wounded his companion officer by the name of Spess. There is evidence on the part of the state which tends to establish a conspiracy between petitioner and his codefendants, Shipman and Massingale, to effect this particular robbery, with instructions by petitioner to the other two to shoot to kill if apprehended.

In rebuttal of this evidence, the petitioner offers in this court an affidavit by his wife and also one by a lady friend of hers to the effect that, on the evening it is alleged by some of the state's witnesses that defendant had planned the said robbery, defendant was seen at his place of business during different intervals from shortly after supper until about midnight. Also, there are one or two affidavits to the effect that the general reputation of one of the state's witnesses for truth and veracity is not good. The petitioner did not take the witness stand either in his preliminary examination or before the district court or in this court.

[1] The settled rule of this court is that upon an application for bail by writ of habeas corpus, after commitment for a capital offense by an examining magistrate, the burden is upon petitioner to show facts sufficient to entitle him to bail when these facts do not appear from the evidence adduced on the part of the prosecution, and if, upon a consideration of all the evidence introduced on the application for bail, the court is of opinion that it is insufficient to create a reasonable doubt of petitioner's guilt of a capital offense, bail will be refused. In re Kerriel,

12 Okl. Cr. 386, 157 Pac. 369; Ex parte Butler, 15 Okl. Cr. 111, 175 Pac. 132.

[2] The court has carefully examined the record before us, and without entering into a discussion of the incriminating facts and circumstances, we are of opinion, after a careful consideration of all the evidence presented in support of the application, that the petitioner is not entitled to be admitted to bail as a matter of legal right.

It is therefore considered and adjudged that the writ be denied and bail refused.

Ex parte DENHAM. (No. A-3998.)

(Criminal Court of Appeals of Oklahoma. June 14, 1921.)

(Syllabus by Editorial Staff.)

1. Habeas corpus \S 85(1)—Burden upon petitioner to show himself entitled to bail.

Upon an application for bail by writ of habeas corpus, after commitment for a capital offense by an examining magistrate, the burden is upon petitioner to show himself entitled to bail when the facts do not appear from the evidence in the prosecution, and if, on the consideration of the evidence, the court is of opinion that it is insufficient to create a reasonable doubt of petitioner's guilt of a capital offense, bail will be refused.

2. Habeas corpus \S 85(1)—Evidence insufficient to show that petitioner was entitled to bail as of legal right.

On an application for habeas corpus to be admitted to bail by one charged with murder, evidence held insufficient to show petitioner entitled to bail as matter of legal right.

Application by Dewey Denham for habeas corpus to be admitted to bail. Writ denied, and bail refused.

Welch & Welch, of Antlers, for petitioner. S. P. Freeling, Atty. Gen., W. C. Hall, Asst. Atty. Gen., and R. L. Evans, of Hugo, for respondent.

PER CURIAM. In this proceeding petitioner, Dewey Denham, by his counsel, has presented to this court a verified petition wherein he alleges that he is unlawfully imprisoned and restrained of his liberty in the county jail of Pushmataha county by N. F. Kirkpatrick, sheriff of said county; that the cause of his restraint is that he has been committed to said county jail by one George R. Childers, justice of the peace of Antlers township, said county, upon a preliminary examination held by him on the 24th day of May, 1921, upon a charge of having murdered in said county on the 15th day of May, 1921, one I. J. Bilbrey; and petitioner avers that said restraint is illegal and unauthorized

and that petitioner is entitled to bail and to be discharged from said restraint upon bail bond for the reason that the proof of petitioner's guilt of said murder is not evident nor the presumption thereof great.

Petitioner further alleges that he has heretofore made application for bail to the district judge of Pushmataha county, and that bail was denied by said judge.

As evidence that the proof of petitioner's guilt of said murder is not evident nor the presumption thereof great, petitioner presents in support of his application all the evidence taken at the preliminary examination and before the district judge, and also some affidavits.

The testimony discloses that in the evening of Sunday, the 15th day of May, 1921, about dark, petitioner killed and murdered one I. J. Bilbrey by shooting him in the back part of the head with a shotgun; that the shooting occurred on a public highway near the town of Cloudy, in Pushmataha county, and close to the home of one Henry McDaniel; that deceased was a man about 60 years of age, and defendant about 19 years of age. The evidence on the part of the state and also the evidence of one Jess Musgraves, who was with defendant at the time, supports the allegations of the preliminary complaint or information.

In the hearing before the district judge, defendant took the witness stand, and testified that the killing was in defense of his person.

[1] The settled rule of this court is that upon an application for bail by writ of habeas corpus, after commitment for a capital offense by an examining magistrate, the burden is upon petitioner to show facts sufficient to entitle him to bail when these facts do not appear from the evidence adduced on the part of the prosecution, and if, upon a consideration of all the evidence introduced on the application for bail, the court is of opinion that it is insufficient to create a reasonable doubt of petitioner's guilt of a capital offense, bail will be refused. In re Kerriel, 12 Okl. Cr. 386, 157 Pac. 369; Ex parte Butler, 15 Okl. Cr. 111, 175 Pac. 132; Ex parte Dennison (No. A-3989) 198 Pac. 514, not yet officially reported.

[2] We have examined the entire record before us, and without entering into a discussion of the facts, and without comment upon the sufficiency of the evidence to establish the allegations of the information, for the reason that such a discussion and comment might result to the prejudice of defendant upon the trial, we deem it sufficient to say that the court is of opinion that petitioner is not entitled to be admitted to bail as a matter of legal right.

It is therefore considered and adjudged that the writ be denied and bail refused.

HOWELL v. STATE. (No. A-2931.)

(Criminal Court of Appeals of Oklahoma.
June 13, 1921.)

(*Syllabus by Editorial Staff.*)

Intoxicating liquors §236(1)—Evidence insufficient to sustain conviction for violating prohibitory liquor law.

In a prosecution for violating the prohibitory liquor law, evidence held insufficient to sustain a conviction.

Appeal from County Court, Pawnee county; George E. Merritt, Judge.

Ben Howell was convicted of violating the prohibitory liquor law, and he appeals. Reversed.

Redmond S. Cole, of Pawnee, for plaintiff in error.

R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Ben Howell, was convicted at the October, 1916, term of the county court of Pawnee county on a charge of unlawfully conveying intoxicating liquor from a building in the town of Jennings to a place near the Palace Rooming House in said town, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 90 days.

The evidence for the state shows that the defendant started from a little outhouse carrying a sack containing 20 bottles of beer, and was going into the Palace Rooming House when he was arrested by the officers.

As a witness in his own behalf the defendant testified he had lived in Jennings two years and was half owner of the Palace Rooming House; that about six weeks previous to his arrest he had ordered from Joplin for his own personal use a barrel of beer, and when it came he asked and received permission to lock it in a nearby building, owned by the town justice of Jennings; that he never sold any of this beer and had never been convicted of a violation of the prohibitory liquor laws and had never ordered or received but the one barrel; that on the night of his arrest he saw two boys naming them, peeping through a crack into the room where the beer was and he ordered them away from the place; that he put all the beer that was left in a sack to take it to his room in the Palace Rooming House, to keep the boys from stealing it; that he had kept the beer in the outbuilding because the rooming house was a public place; that the outhouse where the beer was kept was 50 feet in the rear of the Palace Rooming House.

We deem it unnecessary to consider the other errors assigned. It is sufficient to say,

after a careful examination and consideration of the testimony, we are of the opinion that the conviction is not sustained by the evidence. Wherefore the judgment is reversed.

BURBA v. STATE. (No. A-3878.)

(Criminal Court of Appeals of Oklahoma.
June 11, 1921.)

(*Syllabus by the Court.*)

Criminal law §1106(3)—Procedure necessary to confer jurisdiction upon Criminal Court of Appeals stated.

In misdemeanor cases the appeal must be taken within 60 days after the judgment is rendered, provided, however, that the trial court or judge may for good cause shown extend the time in which an appeal may be taken, not exceeding 60 days. In such cases the appeal is taken by filing in this court a petition in error with case-made attached, or transcript of the record, together with proof of service of notices of appeal as required by statute, and when this is not done within the time prescribed by Procedure Criminal (section 5991, Rev. Laws 1910), this court does not acquire jurisdiction of the appeal, and such an appeal will be dismissed.

Appeal from County Court, Tillman County; W. H. Hussey, Judge.

T. A. Burba was convicted of abandoning his family, and he appeals. Appeal dismissed.

R. C. Searcy, of Tuttle, for plaintiff in error.

S. P. Freeling, Atty. Gen., W. C. Hall, Asst. Atty. Gen., and F. H. Hurst, Co. Atty., of Frederick, for the State.

DOYLE, P. J. On March 22, 1919, an information was filed in the county court of Tillman county charging appellant, T. A. Burba, with the crime of abandoning his wife and minor children. Upon his trial he was convicted and his punishment fixed at a fine of \$500. From the judgment rendered in pursuance of the verdict on the 11th day of May, 1920, an appeal was attempted to be taken by filing in this court on November 12, 1920, a petition in error with case-made.

Counsel for the state has filed motion to dismiss the appeal herein, for the reasons following:

"(1) That no notice as required by law was served upon the clerk of the trial court, by the plaintiff in error, of his intention to appeal to the Criminal Court of Appeals.

"(2) That no notice as required by law was served upon the county attorney of the county where said cause was tried, by the plaintiff in error, of his intention to appeal to the Criminal Court of Appeals.

"(3) That the plaintiff in error herein failed

to serve his case-made on the county attorney and associate counsel and file same in this court within the time required by law, to wit: The said plaintiff in error, T. A. Burba, was convicted of a misdemeanor in the county court of Tillman county on the 11th day of May, 1920, and served his case-made on the county attorney of Tillman county on the 10th day of September, 1920, more than 120 days from the rendition of the judgment in the case, and filed said case-made at some later date."

Our Code of Criminal Procedure provides:

"In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered: Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days." Section 5901, Rev. Laws.

This court has uniformly held that, in order to confer jurisdiction on this court to review a judgment appealed from, the appeal must be taken within the time prescribed by the statute. When an appeal is not perfected by filing in this court a petition in error with case-made attached, or an authenticated transcript of the record, together with proof of service of notices of appeal, as required by section 5902, Rev. Laws, or in lieu of such notices the record to show the issuance and service of summons in error, or the waiver of the issuance of the same by the Attorney General within the time prescribed by the statute, this court does not acquire jurisdiction of the appeal, and such appeal will be dismissed.

For the reason stated, the motion to dismiss the appeal is sustained, and the cause remanded to the county court of Tillman county, with direction to enforce the judgment and sentence.

Mandate forthwith.

MATSON and BESSEY, JJ., concur.

THOMPSON v. STATE. (No. A-3430.)

(Criminal Court of Appeals of Oklahoma.
June 11, 1921.)

(Syllabus by the Court.)

Larceny \S 55—Evidence insufficient to sustain conviction.

In a prosecution for the larceny of a hog, evidence held insufficient to sustain a conviction.

Appeal from District Court, Cherokee County; John H. Pichford, Judge.

William Thompson was convicted of larceny of a hog, and he appeals. Reversed.

J. J. Bruce, of Muskogee, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, William Thompson, was convicted in the district court of Cherokee county on an information charging the theft of a black and white spotted sow, the property of D. S. Whitmore, and in accordance with the verdict of the jury was sentenced to be imprisoned in the penitentiary for the term of two years. To reverse the judgment he appeals.

In order to present the assignments we will briefly state the testimony in the case.

D. S. Whitmore testified:

"In October, 1917, the defendant lived a mile south and a mile and a half west of me. I was the owner of a certain black and white spotted sow, marked with a smooth crop and two splits in each ear. She was one of 13 head of feeders that I turned on the range two miles west of where I lived in April, about roasting ear time I missed three hogs. I found this sow in Thompson's pen. This sow would have been a year old last August."

On cross-examination the following questions were asked and answers given:

"Do you know whether this hog has any white spots on it? I cannot swear positively.

"Do you know whether it has any white feet or not? I cannot swear positively, it may have.

"Then if it had not been for this mark you could not tell whether this was your hog or not? Well, I would not be able to swear positively it was mine without the mark.

"How much would this hog weigh the last time you saw it before it disappeared? Oh, 80 or 90 pounds, maybe a little bit more.

"How much did it weigh in October when you say you found it in this man's pen? Just guessing, I would judge it would weigh 125 pounds.

"Did you have any talk with Mrs. Thompson about the hog? She came down to the pen and said she had washed for it at John Starnes when it was a little bit of a pig, but she told William to give it up."

James Gable testified:

"I saw a sow in the pen at William Thompson's place, and it looked like one I had seen before up on the mountain above my place. It had Dave Whitmore's mark, two splits and a crop off of each ear."

William Scott testified:

"I saw a sow in the pen at the defendant's place last fall; it was Dave Whitmore's hog. The last time I saw that hog before I saw it in that pen was along in July some time."

On cross-examination the following questions were asked and answered:

"Who were you renting from last year? Dave Whitmore. He is my brother-in-law. He told me there was a hog down at Thompson's. He said he had found his hog.

"The only way you identified this hog as

Whitmore's is from the mark and the general appearance, you say? Yes, sir; from the mark and general appearance I think it is his hog.

"It was in a pen between the house and the road at Thompson's place? Yes, sir."

The state rested; the defendant demurred to the evidence, and moved to dismiss for the reason that the evidence is insufficient to establish the charge in the information. Overruled. Exception allowed.

For the defense Victoria Thompson testified:

"I had this hog in a pen under a plum tree in the yard. I got it from John Starnes; I wash for him, and I paid for this hog that way. I had this hog going on 2 years when Mr. Whitmore came over and claimed it. It would get out and follow the children to school, and they would bring it back. It got out and went to Mr. Baughman's place. When Mr. Whitmore looked at the hog, he says, 'Don't you want to sell it?' and Mr. Thompson said, 'No; it belongs to the old lady.'"

Johnson Thompson testified:

"I am not related to the defendant. The first time I saw that hog was when the defendant went down to John Starnes and brought it home. It was a small pig. I and George Cook were pulling corn at John Starnes when he came and got it. Thompson's wife paid for it by washing. That was two years ago. I have seen it after that often when I would happen up at his place. That is the only hog I saw there for 2 years. The mark on the hog is William Thompson's. He has used this mark 30 or 35 years."

John Ford testified:

"I am acquainted with the stock mark of William Thompson. He has used that mark about 35 years to the best of my knowledge. Mr. Chestnut and Mr. Whitmore use the same mark."

Walter Bean testified:

"I have known the defendant about 25 years. When I first saw that hog to pay any attention to it was last Thanksgiving a year ago. The mark is old man Thompson's. He has used it 20 years that I know of. I saw the same mark on some of Mr. Whitmore's hogs."

H. R. Vanslyk testified:

"I farmed some land on the defendant's place. I know the hog he had last winter a year ago. I first saw it at my place. Mrs. Thompson was there, and it followed her home. Last winter it was at my place fairly often, and I saw it in the pen when I was picking cotton down there."

P. W. Baughman testified:

"I live about a mile from the defendant; roasting ear time I took up a hog. My son told me Mrs. Thompson had one that was gone, so I went to Mr. Thompson, and he told me he had one gone. He described it pretty well, and said if it was his the bush of the tail was cut off. We went on down, and when we got

close to the hog I saw the bush of the tail was gone. I had not noticed that before. He said it was his, and he drove it home with the rope that I had tied it to a tree with."

As a witness in his own behalf, William Thompson testified:

"My age is 54. I have been living right on Four Mile branch all my days. The hog that Mr. Whitmore claims belongs to my wife. She got it from John Starnes. When it was a pig its tail froze off. I have never been arrested before being arrested on this charge."

J. J. Bruce testified, as an attorney for the defendant:

"I filed a praecipe for his witnesses, among others, John Starnes. I called Mr. Starnes up over the phone last night, and he told me he did not get it; he said he was sick in bed and could not come. I had occasion to visit Mr. Thompson's home several times last year. I was there every three or four weeks. I noticed a black-spotted sow in a hogpen in the yard. I happened to be at Mr. Thompson's house the day that Mr. Whitmore came there. He looked in the pen and rode off. Near sundown he returned with an officer; said he wanted to arrest Mr. Thompson and replevin the hog. I asked him how did he know that it was his hog. He said by the mark. I asked him if he had no other way to identify the hog aside from the mark, and he said, 'No.'"

On cross-examination the following questions were asked and answers given:

"You have seen this man Starnes since this controversy arose, haven't you? Yes, sir."

"I will ask you if it is not a fact that Starnes advised you that he had sold them a pig 3 years ago? I asked him did he ever sell this man a hog, and he told me he sold his wife a pig two years ago."

The first assignment is that the court erred in denying a continuance.

The record shows that upon the calling of the case for trial the defendant's counsel announced that he was not ready for trial on account of the absence of certain witnesses for which he had caused subpoenas to be issued and placed in the hands of the proper officer, and that no return had been made.

"The Court: It looks to me like the defendant has used all the diligence the law requires."

"Mr. Bruce: It may be that the witnesses will arrive on this motor; if they do, we are ready for trial. (Mr. Powell, cocounsel, arrives.)"

"The Court: Mr. Powell, do you know whether or not your witnesses came on the motor?"

"Mr. Powell: They did, your honor; at least some of them."

"The Court: Are you ready for trial?"

"Mr. Powell: My cocounsel says he is ready to go to trial with those witnesses."

Thereupon the trial proceeded. Thus it appears that the first assignment is without merit.

(193 P.)

Another assignment is that the verdict of the jury was contrary to the law and the evidence. Ordinarily, whether there is evidence to warrant a conviction is a question for the jury. However, under our Code of Criminal Procedure, it is the duty of the court, where it deems the evidence insufficient to warrant a conviction, to advise the jury to acquit. Section 5896, Rev. Laws. The court may undoubtedly do this of its own motion, and the defendant may present to the court his right to acquittal, as a matter of law, under this section. But the defendant is not confined to this formula, or to any form of words, in presenting to the court his right to be acquitted. All that is necessary is that in some intelligible form there shall be presented to the court, for its ruling and decision, the question that there is no evidence for the jury, or not sufficient evidence upon which to base a conviction.

In view of the very weak and unsatisfactory character of the testimony relied upon to establish the corpus delicti, and, considering the undisputed facts, and that the witnesses on the part of the defendant were in no way attempted to be impeached, we think the court below should have advised the jury to acquit the defendant. In our opinion the evidence falls so far to support the verdict that the necessary inference is that the verdict was the result of passion or prejudice. Because the evidence does not sustain the conviction, the judgment is reversed.

MATSON and BESSEY, JJ., concur.

McCAULEY v. STATE. (No. A-3594.)

(Criminal Court of Appeals of Oklahoma.
June 11, 1921.)

(Syllabus by Editorial Staff.)

Intoxicating Liquors — 236(6½) — Evidence held insufficient to sustain conviction of unlawful possession.

In a prosecution for unlawful possession of intoxicating liquor, evidence held insufficient to sustain a conviction.

Appeal from County Court, Stephens County; G. T. Burrows, Judge.

P. McCauley was convicted of unlawful possession of intoxicating liquor, and he appeals. Reversed.

J. B. Wilkinson, of Duncan, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hafl and E. L. Fulton, Asst. Attys. Gen., for the State.

PER CURIAM. Plaintiff in error, P. McCauley, was convicted on an information charging that he did willfully and unlawfully have in his possession two quarts and one pint of whisky for the purpose and with the intent of bartering, selling, giving away, and otherwise furnishing the same to other persons. The jury failed to agree on the punishment. Motion for new trial was duly filed and overruled; the court sentenced the defendant to be confined for 60 days in the county jail and to pay a fine of \$100 and the costs. To reverse the judgment he appeals.

The principal question presented is the sufficiency of the evidence to support the conviction.

For the state, E. R. Young, sheriff, testified that he had known the defendant about 18 years; that in serving a search warrant he went out to the defendant's place, about nine miles east of Duncan, and found two quarts and one pint of whisky in an out-house that he supposed was on the defendant's premises; that Mr. Gossett, city marshal, went with him.

Marshal Gossett testified that they found two quarts and one pint of whisky buried in some cotton seed, about a quarter of a mile from where the defendant lived.

For the defense, Dan McCauley testified that—

"I bought the whisky the officers found from Bill Phillips, in Duncan, and he delivered it at the cotton seed house, and I put it in the cotton seed. I did not tell the defendant it was there."

The defendant testifying in his own behalf stated that he did not know anything about the whisky found in the cotton seed house; O. H. Marshall had charge of the seed house; that he never knew it was there until it was discovered; never had anything to do with it.

Upon careful consideration we think the testimony is insufficient to warrant the verdict of the jury. Before a jury is authorized to find a defendant guilty in any criminal case, there must be evidence sufficient to prove that an offense has been committed, and to identify the defendant with the commission of it as charged in the information.

Because the evidence is insufficient to support the conviction, the judgment is reversed.

(100 Or. 611)

GRIGNON v. SHOPE.

(Supreme Court of Oregon. June 8, 1921.)

Costs \$257—For additional abstract by respondent not taxable, where it was a copy of appellant's abstract.

Supreme Court rule 7 (173 Pac. viii), providing for a further or additional abstract by respondent, if the appellant's abstract be imperfect or unfair, does not contemplate the repetition of matter included in appellant's abstract, so that, where respondent's additional abstract repeats the matter contained in appellant's abstract, and includes a transcript of the testimony, costs therefor cannot be taxed.

Department 2.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

On motion to retax costs. Allowed.

For former opinion, see 197 Pac. 317.

Robert C. Wright, of Portland, for appellant.

S. T. Richardson, of Portland (W. E. Richardson, of Portland, on the brief), for respondent.

BEAN, J. Defendant, D. F. Shope, has filed a motion to retax the costs in this case. Objection is made to the item of \$16.50, for the additional abstract of record filed by respondent, Edith A. Grignon, for the reason that it is not an allowable disbursement under rule 7 of this court.

Appellant contends that the copies of the findings of fact, conclusions of law, and judgment, in the additional abstract, are identical with the matter set out in appellant's abstract of record, and that the remainder of the additional abstract sets out "testimony," being copies of depositions. Counsel for plaintiff answer defendant's first objection by the claim that the appellant's abstract of record does not show that the lower court ever adopted the findings or judgment.

An examination of the abstract and additional abstract of record discloses that the findings of fact and conclusions of law as printed are practically identical in both of the abstracts. In appellant's abstract of record the findings of fact are stated as proposed by plaintiff, and followed by objections and exceptions thereto. On page 51 of that abstract we find that the objections and exceptions of the defendant to the findings, conclusions of law, and judgment of the court thereon were denied; and also the following:

"And on the 7th day of January, 1920, the following:

"Judgment.

"The findings and judgment are identical in form with that hereinbefore set out as presented and proposed by the plaintiff to be made by the court, and which were made and are now of record herein."

It was therefore unnecessary to set forth the findings of fact, conclusions of law, and judgment, in respondent's additional abstract of record. The testimony taken by depositions was read into the record. These depositions are contained in respondent's abstract of record. In reading the testimony upon the consideration of the cause, as memory serves, the printed copies of the depositions in respondent's abstract were not noticed. The same matter was included in the transcript of testimony, and it was unnecessary to print such testimony in the abstract.

Rule 7 (173 Pac. viii) reads thus:

"If the respondent shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving a copy thereof, deliver to the appellant's counsel one, and to the clerk of this court, with proof of service upon appellant, sixteen printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions involved in the appeal."

This rule, as it will be noticed, provides for "further or additional abstract." It does not contemplate a repetition of matter included in the appellant's abstract. The rules relating to the abstract of record do not provide for including a transcript of testimony. Such practice would open the door to printing abstracts of great length, to the unnecessary expense of the opposite party, in the event judgment should be against him.

The objection to the item of \$16.50, contained in respondent's cost bill, for the amended abstract of record, is well taken. The item is disallowed.

BURNETT, C. J., and JOHNS and BROWN, JJ., concur.

(100 Or. 632)

BARNUM v. SOUTHERN OREGON TRACTION CO. et al. (CALIFORNIA-OREGON POWER CO., Intervener).

(Supreme Court of Oregon. June 8, 1921.)

Costs \$234 — Awarded to neither party on modification of judgment.

In a suit to foreclose a railroad mortgage, involving the question of whether a claim for electric current furnished for light, heat, and power, and for supplies used in the operation of a railroad was entitled to priority over a claim for interest due on a mortgage covering the railroad, where judgment denying power company's claim was reversed, in so far as it denied such claim for power furnished within six months before the appointment of a receiver, to which the company had a preferential right in the net income arising from the receivership, costs will not be awarded to either party on appeal.

Department 1.

Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

On objections to cost bills. Bills disallowed.

For former opinions, see 195 Pac. 580, 197 Pac. 269.

Porter J. Neff, of Medford (Morrison, Dunne & Brobeck, of San Francisco, Cal., and James T. Chinnock, of Grants Pass, on the brief), for appellant.

Gus Newbury, of Medford, and A. C. Emmons, of Portland, for respondent.

HARRIS, J. Barnum, the respondent, filed a cost bill, claiming that he was entitled to \$75 as costs and disbursements. The Power Company, the intervener and appellant, also filed a cost bill, claiming that it is entitled to \$85.05 as costs and disbursements.

The Power Company asserts that it is entitled to costs and disbursements, for the reason that on appeal it secured a modification of the decree rendered by the circuit court. Barnum insists that he should have his costs and disbursements, for the reason that the decree was affirmed as to its principal features, and the modification related only to a matter which was collateral and secondary to the main question litigated in the trial court and presented to the appellate court.

The facts connected with the litigation and the steps taken or refused to be taken by the respective litigants are set forth in our opinions heretofore rendered. *Barnum v. Southern Oregon Traction Co.*, 195 Pac. 580; *Id.*, 197 Pac. 269. And we think that the circumstances attending this suit are such as to make it proper to refuse to allow costs and disbursements to either party.

We direct that the decree shall be without costs or disbursements to either litigant. Both cost bills are disallowed.

BURNETT, C. J., and McBRIDE and BENSON, JJ., concur.

(100 Or. 589)

IMBRIE v. HARTRAMPF.

(Supreme Court of Oregon. May 31, 1921.)

1. Wills §439—Intention of testator controls.

In construing a will, if the intention of the testator can reasonably be ascertained, it controls the disposition of his property.

2. Wills §656—Devise with condition devisee should not sell or incumber before certain time held to pass clear title after such time.

Testator devised to his son certain land subject to the restrictions that it should not be sold or mortgaged until he was 40 years old, nor be subject to his debts, that if he sold or mortgaged any part of it before that

time all his interest should cease and the land descend to his children, if any, and, if not, to his brothers then living, the devise to be accepted in full payment of testator's indebtedness to devisee except \$500, and an incumbrance on the land to be paid out of the estate. *Held*, in view of Or. L. §§ 10121, 10124, providing that the intent of testator shall control, that it was the intention of testator that devisee, after he reached 40, could dispose of the land at his pleasure, and that payment of the incumbrances from the estate indicated his intention to pass a clear title.

3. Wills §598—Term "heirs" or other words of inheritance not necessary to create estate in fee simple.

Under Or. L. § 9847, the term "heirs" or other words of inheritance are not necessary to create or convey an estate in fee simple.

4. Wills §601(1)—Estate in fee given in one clause cannot be taken away or diminished by subsequent expression of doubtful import repugnant thereto.

Where an estate in fee is given in one clause of a will in clear and explicit terms, the interest which the devisee thus obtains cannot be taken away or diminished by any subsequent vague or general expression of doubtful import, or by any inference deducible therefrom that may be repugnant to the estate given.

5. Wills §625—"Executory devise" defined.

An "executory devise" is a future estate or interest in lands created by will, and limited so that it cannot take effect as a remainder or a future use, which does not vest at the death of the testator, but only on the happening of some future contingent event, can be created without the intervention of a preceding estate, and may be limited after a fee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Executory Devise.]

6. Perpetuities §4(14)—Executory devise, to take effect only upon indefinite failure of issue, is void under rule against perpetuities.

An executory devise, to take effect only upon an indefinite failure of issue, is void under the rule as to perpetuities, for an executory interest, to be valid, must take effect within the life or lives of those in being, and within 21 years thereafter, with the usual period of gestation added.

7. Wills §545(3)—Devise of fee over if devisee "die without issue," means dying without issue in lifetime of testator.

A devise of a fee, with a condition that if the devisee "die without issue" the estate is to go to others, means dying without issue in the lifetime of the testator, unless a different intention is manifest from the context of the will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Die Without Issue.]

8. Wills §601(1)—Subsequent paragraph of will held not to debase fee granted devisee in earlier paragraph.

Testator devised to a son in one paragraph of his will certain land subject to the restric-

tion that it should not be sold or mortgaged until devisee was 40 years of age, nor be subject to his debts, that if he sold or mortgaged any part of it before such time all his interest therein should cease and the land descend to his children, if any, and, if not, to all his brothers then living, the devise to be accepted and received in full payment of testator's indebtedness to devisee, except \$500, and the incumbrance upon the land to be paid out of the testator's estate. In another paragraph of the will testator directed that should any of the devisees named in the will die without leaving lineal descendants, children, or grandchildren, all of the property devised to such devisee should go in equal shares to his brothers and sisters then living, or to the children of any brother or sister then deceased. *Held*, that the latter provision did not debase the fee-simple title which passed to the son after he attained the age of 40 years without violating any of the restrictions in the earlier paragraph of the will. (Per Bean and Johns, JJ.)

9. Remainders — No remainder upon estate in fee simple or determinable fee.

There can be no remainder upon an estate in fee simple or upon a determinable fee, for the reason that by disposing of such an estate one divests himself of all his interest, and has no estate to transfer.

10. Wills — Executory devise of fee-simple estate cannot be defeated or lessened by uncertain clause in another portion of will.

An executory devise being for the purpose of carrying out the wish of a testator, no technical, indefinite, or uncertain clause in a subsequent paragraph of the will should be construed to defeat or lessen the plain devise of an estate in fee simple, made in an earlier clause of the will.

11. Wills — Devise over on death without children held to take effect whether the death is before or after the death of testator.

When a devise is made to one person in fee and upon his death to another in fee, and the death of the first taker is coupled with other circumstances which may or may not ever take place, as death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect according to the ordinary and literal meaning of the words, upon the death of the devisee, under the circumstances indicated, at any time, whether before or after the death of the testator.

12. Equity — Complaint taken as true on demurrer.

All averments of a complaint must be taken as true when considered upon demurrer.

Department 2.

Appeal from Circuit Court, Washington County; Geo. R. Bagley, Judge.

Suit by Ralph Imbrie against A. J. Hart-rampf. Decree for plaintiff, and defendant appeals. Affirmed.

The purpose of this suit is to enforce specific performance of a contract under which

the plaintiff agreed to sell, and the defendant agreed to purchase, 166 acres of land situated in Washington county, Or. The contract expressly provides that in the event the plaintiff is unable to convey a marketable title in fee simple to the premises, free from all incumbrances, then the defendant is relieved from making payment for the land.

The defendant has refused to perform the contract and to make payment of the purchase price of the land, upon the sole ground that plaintiff's title is not marketable. The complaint fully sets forth all facts upon which the defendant's objections to the title are based. The defendant interposed a demurrer to the complaint, which was overruled. Defendant refusing to plead further, a decree was passed in favor of plaintiff. Defendant appealed.

The defendant has no disposition to evade the performance of his contract, and is in fact anxious to effect a purchase of the property upon the basis of the contract, provided the plaintiff is able to convey unto him a marketable title. The land, title to which is in controversy, was owned by Robert Imbrie, in fee simple, and free from all incumbrances at the time of his death, which occurred on January 5, 1897. The defendant raises no question as to the validity of the title of Robert Imbrie, the ancestor of the plaintiff, under whom plaintiff claims to have derived title. Robert Imbrie left a will, which was duly admitted to probate, and the estate was regularly closed. By the third paragraph of the will he bequeaths and devises certain property to James A. Imbrie. By the fourth paragraph he gives to two of his daughters certain sums of money. By the fifth to his children Lizzie Freeman and Ella Williams certain sums of money. In the sixth he bequeaths certain property to James A. Imbrie. Paragraph 7 of the will is as follows:

"I give, bequeath and devise, to my son Ralph Imbrie, all the land that I now own in and being a part of the donation land claim of Caleb Wilkins and wife, and being the tract of land purchased by me from William L. Wilkins, and being in township 1 north, range 2 west, Will. Mer., in Washington county, Oregon, subject to the following restrictions to wit: Said land shall not in whole or part be sold or mortgaged until the said Ralph Imbrie is forty years of age, nor subject to his debts and should he sell or mortgage it, or any part of it, before that time, all his interest in said land shall cease and terminate, and said land shall descend to his children, if he then have any, and if not, then to all his brothers then living. This devise to be accepted and received by him in full of any indebtedness to him, except five hundred dollars. The incumbrance upon his land to be paid out of my estate."

In the eighth paragraph of the will he devises to his son James A. Imbrie in fee simple a tract of land. By the ninth he devises to

his son T. R. Imbrie in fee simple a certain tract of land. By the tenth paragraph he gives, bequeaths, and devises all of the rest, residue, and remainder of his property, real and mixed, to all of his children, or to the children of any deceased child. Paragraph 12 of the will is as follows:

"I further bequeath, devise and direct that should any of the above-named devisees die without leaving lineal descendants, children or grandchildren, then in that case, all of the property above devised to such devisee shall go in equal shares to his or her brothers and sisters then living, or to the children of any brother or sister then deceased, by right of representation."

The plaintiff did not, either in whole or in part, sell or mortgage said real property prior to arriving at the age of 40 years, nor permit the same to become subject to his debts. On and prior to January 29, 1920, the plaintiff secured deeds of conveyances from all of the children and grandchildren of Robert Imbrie, deceased, of all their interest in the land, except a conveyance from plaintiff's own child, who is a minor.

M. B. Bump, of Hillsboro, and D. D. Bump, of Forest Grove, for appellant.

W. G. Hare, of Hillsboro (Hare, McAlear & Peters, of Hillsboro, on the brief), for respondent.

BEAN, J. (after stating the facts as above). This controversy arises out of the construction of paragraphs 7 and 12 of the will, and as to the estate or interest in the real property thereby devised to the plaintiff. It is the contention of the defendant that the provisions of the paragraphs of the will referred to vested in plaintiff only a life estate, with the remainder over to his children or grandchildren living at the time of his death; and in case he died "without leaving lineal descendants, children or grandchildren," then in such case only does title to the property pass to the brothers and sisters.

[1] It is a cardinal principle of law that in construing a will the intention of the testator is the guide. If such intention can reasonably be ascertained it controls the disposition of his property. *Jasper v. Jasper*, 17 Or. 590, 22 Pac. 152; *Love v. Walker*, 59 Or. 95, 107, 115 Pac. 296; *Kaser v. Kaser*, 68 Or. 157, 137 Pac. 187; *Beakey v. Knutson*, 90 Or. 574, 174 Pac. 1149, 177 Pac. 955.

[2, 3] By paragraph 7 of the will, Robert Imbrie devised to his son, the plaintiff Ralph Imbrie, the land in question, subject to the restrictions that the real estate should not be sold or mortgaged until Ralph Imbrie was 40 years of age, nor be subject to his debts. If he had sold or mortgaged any part of it, all his interest in the land would have ceased and the land would have descended to his children, if he had any, and, if not, then to all his brothers then living. This para-

graph of the will provided that this devise was to be accepted and received in full payment of the indebtedness of the testator to Ralph Imbrie, except \$500. The incumbrance upon his land was to be paid out of the testator's estate. Had it been the intention of the testator to devise a life estate to his son Ralph Imbrie, it would have been the most natural thing for whoever drafted the will to have used the words "during his natural life," or words of like import. A devise of real property is deemed to be a gift of all of the testator's estate in the premises devised, "unless it clearly appears from the will that he intended to devise a less estate or interest." Section 10121, Or. L. Section 10124, Or. L., provides that—

"All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true interests [intent] and meaning of the testator in all matters brought before them."

The provision of the will that Ralph Imbrie should not sell or mortgage the land until he became 40 years of age clearly indicates that after that time he could dispose of it at his pleasure. The provision for the payment of the incumbrances on the land from the estate indicates that it was the intention of the testator to pass a clear title to his son. The specifications indicate that no other restrictions upon the title were intended by the testator. The language of the will in question is entirely different from that used in the will construed in *Love v. Walker*, supra, and *Love v. Linstedt*, 76 Or. 66, 147 Pac. 935 Ann. Cas. 1917A, 898, cited and relied on by defendant. In this state the term "heirs," or other words of inheritance, are not necessary to create or convey an estate in fee simple. Section 9847, Or. L.

It is clear that by the seventh paragraph of the will Robert Imbrie devised the land to his son Ralph Imbrie, in fee, subject to certain restrictions enumerated in that part of the will. Applying the maxim, "*Expressio unius est exclusio alterius*," it would not occur to one by the reading of the will, when taking it by its four corners, that it was the intention of the testator to include or apply other restrictions or limitations to take effect after his decease. Under any suggested construction of the will when taking into consideration paragraph 12, the estate devised to Ralph Imbrie may last forever, as he may not "die without leaving lineal descendants, children or grandchildren." Therefore it is safe to start with the premise that Ralph's estate is a fee.

[4] It is a well-established rule that where an estate in fee is given in one clause of a will in clear and explicit terms, the interest which the devisee thus obtains in the land cannot be taken away or diminished by any subsequent vague or general expression of doubtful import, or by any inference deduc-

ble therefrom, that may be repugnant to the estate given. *Irvine v. Irvine*, 69 Or. 187, 190, 136 Pac. 18; *Roberts v. Roberts*, 140 Ill. 345, 29 N. E. 886; *Meacham v. Graham*, 98 Tenn. 190, 39 S. W. 12; 2 *Underhill on Wills*, § 689; 2 *Alexander, Com. on Wills*, § 931.

It is noticed that by the provisions of paragraph 7, the devise to Ralph was conditioned upon its being accepted and received by him in full of the testator's indebtedness to him, with the exception of \$500. While the amount of the indebtedness is not disclosed by the record, it would not seem that the father in the liberal disposition of his bounty to his son, as manifested by the will, would devise a title in fee to land for a consideration in one part of the will and take it away or diminish the title, debase the fee as it is usually termed, in another part. It would be inequitable for him to attempt to do so, and a construction of the will which would effectuate such a result would be antagonistic to the intention of the testator, according to the language of his testament. As well said by Mr. Justice Burnett, in *Bilyeu v. Crouch*, 96 Or. 66, 189 Pac. 222, "No will has a twin brother." It might be said that on this account the precedents which we find for enlightenment do not appear to belong to the same family. It is seldom that one undertakes to reconcile the divergent judicial decisions. No such effort will here be made.

It is stated in 21 C. J. p. 995, § 149, as follows:

"The tendency of modern decisions on questions of contingent and vested remainders has been more and more to break away from the technical refinements of the old common-law learning, and to allow deeds and wills to be effective in line with the intent of their faces, as gathered from the everyday good sense of their language."

We quote from 10 R. C. L. p. 651, § 7:

"Since an estate in fee simple implies absolute sovereignty over the land, the power of alienation is necessarily and inseparably incidental thereto, and an unlimited condition in restraint of alienation attached to such an estate is void. The estate is subject to dower and curtesy; and it is descendible to the heirs general, whether male or female, lineal or collateral."

Nevertheless the question is submitted as to whether or not the language of paragraph 12 of the will clearly shows an unmistakable intention on the part of the testator to diminish the estate of Ralph Imbrie, or debase the fee devised by the terms of paragraph 7. It is believed that the question should be answered in the negative.

[5] It is suggested that by the provisions of the twelfth paragraph of the will the estate of Ralph Imbrie may end if he should die without lineal descendants, children or grandchildren, and therefore it is a determinable or qualified fee, with a gift over in

the nature of an executory devise in favor of his brothers and sisters and their children.

An executory devise is defined as a future estate or interest in lands created by will and limited so that it cannot take effect as a remainder or a future use. It does not vest at the death of the testator, but only on the happening of some future contingent event. It is such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitations regarding conveyances at common law. It can be created without the intervention of a preceding estate, and it may be limited after a fee. 2 *Alexander on Wills*, § 1017. This kind of an estate or interest, it is declared, was instituted to support the will of the testator in cases where by the rules of law the devise of a future estate could not operate as a remainder, as in case of a remainder after a fee which, although not good as a remainder, is valid as an executory devise. 4 *Kent, Com.* *269.

[6] An executory devise, to take effect only upon an indefinite failure of issue, is void under the rule as to perpetuities; for an executory interest, in order to be valid, must take effect within the life or lives of those in being, and within 21 years thereafter, with the usual period of gestation added.

[7] There appears to be a distinction between a case where a life estate is devised with a remainder over in case the devisee die without issue and where an estate is devised or conveyed in fee with a gift over upon the proviso that the grantee die without heirs. It is stated in *Love v. Walker*, 59 Or. 95, at page 107, 115 Pac. 296, at page 301:

"The rule of construction prevailing in most states of the Union is that a devise of a fee, coupled with a condition that if the devisee die without issue the estate is to go to others, means dying without issue in the lifetime of the testator, unless a different intention is manifest from the context of the will. 'The presumption that the contingency of dying without issue,' says the author of the exhaustive note to the case of *Lumpkin v. Lumpkin*, 25 L. R. A. (N. S.) 1063, 1064, 'is to be restricted to testator's lifetime being fundamentally limited to cases where an absolute gift is made to the first taker, in express terms or by implication, is not applicable where the gift is clearly of a less interest.'"

Turning to the foundation of that enunciation, 25 L. R. A. (N. S.) 1059 et seq., we find among numerous authorities cited in the notes the following, on page 1060:

"It is well settled that where the terms of the will indicate an intention that the primary devisee shall take the fee on the death of the testator, coupled with a devise over in case of his death without issue, the words refer to a death without issue during the life of the testator; and where the primary devisee, surviving the testator, takes an absolute estate in fee simple, this rule of construction is adopted in order to avoid repugnancy, and because

the law favors the vesting of estates at the earliest possible moment, in the absence of a clear manifestation of the intention of the testator to the contrary. *Tarvell v. Smith*, 125 Iowa, 388, 101 N. W. 118.

"Where a bequest is direct and immediate, and nothing else appears to aid in the interpretation, the law inclines to construe 'die without issue' as meaning the death of the legatee without issue in the testator's lifetime. * * * *Birney v. Richardson*, 5 Dana, 424.

"So, also, in *Washbon v. Cope*, 144 N. Y. 287, 39 N. E. 383, it is said that the rule is well settled that where a devise or bequest over to third persons is dependent upon death without issue or without children, the death referred to is death in the lifetime of the testator."

[8] The fact that our Code is closely related to those in the states of Iowa and New York lends weight to the opinions in those states. In the present case, instead of the language of the will, other than that in paragraph 12, manifesting an intention of the testator to devise an estate less than that of fee simple, the expression of the will of the devisor is to the contrary, as we have noted.

We therefore conclude that the proviso that in the event Ralph Imbrie should "die without leaving lineal descendants, children or grandchildren," etc., was not inserted in the memorandum of the testator with the intention of debasing the fee devised to Ralph Imbrie, or indicating that Robert Imbrie proposed to give to this son an estate less than an absolute fee simple after he attained the age of 40 years without violating any of the restrictions embodied in paragraph 7.

It is no doubt the rule that where an estate otherwise than an absolute estate in fee simple is devised in one portion of a will, in clear and decisive terms, and the subsequent provisions clearly show an unmistakable intention on the part of the testator to give an estate less than an indefeasible fee simple, such latter intention must control. 2 *Alexander on Wills*, p. 1363, § 933. In considering the will in question, we do not find such unmistakable intention indicated on the part of the testator.

[9] There can be no remainder upon an estate in fee simple for the reason that, by disposing of such an estate, one divests himself of all interest in the land, and has no estate to transfer to another. For the same reason there can be no remainder upon a determinable fee. 1 *Tiffany, Real Property*, 481; 21 C. J. p. 1024, §§ 205, 206.

[10] The very reason of the institution of an executory devise being for the purpose of carrying out the wish of a testator, it should not be transformed into an instrument serving the purpose to defeat such will. No technical, indefinite, or uncertain clause in paragraph 12 of the will should be construed to defeat or lessen the plain devise made by the testator in the seventh clause of the will.

Plaintiff Ralph Imbrie, by virtue of his father's will, took an absolute title in fee simple to the real estate described. *Love v. Walker*, supra; *Rowland v. Warren*, 10 Or. 129; *Bilyeu v. Crouch*, 96 Or. 66, 189 Pac. 222; *Love v. Lindstedt*, 76 Or. 66, 147 Pac. 935, Ann. Cas. 1917A, 898.

[11] In *Britton v. Thornton*, 112 U. S. 526, 532, 5 Sup. Ct. 291, 294, 28 L. Ed. 816, quoted from, with approval in *Bilyeu v. Crouch*, supra, we find this statement of the law:

"When indeed a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. * * * But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator."

Applying this excerpt to the present case, upon an analysis of the entire will, we think that the provisions of the will, other than those embraced in paragraph 12, control, and clearly express the desire of the testator in bestowing his bounty. Whatever road we travel, and view as many precedents as we may, we necessarily come back to the language found in the testamentary instrument.

The minor child of plaintiff has no interest in the real property in question. The time is past for the happening of the event detailed in the seventh paragraph of the will. Ralph Imbrie did not sell or encumber the land prior to his arriving at the age of 40 years, so that his interest in the real property would cease and the land go to his children by virtue of the will.

[12] From the averments of the complaint, which must be taken as true when considered upon demurrer, plaintiff has a marketable title to the land in question.

The decree of the lower court is therefore affirmed.

JOHNS, J., concurs.

BROWN, J., concurs in result.

BURNETT, C. J. (specially concurring in the result). This is a suit by the seller to enforce specific performance of a contract whereby the defendant agreed to buy certain lands, provided the plaintiff had a fee-simple title thereto. The plaintiff derives title under the will of his father, Robert Imbrie, who died January 5, 1897. Other clauses of the testament devise lands to the sons of the testator in fee, but the title of the plaintiff depends upon and is affected

by two clauses, the seventh and the twelfth. The seventh reads thus:

"I give, bequeath and devise to my son, Ralph Imbrie, all the land that I now own in and being a part of the donation land claim of Caleb Wilkins and wife, * * * subject to the following restrictions, to wit: Said land shall not in whole or part be sold or mortgaged until the said Ralph Imbrie is forty years of age, nor subject to his debts and should he sell or mortgage it, or any part of it, before that time, all his interest in said land shall cease and terminate, and said land shall descend to his children, if he then have any, and if not, then to all his brothers then living. This devise to be accepted and received by him in full of my indebtedness to him, except five hundred dollars. The incumbrance upon his land to be paid out of my estate."

The twelfth clause here follows:

"I further bequeath, devise and direct that should any of the above-named devisees die without leaving lineal descendants, children or grandchildren, then, in that case, all of the property above devised to such devisee shall go in equal shares to his or her brothers and sisters then living, or to the children of any brother or sister then deceased, by right of representation."

The complaint states that the plaintiff became 40 years of age on October 8, 1916, and prior to that time did not sell the realty in whole or in part, or mortgage the same, or permit it to become subject to his debts. The pleading also recites the names of the children of Robert Imbrie, the testator, then living and one daughter dead, survived by her two children, gives the names of all the grandchildren of the testator, and avers that on January 29, 1920, all the brothers and sisters of the plaintiff then living and all their children and the children of the deceased sister, naming all of them, conveyed to him all their right, title and interest in the property by deeds of conveyance duly executed, acknowledged, delivered and recorded. He states that he himself has one child, Gladys Imbrie, a minor, born after the death of the testator. Upon this narration of facts, claiming he has no plain, speedy, or adequate remedy at law, he prays for a decree to the effect that his title be adjudged a marketable one, and that the defendant be compelled specifically to perform the contract, together with other and further relief as may seem equitable.

The sole defense interposed is a general demurrer to the complaint, which, being overruled, the defendant refused to answer further, whereupon the court rendered a decree according to the prayer of the complaint, and the defendant has appealed.

It is conceded that the testator had the fee-simple title absolute to the land, hence the question to be determined is whether or not the plaintiff, Ralph Imbrie, has the same title, that being the estate which he contract-

ed to convey. The devising words in the seventh clause are sufficient to pass to Ralph that interest in the land, although neither the word "heirs" nor the words "fee simple" appear in the will. Although at common law in a conveyance it was requisite to the creation of a fee-simple estate that it run to the grantee and his heirs, yet even then the words "fee simple" and "heirs" were not necessary in a will devising real property to a devisee. 2 Blackstone, 108. In Oregon the rule is settled by statute, to the effect that:

"A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest." Section 10121, Or. L.

It is admitted that all of the conditions in the seventh clause, restraining the alienation of the land until Ralph is 40 years of age, have been fulfilled. Without regard, therefore, to the question, academic here, of whether this condition is void as a restraint upon alienation, under the authority of *Hawley v. Northampton*, 8 Mass. 3, 5 Am. Dec. 66, and many other precedents, or whether it is fulfilled, the question to be determined is: What effect has the twelfth clause of the will on the estate of Ralph? We note that the entire fee-simple estate passed out of the testator by virtue of his will and succeeding death. There is no remainder to any one by virtue of that devise. The case does not involve either vested or contingent remainders. The whole estate went to Ralph Imbrie with the conditional limitation laid down in the twelfth clause.

It is impossible by deed to convey a fee-simple title to one, and in the same conveyance to limit the same fee simple to another. The conveyance would contradict itself. In wills, however, a fee-simple estate may be devised, and on certain conditions the identical fee may be limited to another individual. This would be good as an executory devise. This executory devise, however, must be one that is recognized by the law. Its conditions must conform to public policy. In other words, since the testator has devised a fee-simple estate to Ralph, if the former would limit this estate and divert it in the future to some one else, it must be by a lawful limitation. At common law the effort of landed proprietors was to perpetuate their holdings throughout the successive generations of their families. The effort of the king and courts was to break down these perpetuities and make the land alienable within certain reasonable conditions. The result was, that the common-law rule provides that the limitation to be worked out by executory devise must not extend the perpetuation of the estate beyond a life or lives in existence at the time the will takes effect at the death of the testator, plus the period of 21 years with

9 months, as the period of gestation, added. As stated by Mr. Chief Justice Parker in *Hawley v. Northampton*, supra, the limitation of 21 years was to meet the case of a minor, and that of 9 months was to let in a child yet unborn. The weight of authority is that the mention of this fractional year was superfluous, for the reason that, if it be to his interest, a child en ventre sa mere is deemed to be living at the time the will takes effect.

Another principle to be observed is thus expressed in 21 R. C. L. 289:

"In enforcing the rule against perpetuities, it is a firmly established principle that every future limitation of an estate is void as too remote unless it is apparent that it must take effect and vest, if at all, within the period allowed by the rule. * * * Thus, where a breach of condition on which a limitation depends, if it occurs at all, must occur within the period allowed by the rule, it will be upheld. It is not sufficient that the future estate may by possibility become vested within the period allowed by the rule against perpetuities, or even that it will probably become vested in such period. If it may possibly happen beyond the established time limits, or if there is left any room for uncertainty or doubt on the point, the limitation is void. If a future limitation may not by possibility take effect within the prescribed period, it cannot be made good by subsequent events. In other words, the validity of the future estates under the rule against perpetuities depends, not on what actually happens after the time at which the rights of the parties are fixed, but on what may happen as viewed at the time when the deed or will creating them takes effect. Thus, it makes no difference that one to whom a future interest is given happens to be born within the period allowed by the rule if he might have been born beyond that period."

A leading case on perpetuities is *Brattle Square Church v. Grant*, 3 Gray (Mass.) 142, 63 Am. Dec. 725. The syllabus of that case reads thus:

"A limitation, by way of executory devise, which may possibly not take effect within the term of a life or lives in being at the death of the testator, and 21 years (adding in case of a child en ventre sa mere, about 9 months) afterwards, is void, as too remote, and tending to create a perpetuity. A devise, subject to a conditional limitation void for remoteness, vests an absolute estate in the first taker."

In the exhaustively reasoned case of *Moody v. Walker*, 3 Ark. 147, 190, the rule is thus stated:

"An executory devise cannot be barred by fine or a common recovery, and, therefore, to prevent perpetuity, it became necessary to prescribe the bounds and limits beyond which it should not extend. The time to which they were limited was definitely settled in *Stephens v. Stephens*, and that decision received the sanction of the court of chancery, and of the judges of the King's Bench. According to the resolution of that case, the devise over must

vest within the compass of a life or lives in being and 21 years and 9 months thereafter. But should an executory devise be not limited to an event within the prescribed period of time mentioned, as upon an indefinite failure of issue, it was void, by reason of its remoteness, as favoring the doctrine of entailed estates, and thereby creating perpetuities. 'It is of no importance how the fact turns out to be; it is void at the commencement, if the event on which its existence depends may, by possibility, extend beyond the duration of the time prescribed.' 6 Cruise, tit. Devise, 32, ch. 17."

In *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925, it is said that no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within 21 years after some life in being at the creation of the interest. In *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88, it was decided that:

"If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and 21 years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity, and void as against the policy of the law, which will not permit the property to be inalienable for a longer period."

In *Graham v. Whitridge*, 99 Md. 248, 57 Atl. 609, 58 Atl. 36, 65 L. R. A. 408, the principle is thus enunciated:

"If the contingency upon the happening of which the remainders over * * * are to vest is one that might or might not happen during a life or lives in being at the time of the death of [the testator] and 21 years and a fraction of a year in addition, then the contingency is too remote, and the remainders fail to take effect. In determining this question of remoteness, it is an invariable principle that regard is to be had to possible and not merely actual events. It is not determined by looking back on events which have occurred and seeing whether the estate has extended beyond the prescribed limit, but by looking forward from the time the limitation was made and seeing whether, according to its terms, there was then a possibility that it might so extend. * * * The event upon the happening of which the remainder is to vest must be one that is certain to happen within the prescribed period or the limitation will be bad."

The court there, speaking of remainders, said the same rule already mentioned respecting remainders applies to executory devises. See, also, *Andrews v. Lincoln*, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103; *Wells v. Heath*, 10 Gray (Mass.) 17; *Coggins' Appeal*, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565; *Lasnier v. Martin*, 102 Kan. 551, 171 Pac. 645; *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167, 1 A. L. R. 365; *Hopkinson v. Swalm*, 284 Ill. 11, 119 N. E. 985; *Ortman v. Dugan*, 130 Md. 121, 100 Atl. 82; *Moroney v. Haas*,

277 Ill. 467, 115 N. E. 648; *Taylor v. Crosson*, 11 Del. Ch. 143, 98 Atl. 375; *Riley v. Jaeger* (Mo.) 189 S. W. 1168; *Overby v. Scarborough*, 145 Ga. 875, 90 S. E. 67; *Camden, etc., & Trust Co. v. Guerin*, 87 N. J. Eq. 72, 99 Atl. 105; *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127; *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771; *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *Haydon v. Layton* (Ky.) 128 S. W. 90; *Starr v. Minister et al.*, 112 Md. 171, 76 Atl. 595; *Hewitt v. Green*, 77 N. J. Eq. 345, 77 Atl. 25; *Gambrill v. Gambrill*, 122 Md. 563, 89 Atl. 1094; *Hollander v. Central, etc., Co.*, 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; *Hayes v. Martz*, 173 Ind. 279, 89 N. E. 303, 90 N. E. 309; *Dime Savings & Trust Co. v. Watson*, 254 Ill. 419, 98 N. E. 777.

With these principles in mind, let us advert to the conditions described in the complaint. We remember that Ralph's father, the testator, died on January 5, 1897, and that Ralph's daughter, Gladys, yet a minor, was born after the death of the testator. As to Ralph's devise his own was the only life in being at the death of his father. Yet the estate to be taken under the executory devise by Ralph's brothers and sisters is made by the twelfth clause of the will to depend on possibly three lives: First, Ralph's; sec-

ond, that of his yet unborn daughter; and, third, that of her potential child or children; for this twelfth clause makes the estate of the brothers and sisters to depend upon the conditional limitation that Ralph shall die without leaving lineal descendants, children or grandchildren. Contrary to the law, the testator essayed to control the devolution of his property through and beyond two generations yet unborn. In other words, it is possible that grandchildren be born to Ralph; that he survive both them and his own children and that he then die "without leaving lineal descendants, children or grandchildren." Extending, as possibly it may, over three lives, two of which in succession were not in being when the will took effect, January 5, 1897, the conditional limitation by way of executory devise which was designed to defeat Ralph's fee and pass it to his collateral kindred is void within the rule against perpetuities. The result is that since there is no valid restriction now operative on the estate given to him by the seventh clause of the will, Ralph has a fee-simple absolute in the property mentioned. His title is therefore marketable. There is no excuse shown on the pleading to relieve the defendant from performing his contract.

The decree of the circuit court should therefore be affirmed.

(27 N. M. 145)

STATE v. BAILEY. (No. 2424.)

(Supreme Court of New Mexico. Jan. 14, 1921.
Rehearing Denied June 20, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 1166½(8)—Error in overruling challenge not prejudicial where peremptory challenges not exhausted.

Appellant cannot predicate error upon the action of the trial court in improperly overruling his challenge to a jurymen, when at the final impaneling of the jury he had not exhausted his peremptory challenges and the objectionable jurymen was not forced upon him.

2. Homicide \S 158(3) — Evidence of threats admissible although no one definitely designated.

Evidence of threats is admissible in a case of homicide, although no one is definitely designated.

3. Homicide \S 163(2)—Reputation of deceased competent on behalf of prosecution after attack by defense.

The reputation of the deceased as a man of peaceable character is competent evidence on behalf of the prosecution after such character has been attacked and put in evidence by the defense.

4. Witnesses \S 344(1) — Extent of examination as to wrongdoing of witness within discretion of court.

Proof of a witness' particular overt acts of wrongdoing is ordinarily relevant as impeaching evidence. The extent of such examination rests largely in the discretion of the trial court.

5. Criminal law \S 829(1), 830 — Requested instructions covered or incorrectly stating applicable law properly refused.

Where instructions given are correct and cover the same ground as those requested, or where those requested incorrectly state the law as applicable to the case, the instructions requested are properly refused.

On Motion for Rehearing.

(Syllabus by Editorial Staff.)

6. Homicide \S 304—Instruction held fully to cover defense of accidental killing.

In a prosecution for murder, an instruction held fully to cover the defense of accidental discharge of the gun in defendant's hands thereby killing deceased.

7. Homicide \S 304—Instruction as to accidental killing held properly refused.

In a prosecution for murder, where the defense of accidental killing was interposed, an instruction that if the jury believed that deceased was accidentally killed, or if they entertained a reasonable doubt thereon, they should acquit, held correctly refused, as not including all necessary elements.

8. Homicide \S 304—Instruction abstract and inapplicable to facts properly refused.

In a prosecution for murder, where the defense of accidental killing was interposed, an instruction in the exact language of Code 1915, \S 1472, held properly refused, as being inapplicable and as being abstract.

9. Homicide \S 340(1) — Instruction confusing self-defense and defense of habitation held not prejudicial error.

In a prosecution for murder, an instruction held not prejudicially erroneous, although confusing the doctrine of self-defense and the doctrine of defense of habitation.

10. Criminal law \S 1056(1)—Instructions not excepted to need not be considered on appeal.

An instruction not excepted to need not be considered on appeal.

Appeal from District Court, Grant County;
R. R. Ryan, Judge.

Sylvester E. Bailey was convicted of murder in the first degree, and he appeals. Affirmed.

K. K. Scott, of Breckenridge, Tex., and Alvan N. White, of Silver City, for appellant.

O. O. Askren, Atty. Gen., and H. S. Bowman, Asst. Atty. Gen., for the State.

RAYNOLDS, J. The appellant, Sylvester E. Bailey, was indicted at the March, 1919, term of the district court for Grant county, N. M., for the killing of one James N. Bedore, and a verdict of murder in the first degree was returned by the jury. Appellant filed a motion for a new trial, which was overruled and the appellant sentenced to be executed Friday, April 25, 1919. From the verdict and sentence appeal is taken to this court.

At the time of the homicide in question, the appellant was a prospector and miner living on his mining claim at a place called Vanadium, situated near Silver City in Grant county. On the mining claim were a store building, a small adobe residence, and an automobile garage. Appellant had rented his store to one L. E. Freeland. Freeland had rented the dwelling at the direction of appellant during his absence to the deceased, Bedore, for a period of three months ending September, 1918. Upon appellant's return to his claim he occupied a part of a box car which had been used by the railroad as a temporary depot. While appellant was waiting for the possession of his property, the deceased, Bedore, had turned over his dwelling to one Rose Freeland, who was then occupying it. Appellant notified the deceased and Rose Freeland that he desired possession of his dwelling on September 1, 1918. Deceased, Bedore, shortly after September 1st had tendered to the appellant another month's rent and appellant had refused to ac-

cept it. There was testimony to show that on the morning of the killing the deceased had stated that he was about to move from the premises of the appellant on that day, and that he had made arrangements with one of the witnesses to secure a team to move his belongings from said premises.

The appellant in his testimony, and by the testimony of other witnesses, attempted to show that the gun from which the fatal shot was fired was discharged by accident in a struggle between him and the deceased, after the appellant had taken the gun from under his pillow and used it as a club to drive off the deceased who was about to attack him in his room. Upon examination of the body of the deceased, it was found he was shot in the abdomen, about two inches below the breastbone and a half inch to the right of the median line, and there was no point of exit. The shirt and underclothes had holes in them and were powder burned. There were no eyewitnesses to the homicide, and the deceased made no statement, living only a few minutes after he fell.

Appellant assigns errors as follows:

1. The court erred in sustaining the two challenges made by the state to certain jurymen in overruling the challenges made by the appellant to two others in regard to their qualifications. Upon this assignment the law is well settled in this state.

"We are of the opinion that Mr. Thompson correctly states the general rule regarding the discretion of the court in respect to impaneling the jury as follows: 'In the superintendence of the process of impaneling the jury, a large discretion is necessarily confided to the judge, which discretion will not be revised on error or appeal, unless it appears to have been grossly abused or exercised contrary to law.' 1 Thompson, Trials, § 88." Territory v. Lynch, 18 N. M. 15, at page 23, 133 Pac. 405, at page 407.

"Assuming that the trial court excused this juror without cause, nevertheless we do not consider that appellant has ground for complaint. In 1 Thompson on Trials, § 43, the author, after pointing to the fact that the right of peremptory challenge is a right to reject, and not a right to select, says:

"Therefore, a party cannot, in general, complain that the court has excused jurors without cause, or sustained untenable challenges of the other party, thus driving the objecting party to exhaust his peremptory challenges upon other members of the panel, or upon special veniremen or talesmen." See, also, 24 Cyc. 315; 16 R. C. L. 291.

"Mr. Thompson, at section 120, more completely states the rule in the following language:

"No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless through rejecting qualified persons, the necessity of ac-

cepting others not qualified has been purposely created."

"We adopt this statement of the law, which is undoubtedly conclusive upon the assignment under consideration, in which, therefore, we find no merit."

State v. Rodriguez, 23 N. M. 156, at pages 164, 165, 167 Pac. 426, at page 428 (L. R. A. 1918A, 1016).

[1] In the present case it also appears that the defense had not exhausted its peremptory challenges when the jury was finally impaneled, and the action of the court is not error, for this as well as the foregoing reasons:

"The weight of authority is to the effect that, when a challenge for cause to a juror is improperly overruled, the error will be regarded as immaterial and without prejudice, if the objecting party did not challenge the juror peremptorily and his peremptory challenges were not exhausted; this upon the theory that a party must use all available means to exclude all objectionable jurors, and that a failure to do so constituted a waiver of his objection. 24 Cyc. 323, 324. We agree with the majority rule. This being true, it is our duty to assume that appellant was not harmed by the failure to sustain his challenge for cause." State v. Smith, 24 N. M. 405, at page 408, 174 Pac. 740, at page 741.

"It is our opinion that the better rule is that an erroneous overruling of a challenge for cause, even though the peremptory challenges are thereafter exhausted, will not warrant a reversal of the judgment unless it is further shown upon appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after such party had exhausted his peremptory challenges. [Citing cases.] Colbert v. Journal Pub. Co., 19 N. M. 156, at page 160, 142 Pac. 146, at page 147.

"Finally it is a rule of paramount importance that errors committed in the overruling of challenges for cause are not grounds for reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. If his peremptory challenges remain unexhausted so that he might exclude the objectionable juror by that means, he has no ground for complaint." 1 Thompson on Trials, § 68, p. 147.

See, also, People v. Duerant, 116 Cal. 179, 48 Pac. 75, at page 78.

[2] (2) The court erred in admitting evidence of the alleged statement not amounting to a threat, highly prejudicial to appellant. The statement or threat was as follows:

"He said he would protect his ground if he couldn't by law, he would with his gun. He had done it and he could do it again."

Standing alone such an indefinite statement might be objectionable as a threat, but with other evidence of the relationship between the parties and the circumstances of the case, it is clearly a threat and properly admitted.

"One of the errors assigned by the defendant is that the evidence of a threat made by him to shoot a person whom he did not name, was admitted. There was, besides the language of the threat itself, evidence that the defendant had been warned against Camilo Martinez not long before he made the threat, and the undisputed fact that he, soon after he made it, began a controversy with Martinez on a matter in dispute between them, and did shoot him. It was for the jury to determine from the evidence whether he had reference to Martinez when he made the threat, if they believed he made it. *State v. Cochran*, 147 Mo. 517; *Moore v. People* (Colo.) 57 Pac. 858; *State v. Vance* (Wash.) 70 Pac. 34." *Territory v. Alarid*, 15 N. M. 165, at page 170, 106 Pac. 371, at page 372.

"It is a general rule that threats made by the defendant accused of murder, to kill some person not definitely designated, especially when made shortly before the commission of the crime to which they may be construed to refer, are admissible in evidence in connection with other explanatory circumstances on proof of the corpus delicti. See cases cited in note to the case of *State v. Nelson*, 89 Am. St. Rep. 691. Here the circumstances in evidence were sufficient to have warranted the jury in believing that the note was sent to the justice of the peace on the morning immediately preceding the homicide, and the weight to be given to the evidence was for the jury. See, also, 13 R. C. L. 924." *State v. Martinez*, 25 N. M. 328, at page 335, 182 Pac. 868, at page 870.

See, also, *Territory v. Hall*, 10 N. M. 545, at page 552, 62 Pac. 1083; *Territory v. Pratt*, 10 N. M. 138, at page 140, 61 Pac. 104; *Miera v. Territory*, 13 N. M. 192, at page 200, 81 Pac. 586.

[3] 3. The court erred in permitting a witness to testify over appellant's objection that the deceased was not a quarrelsome man before deceased's reputation or character had been attacked. The general rule is that—

"Testimony as to the deceased's peaceable character is not competent on behalf of the prosecution until his character has been put in issue by the defendants." 6 Ency. of Ev. p. 659.

This assignment is without merit. The character or reputation of the deceased had not been put in issue in the cross-examination, but the defendant had sought, unsuccessfully, to elicit facts which would show that the deceased was a quarrelsome and violent man. The evidence on redirect examination, the admission of which is assigned as error, simply followed the cross-examination and was properly admitted to explain and amplify the matters testified to on such cross-examination.

[4] 4. The court erred in permitting the appellant while testifying to be cross-examined to the effect that he had been guilty of other offenses against the law. It is elementary and has been decided by this court many times that one offense may not be shown as evidence of the commission of another of-

fense. In this case, however, the evidence objected to was not of other crimes, but of misconduct in the assertion of his rights, and was limited to the purpose of affecting the credibility of the witness; the court so instructing upon request as follows:

"Gentlemen, it has been permitted to inquire of certain questions of the defendant concerning with respect to alleged moral misconduct—these questions and answers have been solely for the purpose of inquiring into the credibility of the accused as a witness and as affecting his credibility. You will consider them as affecting the credibility of the accused as a witness, not in his capacity as an accused."

We find no error in this assignment. The general rule in matters of this kind is laid down in the case of *State v. Perkins*, 21 N. M. 135, at page 144, 153 Pac. 258, at page 261, where the following language is used:

"Complaint is also made of the refusal of the trial court to permit the appellants, on cross-examination of Mrs. Kubena, a very important witness for the state, to ask the witness as to specific acts of wrongdoing on her part. The same is true of the prosecuting witness, Mrs. Knapp. The law in this jurisdiction was settled by the territorial Supreme Court in the cases of *Territory v. Chavez*, 8 N. M. 528, 45 Pac. 1107; *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349; and *Territory v. De Gutman*, 8 N. M. 92, 42 Pac. 48. There is a sharp conflict in the authorities upon this question, but, as the territorial Supreme Court has adopted the rule that proof of a witness' particular overt acts of wrongdoing are ordinarily relevant as impeaching evidence, but that such acts can never be shown by any evidence outside the examination of the assailed witness, and that the extent of such examination rests largely in the discretion of the trial court, we can see no good reason to depart from the rule of practice thus established."

[5] 5. The alleged assignments of error, Nos. 5, 6, 8, 9, and 10, are upon the refusal of the court to give certain instructions asked by the appellant. The rule in this jurisdiction is that if the instruction given by the court properly presents the law of the case to the jury, it is not error to refuse a requested instruction, covering the same ground. *Territory v. Baker*, 4 N. M. (Gild.) 236, at page 237, 13 Pac. 30; *Cunningham v. Springer*, 13 N. M. 259, at page 287, 82 Pac. 232; *Territory v. Pierce*, 16 N. M. 10, at page 14, 113 Pac. 591.

Instruction No. 1 asked for by the appellant is also objectionable because it includes in it the element of heat of passion and the absence of a deadly weapon, when the question was not involved in this phase of the case and it is admitted that the killing was done with a deadly weapon. In a subsequent instruction the court treating the law of manslaughter set forth the effect of heat of passion in reducing the grade of the crime from murder to manslaughter. All the instruc-

tions asked for are covered by those given by the court and those given by the court sua sponte correctly state and apply the law.

Realizing the importance of a case of this nature, we have carefully read the transcript with the view of ascertaining whether or not the appellant's rights were properly protected. We have come to the conclusion after such examination that the instructions requested were properly refused, as they were covered by instructions given by the court, and that those given by the court, to which objection was made, correctly and fully set forth the law applicable to the evidence adduced by the state and the appellant, and that a fair and impartial trial was had.

Finding no error in the record, the judgment of the lower court is therefore affirmed, and it is so ordered.

ROBERTS, C J., and PARKER, J., concur.

On Motion for Rehearing.

RAYNOLDS, J. A motion for rehearing has been filed by the appellant, in which he calls attention to a condition in the instructions which it is alleged was presented in the original briefs, and was overlooked by the court. The defense in the case was accidental killing. Surrounding this general proposition there were questions as to the law of the defense of habitation, the law of self-defense, and the law of excusable homicide; but these questions were all collateral to the ultimate specific defense of accidental killing. In describing the occurrence, the defendant, the only witness on the subject, testified as follows:

"Q. Do you state now to the jury that in the struggle over this gun, when you hit him and he grabbed the gun, whether you pulled the gun off, or did he pull the gun off? A. He pulled the gun off, or it went off. I don't say how that was; it was in the struggle, in a mad moment. I didn't pull the trigger, and I didn't shoot the man, and I didn't take the gun with that intention, and I didn't shoot him.

"Q. How were you using it—as a club? A. Yes; to strike him.

"Q. For what purpose were you doing that? A. To keep him from attacking me, and perhaps killing me."

On cross-examination, appellant, when pressed for a more definite statement as to just how the killing occurred, testified as follows:

"Q. What did he do when you hit him? A. He grabbed the gun. As I said, the gun went off in the tussle.

"Q. That was accidental shooting? A. Yes.

"Q. Self-defense, but coupled with an accident, caused the deceased's death? A. That's the idea; he killed himself.

"Q. Committed suicide? A. That is what I want the jury to believe; he grabbed the gun, and in the tussle the gun went off without my putting my finger on the trigger.

"Q. Mr. Bailey, you were holding the gun by the handle, were you, when you hit him, and he grabbed the barrel? A. Grabbed right this way.

"Q. Got hold of the gun barrel? A. No; got hold with both hands, got hold of the whole thing.

"Q. The whole thing? A. Yes; the whole thing, and I believe that—that's the hammer, and at the time he grabbed that way and got in that position, he grabbed—his hand went over there and pulled the hammer back, and in the tussle it released and caused the gun to go off. * * *

"Q. You shot the man accidentally? A. The man shot himself.

"Q. The man shot himself? A. Yes.

"Q. You were acting in self-defense? A. And I hit him in self-defense, and acted all the time in self-defense.

"Q. You had no feeling against that man whatever? A. There was no intention to shoot him. I didn't shoot him. I didn't take up the gun to shoot him."

It will thus be seen that the appellant undertook to say and did say that the deceased caused the gun to be discharged by grabbing hold of it while it was in the appellant's hands being used as a club. At the time of the trial counsel for appellant evidently took the view that this was what the testimony showed, and in accordance therewith requested the court to give instruction No. 19, which was done. This instruction is as follows:

"19. You are instructed that, if you find from the evidence in this case that on the occasion of the killing of James M. Bedore, the deceased, immediately before the said killing, entered the house or place of abode of defendant in a violent and angry manner, and either assaulted the defendant, or manifested an immediate intention to violently assault the defendant, and the defendant, believing it was necessary to protect himself from such violent assault of the deceased, seized a pistol and struck the deceased with it, and the deceased seized the pistol in the hands of the defendant, and in the struggle between the deceased and the defendant, which thereupon ensued, the deceased caused the pistol to be discharged in said struggle, and the deceased was thereby killed, then the defendant would not be guilty as charged, and you should acquit him; and if you have a reasonable doubt as to such facts, you should acquit the defendant."

[6] This instruction, while it is not now objected to by counsel for appellant as being erroneous, is now said to be partial and insufficient to cover the whole ground, for the reason that it restricts the defense of accidental killing to a case where the gun was caused to be discharged by the deceased, and does not include the accidental discharge of the pistol by either the deceased or the defendant. It clearly appears, however, from the quotation of the testimony heretofore made, that the instruction exactly covers the situation as portrayed by the defendant in

his testimony. He denies that he accidentally discharged the gun, and asserts that the deceased caused it to be discharged. Under such circumstances the instruction fully covers the facts as developed at the trial, and the appellant has no cause for complaint of the same.

[7] By way of further argument to the effect that the defense of accidental homicide was never fully presented to the jury, counsel for appellant complain of the refusal of the court to give their requested instruction No. 8, which is as follows:

"8. The court instructs the jury that if they believe from the evidence that James M. Bedore was accidentally killed, or entertain a reasonable doubt thereon, you should find the defendant not guilty."

It is apparent at a glance that the requested instruction was erroneous, and was correctly refused. The instruction directs the jury that, if the deceased was accidentally killed under any circumstances whatever, the defendant should be acquitted. This instruction leaves out of consideration all of the circumstances showing whether the defendant was at fault, was the aggressor, or was entirely in the wrong in the use of the pistol, as outlined in the testimony. These circumstances must necessarily appear in the instruction before it would be competent for the court to direct the jury that the accidental killing of the deceased would entitle the defendant to an acquittal.

Much reliance is placed by appellant upon the case of *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152. In that case a wife was on trial for the murder of her husband. The defense was accidental killing, and the facts were that her husband instructed her to hand him his gun, and she undertook to get the gun down from the rack where it was kept to hand to him, and, according to the defendant, it was accidentally discharged and killed the husband. The defendant requested two instructions, which were refused as requested, but erroneously modified, and, as modified, given by the court; the first being in the exact language of appellant's instruction No. 8, *supra*, and the second applying the doctrine of accidental killing to the specific facts as above set out. Counsel overlook the distinction between the *Legg* Case and the case at bar. In the *Legg* Case, the defendant, in any view of the testimony, either for the prosecution or defense, was engaged in an entirely lawful act, unaccompanied by any circumstances which could deprive her of her defense of accidental killing. She could not be guilty unless the killing was intentional. In the case at bar, under the facts shown, the appellant may have been guilty, even if the firing of the gun was accidental, by reason of his attitude towards and in the controversy. Appended to the *Legg* Case is an extensive note,

collecting the cases on accidental killing as an excuse.

[8] 2. Complaint is made of the refusal of the court to give appellant's requested instruction No. 1. This instruction is in the exact language of section 1472, Code 1915, which is as follows:

"Such homicide is excusable when committed by accident or misfortune [in lawfully correcting a child], or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent; or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation; or upon sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner."

The instruction omits only the words in brackets above indicated. The instruction as asked is clearly inapplicable. It is an abstract statement of the law, and no attempt is made to apply the provisions of the statute to the facts in the case. But, even assuming that the court might well have modified the instruction and applied the statute to the facts in the case, we think the court fully covered the ground in instruction No. 19, *supra*. It is to be observed that the statute covers three classes of cases: (1) Where the homicide is committed by accident or misfortune in doing any other lawful act by lawful means, with usual and ordinary caution and without any unlawful intent; (2) by accident or misfortune in the heat of passion upon a sudden and sufficient provocation; and (3) upon a sudden combat without any dangerous weapon being used, etc.

We assume that there is no magic in the word "excusable" as used in the section, and that, if every phase of appellant's defense was duly presented in the instructions, he will have no cause to complain at the refusal of the court to use the exact language of the statute. The question, then, is whether the instructions given did cover the whole field. It is to be observed that instruction No. 19, directed the jury that under the circumstances detailed by the defendant and assumed in the instruction, he should be acquitted. The instruction, therefore, in effect directed the jury that, under the assumed circumstances, the act of striking deceased with a pistol was a lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. This satisfied the first clause of the statute.

The second clause of the statute assumes the presence of heat of passion. An examination of defendant's testimony discloses that he disavows heat of passion and states that he acted at all times solely in self-defense. This clause of the statute is therefore inapplicable to the defense interposed.

The third clause of the statute contemplates a sudden combat, without any danger-

ous weapon being used. The defendant in his testimony says that he entered into no combat, but that he merely defended himself against the assault of the deceased. This does not constitute combat, as used in the statute. Sudden combat signifies a sudden fight in the nature of a duel, in which both participate in an aggressive way, rather than a one-sided affair, in which one party merely defends himself against the assault of another. It thus appears that section 1472, Code 1915, is in no way applicable to the facts in the case, except the first clause thereof, which as before seen, was substantially presented in instruction No. 19.

[9] 3. Appellant complains of instruction No. 18 on the subject of the defense of one's person while in his own dwelling and the force which may be employed to expel the intruder. The instruction is as follows:

"18. You are instructed that a person may repel force by force in the defense of his person, being in his own habitation, against one who manifestly intends and endeavors violently to enter therein and to do him bodily harm, and if a conflict ensue under such circumstances, and life is taken, the killing is justifiable. It must appear, however, that the assault was imminently perilous, and unless there be an apparent manifestation of an intent to take life, or to do great bodily harm, no assault will justify the killing of the assailant. A person repelling an attack in his own dwelling is not compelled to flee from his adversary, but he may use such force as is necessary to expel him therefrom, and he may stand his ground and defend his life, or defend himself from bodily harm, and he may even pursue his assailant until the danger to his life and danger of bodily harm to him is past."

There is evident confusion in this instruction of two doctrines, viz. the doctrine of self-defense and the doctrine of defense of habitation. The two doctrines bear such marked resemblance to each other, however, as to be almost identical; but by reason of the varying circumstances attending them there are points of divergence in the doctrines. There is, however, the common principle in both, viz. that it is the necessity of preventing the commission of a felony which justifies the killing of the assailant. Thus, in case of personal assault, the attempted infliction of death or great bodily harm is the felony which authorizes the killing of the assailant. In cases of assault upon the habitation it is the felony of burglary, robbery, or like crimes, which authorizes the inhabitant of the dwelling to resist the assault, even to killing the assailant if necessary. Or if the assault upon the habitation is for the purpose of reaching and committing a felony upon the dweller therein, or one of his family, this justifies resistance to the extent of killing, if necessary to prevent the felony. Where expulsion of an intruder from a dwelling is attempted, a slightly different situation

arises. The owner may expel the intruder, using all the force necessary to accomplish that end. He may take an affirmative and aggressive attitude, and if a conflict ensues, and the intruder endangers his life, or places him in great bodily harm, he may slay the intruder. But it is not true that a man may kill another in his house when under the same circumstances of danger, or apparent danger, to person or property, he would not be justified in killing outside his house. In personal encounters outside a dwelling, the appearances are usually plain and unmistakable, while in assaults upon or in dwellings the appearances are often not so plain, and apparently a greater latitude is, and should be, allowable, to a man in his own house in taking life. But the principle governing action is the same in both cases. Upon this subject see 21 Cyc. 828; 1 Bish. New Crim. Law, §§ 858, 859; 2 Bish. New Crim. Law, § 707; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Thompson v. State*, 61 Neb. 210, 85 N. W. 62, 87 Am. St. Rep. 453; *State v. Sumner*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, and note; 13 R. C. L. Homicide, §§ 144, 145; note to *Newman v. State* (Tex.) 21 Ann. Cas. 721.

In view of what has been said, we have no criticism of instruction No. 18, except in its confusion of the two situations above mentioned. But just why the court should have submitted any such proposition to the jury we do not understand, except that it was requested by the defendant. Why the right to kill in self-defense, or in defense of habitation, was a question to be submitted to the jury, does not appear. The defendant says that he never intended to kill deceased, did not attempt to kill him, and did not kill him. No question as to the right to kill was involved, and the defendant was not entitled to have the same presented to the jury.

[10] 4. The giving of instruction No. 20 was not excepted to and need not necessarily be considered. The instruction, however, is unobjectionable. It was intended to inform the jury that, if the assault by the defendant upon the deceased with a pistol was not in fact in defense of defendant's person, or for the purpose of expelling deceased from the dwelling, but was in fact for the purpose of engaging him in a difficulty, and of then killing him, the appellant could rely neither upon the law of self-defense, defense of habitation, nor accidental killing. We can see no objection to this statement of the law.

In connection with the discussion of these instructions, we do not wish to be understood as departing from the well-established practice of refusing to consider questions on instructions where they have not been duly saved. We have been led in this case to depart somewhat from the strict letter of the rule on account of the enormous consequences

to the appellant; he being under sentence of death. For this reason alone, we have been desirous of satisfying ourselves that by no possibility has the defendant been unjustly convicted.

It follows from the foregoing that the court committed no errors in the instructions to the jury, to which the motion for a rehearing is directed, and that the former opinion in the case should be adhered to; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(116 Wash. 1)

STATE ex rel. SHORT et al. v. HINKLE,
Secretary of State. (No. 16353.)

(Supreme Court of Washington. May 26,
1921.)

1. Constitutional law \S 70(3)—Legislature being presumed to know facts on which it declared a law to be an emergency act, court cannot determine the contrary.

The Legislature is conclusively presumed to have availed itself of the opportunity to know the facts declared in Laws 1921, c. 7, \S 138, for promoting efficiency and economy in the administration of the state government that owing to the condition of the state revenues in emergency exists, and this court cannot declare otherwise where it cannot from its judicial knowledge determine that a patent contradiction exists upon the face of the enactment.

2. Mandamus \S 172—Inquiry into legislative declaration of emergency which prevents referendum on statute limited to judicial knowledge.

In a mandamus proceeding to compel the secretary of state to file proposal and affidavits for referendum under Const. art. 2, \S 1, of Laws 1921, c. 7, declared by the Legislature to be an emergency act for the promotion of efficiency and economy in the administration of state government, the court can only inquire into the facts as to whether a necessity exists, and the inquiry is limited to so-called judicial knowledge, and in its nature the theory of judicial knowledge, in the presence of so considerable a mass of fact as the administrative code, cannot afford proof sufficient to overcome the legislative declaration, even though it were naked and unsupported by the presumption of verity.

3. Statutes \S 35½—Declaration that statute is necessary for operation of state government held not ipso facto false in proceeding to compel referendum.

In a proceeding for mandamus to compel proposal and affidavits for referendum on Laws 1921, c. 7, declared an emergency statute for economy in administration, an objection that such declaration is ipso facto false because the state always possesses power of taxing in any necessary amount to perpetuate its existence is not well taken, where the additional taxation

sought to be avoided levies so heavy a burden as to be extremely detrimental to the source of revenue.

4. Mandamus \S 174—Where certain parts of an act are such that the court has judicial knowledge that they constitute an emergency, parties seeking mandamus to compel referendum of act cannot prevail.

In a proceeding for mandamus to compel the secretary of state to file proposal and affidavits for referendum under Const. art. 2, \S 1, of Laws 1921, c. 7, declared to be an emergency act necessary to promote economy and keep the state within its revenues, where the relators have challenged the entire act they cannot prevail, where the court has judicial knowledge that certain matters included in the act are necessarily such as to constitute an emergency.

Holcomb, Tolman, Main, and Mitchell, JJ., dissenting.

In Banc.

Original application for mandamus by the State, on relation of William M. Short and others, against J. Grant Hinkle, Secretary of State, to compel the respondent to receive and file proposal and affidavits for referendum of Laws 1921, c. 7, relating to the promoting of efficiency, order, and economy in the administration of the state government. Writ denied.

Lindsay L. Thompson, of Olympia, for relators.

P. M. Troy, of Olympia, and Geo. H. Rummens and Tracy E. Griffin, both of Seattle, for respondent.

MACKINTOSH, J. This is an original proceeding in mandamus to compel the secretary of state to receive and file the proposal and affidavits of the relators for the referendum of chapter 7, Laws 1921, being an act entitled "An act relating to, and to promote efficiency, order and economy in, the administration of the government of the state, prescribing the powers and duties of certain officers and departments, defining offenses and fixing penalties, abolishing certain offices, and repealing conflicting acts and parts of acts," and commonly known as the "administrative code."

Chapter 7 consists of 138 sections, the final section being:

"Whereas the revenues of the state are insufficient to support the state government and its existing public institutions as at present organized, and whereas it is necessary that the existing administrative agencies of the state government be consolidated and co-ordinated in order to bring the cost of supporting the state government and its existing institutions within the possible revenues of the state, therefore this act is necessary for the support of the state government and its existing public institutions, and shall take effect immediately."

Article 2, § 1, of the state Constitution, is as follows:

"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the Legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws and to enact or reject the same at the polls, independent of the Legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act or law passed by the legislature. * * * The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the Legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the Legislature as other bills are enacted. Six per centum, but in no case more than thirty thousand, of the legal voters shall be required to sign and make a valid referendum petition. No act, law, or bill, subject to referendum, shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment. But such enactment may be amended or repealed at any general, regular or special election by direct vote of the people thereon."

The respondent declined to accept and file the proposal and affidavits for the reason that section 138 does not permit of the act being referred. The relators' position is that section 138 is of no effect for the reason that the act is not emergent.

The relators take their stand flat-footedly upon our decision in the case of *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11, that being a case which involved an act of the Legislature passed in 1915 (chapter 6, Laws 1915) in relation to the board of state land commissioners, the act being an amendment of the prior law (Laws 1909, c. 223). Under the law of 1909 the board was made up of the commissioner of public lands, the state fire warden, and the members of the state board of tax commissioners. The act of 1915 merely substituted for the state fire warden and the board of tax commissioners the secretary of state and the state treasurer, and to this amending act was added a section which stated that the act was necessary "for the immediate preservation of the public peace and safety and the support of the state government and shall take effect immediately." This court, in passing upon this emergency clause, held that an emergency clause attached to an act was subject to review by the courts, and that the clause would be held unconstitutional where the act, on its face, shows that the declaration is false, but that

if, from an examination of the act, it be doubtful as to whether an emergency exists in fact, that the question of emergency would be treated as a legislative question, and the act would be upheld. The court there further decided that, by reason of the fact that there were being merely substituted two officers on a board in the place of other state officers, that the court could determine, from its judicial knowledge, that there was no emergency, and that the final clause of the act was inoperative.

The alpha and omega of the relators' argument is that chapter 7 of the Laws of 1921 makes no more change in the theretofore existing plan of state government than did the act of 1915 in relation to the composition of the board of state land commissioners. It is unnecessary to review the reasons assigned by the majority and minority opinions in the *Brislawn Case*, and it is unnecessary to determine whether the *Brislawn Case* was properly or improperly decided. It is sufficient to take that decision as it appears in the books and apply to it the facts in the instant case, facts obtained by an examination of chapter 7, Laws 1921, and not assertions based upon only a casual reading thereof. The fallacy of relators' position lies in the unfounded premise, i. e. that chapter 7 is "nothing more than a broad, comprehensive scheme for transferring the duties now performed by various state officers and subordinates under the present form and plan of state government to other officers and departments created by the act." Grant the premise, and under the *Brislawn Case* relators' position may be correct, but the premise is found to be unwarranted upon a careful and exact analysis and understanding of the act. The act says that the revenues are insufficient to support the state government in its then existing form, and that in order for the state, as an institution, to continue to function, its expenditures must be so reduced as to fall within the possible revenue, and to effect this purpose the act abolishes many offices, boards, and commissioners, provides against the duplication of duties and responsibilities in administration, co-ordinates the operation of the business of the state, classifies employees, provides for expenditures in cases of emergency, authorizes the exchange between state institutions of supplies, provides a cost accounting system, sustains building programs, and authorizes the preparation of estimates for appropriations. Without going into the act section by section it, in general, provides a more efficient method of carrying on the state government. The court is not concerned with whether—for the reason that it cannot know—the results anticipated by the new plan will be achieved. Under the *Brislawn* decision, the court can only hold section 138 invalid, if from its knowledge, which it possesses as a court, it can say that no necessity exists for

such a change in the method of conducting the state government in the fact of the legislative declaration that public funds were not sufficient to uphold the state government under the prior existing plan.

[1] The Legislature possessed the opportunity (and is conclusively presumed to have availed itself of that opportunity) to know the facts and has declared that a precarious financial condition prevails. We are asked to say that the solemn statement of the Legislature is false, and to say so, not because we are possessed of any knowledge upon the subject, but because we are ignorant upon it. We can take no testimony; we have no machinery with which to gather the facts, which the Legislature is presumed to be possessed of, but, totally in the dark, we are asked to substitute our personal prejudices, predilections, and preconceptions for the presumably enlightened judgment of those deputed by the Constitution of the state to inquire into and determine these factual problems. It is only when the court, following the *Brislawn Case*, can say, from its judicial knowledge, that a patent contradiction exists upon the face of a legislative enactment, that, in law or in reason, it can deny the legislative declaration of emergency. As Judge Parker says in the case of *State ex rel. Reclamation Board v. Clausen*, 110 Wash. 525, 188 Pac. 538:

"It may well be doubted that there has ever come to the American courts any more vexatious question than that of determining whether or not a particular purpose for which public funds were sought to be raised by taxation and expended is a public purpose, when the particular purpose in question lay within that twilight zone wherein the minds may reasonably differ as to such purpose being a public one; the bounds of which zone are ever changing with the passing of time, and within which now problems of public welfare always first appear. That such a question, when arising in the courts, has proven so vexatious is, we apprehend, because of its inherent nature, in that, in its last analysis, it is not one of exclusive legal logic, but is one more or less of policy and wisdom, properly determinable in the light of public welfare, present and future, in a broad sense; and hence is not a pure judicial law question, except in those cases clearly outside of the twilight zone we have alluded to. * * * Plainly, since a correct solution of our present problem, because of its inherent nature, calls for the consideration of something more than pure legal principles, suggests that we exercise a great degree of caution to the end that we shall not usurp powers which do not constitutionally belong to us. This court has adhered steadfastly to the general rule, in common with other courts of our country, that a statute cannot be declared unconstitutional unless it clearly so appears. Is not this rule of peculiar force in its application to the question of whether or not a legislative act authorizing the levy of a tax and the expenditure of public moneys so raised is for a public purpose? We are decidedly of the opinion that it is."

[2] When the court speaks of the determination of the validity of a section such as 138 being a judicial question, it is meant that courts will inquire into the fact as to whether a necessity exists, an inquiry necessarily based upon proof, but proof limited by law to so-called judicial knowledge. But to resolve the immediate problem, obviously its intricate and complicated nature requires the exertion and application of an amount of expert knowledge, experience, and judgment, necessarily without the scope of the restricted doctrine of judicial knowledge, and, as we have intimated, properly commanded only by the Legislature. In its nature, the attenuated theory of judicial knowledge, in the presence of so considerable a mass of fact as the administrative code, cannot afford proof sufficient to overcome the declaration of the Legislature, even though that declaration were naked and unsupported by the presumption of verity. To apply judicial knowledge to the resolution of peculiarly factual problems would "amount to turning the supreme court into an irresponsible House of Lords," as Theodore Roosevelt said, in referring to the *Bakeshop cases*, "a position which the people of the United States would never stand."

[3] Relators speciously argue that the declaration of the Legislature that some change in the method of administration is necessary in order to bring the cost of operating the state government within its revenues is, *ipso facto*, false, for the reason that the state always possesses the power of taxing in any amount that is necessary to perpetuate any form of administration which may be in existence. This is an enameled argument which might be brightly attractive to those fortunate citizens who contribute nothing by way of taxes to the support of the state. Although the state possesses unlimited power of taxation, such unlimited power does not produce unlimited revenue, and a point is attainable—and the Legislature declares it is already reached—where additional taxation produces nothing but defaulted realty and personalty in the hands of the collector, and when the levy of additional taxes creates burdens which parch the source of revenue, the levies tend to destroy rather than support the state government. It is certain, as was said in the case of *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209:

"If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

In *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810, the court said, in reference to "support":

"The intent and purpose of the people, as gathered from the words of the Constitution and the circumstances attending the adoption of the Seventh Amendment, impels the holding that the people intended to use the word 'support' in its fullest sense. When so considered, 'support' includes appropriations for current expenses, maintenance, upkeep, continuation of existing functions, as well as appropriations for such new buildings and conveniences as may be necessary to meet the needs and requirements of the state in relation to its existing institutions. In Webster's New International Dictionary, the word 'support' is given the following definitions: 'To furnish with funds or means for maintenance; to maintain; to provide for, to enable to continue; to carry on.' In the absence of an express reservation, it would be a usurpation on the part of any court to say that an appropriation directed to the maintenance of the existing activities of the state is subject to the referendum. The first right of government is the right of self-preservation, and to say that the people intended, in the absence of an express reservation, to allow the government or its institutions to be crippled or embarrassed in any way would be to say that the people intended that the government could not sustain itself through the mediumship of the ordinary and recognized methods of legislation."

See, also, *State ex rel. Anderson v. Howell*, 106 Wash. 542, 181 Pac. 37; *State ex rel. Case v. Howell*, 85 Wash. 281, 147 Pac. 1162.

If the purpose of the act is to give the government and its existing public institutions the greatest benefit from the revenues which were actually received, and also to protect the resources of the state from which those revenues derive, then the act is properly one for the support of the government.

[4] There is another reason why the relators must fail in their attempt to refer this act, and that is that they are seeking reference of the entire act, and if there is any section or portion of it of which the court can say there is an emergency, their proceedings must fail. If it should be conceded that as to certain sections or portions of the act the court could say, from its judicial knowledge, that the changes made were not necessary for the support of the state government and its existing institutions, yet the relators are making a general attack and are not seeking to refer those sections only which the court might judicially declare not to be emergent. There are, however, many separate sections which the court in the exercise of its judicial knowledge must know are emergent, and, as we have already indicated from our judicial knowledge we cannot say that the act as a whole is not emergent. Those sections referring to the protection of agriculture, game, and fish are, from their very nature, concerned with things necessary for the support of the state and its existing institutions. Those sections dealing with labor and industry show a necessity exists to overcome the conflict of jurisdiction and inefficiency of the existing form of administration

of which the court has judicial knowledge from the many cases coming before it involving these questions. One instance of this conflict is the difference existing between the commissioner of labor and the state safety board, to which this court has devoted its attention. *State ex rel. Younger v. Clausen*, 190 Pac. 324. Instances might be multiplied of where the act in itself contains evidence of the necessity which the judicial knowledge of this court confirms.

To summarize then our conclusions: Taking the *Brislawn Case* as the law, we find that in that case the court had before it a scheme which merely changed the personnel of one of the state commissions and between that change of membership of a minor board and the support of the state government there was no natural connection. In the act before us there are certain facts which, if they were considered by themselves, are similar to the facts in the *Brislawn Case*, but these facts are only a part of an entire plan proposed to reorganize the administration of the state's business, upon what the Legislature deems are businesslike principles. This court is not called on to consider the act section by section, disregarding the act as a whole, especially since the relators are not making specific attack upon any special sections but are attacking the act as a whole. Moreover, this case differs from the *Brislawn Case* in that in the *Brislawn Case* the Legislature merely stated that a necessity existed, and this was but a conclusion by the Legislature that it was engaged in a constitutional proceeding. This court refused that legislative dictum in the light of the facts of which the court had judicial knowledge. In the act before us, however, the Legislature makes a specific statement of fact that the revenues of the state are not sufficient to support the state government or its existing institutions as they were then organized, and that it was necessary to co-ordinate the affairs of the state, "in order to bring the cost of supporting the state government and its existing institutions within the possible revenues of the state." This is a declaration of fact, and unless the court from its judicial knowledge can say this fact does not exist, it must be taken as true. *State ex rel. Govan v. Clausen*, 108 Wash. 133, 183 Pac. 115; *State ex rel. Lister v. Clausen*, 108 Wash. 148, 183 Pac. 120.

For the reasons stated the writ is denied.

PARKER, C. J., and FULLERTON, BRIDGES, and MOUNT, JJ., concur.

HOLCOMB, J. (dissenting). "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Constitution of Washington, art. 1, § 1.

Section 32 of the same article declares:

"A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government."

It seems that the majority have forgotten those positive declarations of our fundamental law. It seems, also, that they are imbued with the idea that there are some instances in which the courts may not inquire into the validity of a legislative act under the restrictions of the Constitution. Our primary obligation is to the Constitution.

"In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the Constitution and laws from the encroachments and tyranny of faction. * * * Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and necessary principle of our government, * * * that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the Constitution as the paramount law, and the highest evidence of the will of the people." 1 Kent, 294, 295.

"This, then, is the office of a written (free) Constitution: To delegate to various public functionaries such of the powers of government as the people do not intend to exercise for themselves; to classify these powers according to their nature, and to commit them to separate agents; to provide for the choice of these agents by the people; to ascertain, limit and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives." Hurlbut on Human Rights and their Political Guaranties.

"It is idle to say that the authority of each branch [of the government] is defined and limited by the Constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention.

"From its every position, it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency; else causes would be decided not only by the Legislature, but, sometimes, without hearing or evidence."

Gibson, Chief Justice, in *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

"Without the limitations and restraints usually found in written Constitutions the government could have no elements of permanence and durability; and the distribution of its powers and the vesting their exercise in separate departments would be an idle ceremony." *People v. Draper*, 15 N. Y. 532, Brown, J.

"It cannot be denied that the only great object of a written Constitution is to keep the departments of government as distinct as possible; and for this purpose to impose restraints

designed to have that effect. And it is equally true that there is no department on which it is more necessary to impose restraints than upon the Legislature. The tendency of things is always to augment the power of that department. * * *

"The Constitution being the supreme law it follows of course that every act of the Legislature contrary to that law must be void. But who shall decide this question? Shall the Legislature itself decide? If so, then the Constitution ceases to be legal and becomes only a moral restraint upon the Legislature. If they and they only are to judge whether their acts be conformable to the Constitution, then the Constitution is admonitory and advisory only, not legally binding, because if the construction of it rests wholly with them their discretion in every case may be in favor of very erroneous and dangerous constructions. Hence the courts of law, necessarily, when the occasion arises, must decide upon the validity of the particular acts. Without this check no certain limitations could exist on the exercise of legislative power." Daniel Webster on the Independence of the Judiciary, Works, volume 3, page 29.

During the last 40 years of the nineteenth century and the first decade of the twentieth, popular unrest and distrust of Legislatures resulted, in numerous states, in a return to the primitive system of direct legislation, modified by modern systems of election. The result in this state was the adoption in 1912 of the Seventh Amendment to the Constitution, which is, in substance, set forth in the majority opinion. By plain and simple, apt and certain words, it withdrew from the Legislature the power to finally enact legislation, with certain clear exceptions, and reserved them to the people.

The emergency declared in the act under consideration is that it is "necessary for the support of the state government and its existing institutions."

That it may be a better system of administration and operation of the state's activities may, for the purpose of this argument, be readily conceded. With the desirability or results of such a system, or the policy or the expediency of it, courts have no concern. We are here to declare the law, not to defend, or assail, policies. That this system is immediately necessary for the support of the state and its existing institutions is plainly, utterly, and emphatically fallacious. This is proven by the fact that for 32 years the state existed and the successive and cumulative wisdom of 16 Legislatures evolved the system of administration heretofore existing. It remained for the Seventeenth Legislature to suddenly enact, almost without debate, or deliberation, a revolutionary act, completely changing the existing system of administration, transferring the duties of a number of bureaus, commissions, and officials to 10 new, highly paid officials, with numerous highly paid assistants; and it is declared that this new and extremely revolutionary system is

so immediately necessary that an emergency exists, and that the act cannot await the lapse of ninety days from the adjournment of the session at which it was enacted.

The proposition is preposterous. There is no declaration that unless put into effect before June 8, 1921, the state would become insolvent, or that its several agencies transformed and transferred to the new would cease to function under the old system. It may be noted that the same Legislature that declared this system to be necessary, "in order to bring the costs of supporting the state government and its existing institutions within the possible revenues of the state," appropriated the total sum of \$10,637,289.88 from the general fund for the support and maintenance of the state and its existing institutions for the biennium ending in 1923, as against a total appropriation by the Legislature of 1919, for the support of the state and its then existing institutions from the general fund of \$10,561,000.42. There has never been a more supreme example of an act of the Legislature intended to be reserved by the Seventh Amendment for the right of referendum to the people. It is an act of the utmost importance to the people of the state. It is a much more obvious legislative evasion of the Seventh Amendment than that under consideration in the case of *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11, in which our present learned Chief Justice concurred with the majority in deciding that there could not be any immediate emergency as declared by the Legislature. And that case was right, and the attempt to distinguish this case from it by the majority is a vain attempt at a distinction without a difference. That case was thoroughly considered, unanswerably reasoned, and its determination was the only logical result under the Seventh Amendment. Otherwise that amendment, as to the reserve power of the people to have measures referred for their acceptance or rejection, is merely solemn and empty phrase-making, and the Legislature is at liberty to evade it by a mere *ipse dixit* whenever it is so inclined.

The Legislature is very powerful, but not all powerful. It is not like the British Parliament, or other parliamentary bodies, which exercise sovereign authority, and may even change the Constitution at any time by declaring the parliamentary will to that effect. Our Constitutions consist entirely of commands to, and limitations and restraints upon, the several governmental agencies. They were created for the protection of the minority against the tyranny of the majority.

"In America after a constitutional question has been passed upon by the Legislature, there is generally a right of appeal to the courts when it is attempted to put the will of the Legislature in force. For the will of the people, as declared in the Constitution, is the final law;

and the will of the Legislature is law only when it is in harmony with, or at least not opposed to, that controlling instrument which governs the legislative body equally with the private citizen." Cooley, *Constitutional Limitations* (7th Ed.) p. 6.

"While every possible presumption is to be indulged in favor of the validity of a statute, * * * the courts must obey the Constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed." *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

Courts are both cautious and reluctant to override a law duly enacted by the Legislature; and that caution and that reluctance are to be applauded. We have gone as far as the courts of any state and as far as judicial ingenuity and judicial oaths could possibly go in upholding the legislation of doubtful constitutional validity, upon the theory that every possible presumption is to be indulged in favor of the validity of the statute. The rule of reason should be applied to every case.

"To what purpose," said the great Chief Justice, John Marshall, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or that the Legislature may alter the Constitution by an ordinary act.

"Between these alternatives there is no middle ground. The Constitution is either superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the Legislature shall please to alter it. * * *

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void."

As if in answer to the oral argument made here by the Attorney General, and the idea that seems to prevail in the minds of the majority, that the Constitution does not specify who shall declare the conditions to support which the constitutionality of the act must be determined, exist, and that the Seventh Amendment does not so specify, that the Legislature is therefore the exclusive judge of the existence of these conditions, the great Chief Justice in the case above quoted further said:

"If any act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding

ing its invalidity, bind the courts, and oblige them to give it effect? * * *

"It is emphatically the province and duty of the judicial department to say what the law is. * * *

"If, then, the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the Legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply."

In this case we have a legislative declaration which is manifestly made for the purpose of preventing any referendum to the people upon the act, otherwise it would not be in the act. It was enacted for that sole purpose, and the majority of this court say that the courts are bound by that declaration and cannot inquire beyond its enactment.

The act before us states as its purpose the consolidation of numerous departments, commissions, bureaus, and officials into fewer departments for the purpose of co-ordinating their activities, and securing greater efficiency and greater economy, and transfers the duties of the boards, bureaus, commissions, and officers that are abolished, to the new departments.

In 1915 the Legislature consolidated the duties of several commissions and bureaus and transferred certain duties to one board, called the Board of State Land Commissioners, and declared that the act was "necessary for the immediate preservation of the public peace, and safety, and the support of the state government, and shall take effect immediately." The act was by no means as comprehensive as the present act, but it was brought before this court to contest the validity of the emergency clause. In that case Judge Chadwick, speaking for the court, said:

"Where there is a declaration in the Constitution that no law shall take effect unless in a case of emergency to be declared by the Legislature, it may be truthfully said that the general rule is that the court will not review the declaration of the Legislature; but where the people have put upon the Legislature a limitation in the way of a specific definition of its power and the elimination of acts of a certain character, the rule is that the declaration of an emergency must conform to the constitutional requirement. * * *

"At the general election held in November, 1912, the people of the state adopted the initiative and referendum amendment to the Constitution. By this amendment, it was provided that no law or bill subject to the referendum shall take effect until 90 days after the adjournment of the Legislature at which it was enacted, and that all laws shall be subject to referendum except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. * * *

"It is the contention of the respondents that the provision for an emergency in the amendment is in no respect different from that con-

tained in Const. art. 2, § 31, and that the courts are powerless to inquire into the act or discretion of the Legislature; that we are governed by the same rules and by the same considerations which have moved the courts since the establishment of our government to put no judicial restraints upon legislative discretion. * * *

"The judicial aversion to a review of legislative discretion, in so far as it relates to emergency clauses, is no more thoroughly established than the equivalent declaration that courts have power to declare laws unconstitutional. Now there is no more reason for saying that a bill is an emergency measure, when upon its face it is not, and from the very nature of its subject-matter cannot be, just because the Legislature has said it is so, than there is for declaring a law to be unconstitutional when it has been passed by the Legislature with the Constitution and its limitations lying open before it. The sense and discretion of the Legislature, as well as its power to discriminate between an act falling clearly without and one falling clearly within the Constitution, should, if we are consistent, be given the same weight as a declaration that an act is emergent, but few courts have so held since *Marbury v. Madison*, 1 Cranch (U. S.) 49, although their inconsistencies have long been apparent to the lay mind. In the one case we have said that we will inquire, in the other we have said that we will not inquire, saying meanwhile that we will indulge every presumption in favor of a law and will not declare it unconstitutional unless it is clearly violative of the Constitution. * * *

"The object of the amendment, in so far as it touches the taking effect of bills or laws, was to secure the right of review. In paragraph 'b' of the same section, it is provided: 'The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the Legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions.'

"If specific reservation in words of the right to subject all laws to referendum were not enough, the preamble of the amendment makes it clear that the people intended to assert that the revised and amended clause of the Constitution permitting emergent legislation should not be a dead letter, as was section 31, which was expressly repealed. They said: 'The legislative authority of the state of Washington shall be vested in the Legislature, consisting of a Senate and House of Representatives, which shall be called the Legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act or law passed by the Legislature.' * * *

"The people said to the Legislature, make such laws as you will, but you may not legislate so as to take away our right to pass upon the law you have just enacted, 'except such laws as may be necessary for the immediate preservation of the peace, health or safety, support

of the state government and its existing institutions."

After discussing the fact that under the original Constitution and section 31 of article 2 thereof, the Legislature had unlimited power to declare emergencies without the right of review by the people, the writer of the foregoing opinion continues:

"But here no such declaration is final, and should be given no immediate effect unless it can be fairly said that the act is necessary to preserve the health, peace or safety of the state or to support the government or its institutions"

—and quotes from *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, to the effect that courts are not bound by mere forms, nor are they to be misled by mere pretenses. The opinion continues:

"The reservation in the amendment is a declaration of 'Thou shalt not,' except it be for the safety or support of the state. * * *

"Power has been withheld, in so far as a withholding can be made by apt and certain words."

The opinion further says:

"The true rule is: The referendum cannot be withheld by the Legislature in any case except it be where the act touches the immediate preservation of the public peace, health, or safety, or the act is for the financial support of the government and the public institutions of the state, that is, appropriation bills. If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body.

"Emergency, in the sense of the present Constitution, does not mean expediency, convenience or best interest. There is no room for construction or speculation. The declaration is equivalent to saying that the referendum shall not be cut off in any case except in certain enumerated instances, none of which now occur. * * *

"The essence of our reasoning is not that the Legislature has abused its discretion; that is really immaterial; but that the people shall have a right, if they see fit, to review its act and place the stamp of approval or disapproval upon it."

It was there concluded:

"The real question is: Can the people, as distinguished from a representative legislative body, indulge in constructive legislation and reserve that right without interference by the Legislature or the courts, except where, in certain enumerated instances, they have waived the right in order that the immediate necessities of health, peace and safety and the support of the government and our public institutions may be met by their representatives duly convened in legislative session? Section 2 of the act, amending section 6605, violates the Seventh Amendment to our Constitution, and is void. The act will take effect 90 days after the Legislature has adjourned."

In *State, on the relation of Mullen, v. Howell*, 107 Wash. 167, 181 Pac. 920, involv-

ing the method of ratifying or rejecting the Eighteenth Amendment to the Constitution of the United States, Chadwick, C. J., again writing the opinion for the court, again reviewed the reasons for the adoption of the Seventh Amendment to our State Constitution, known as the direct legislative amendment, and among other things said:

"No cases have been cited, and we may confidently say that there are none holding to the rule of strict construction where the power of the whole people is in question. * * *

"It is well known that the power of the referendum was asserted, not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the Legislature had ceased to be responsive to the popular will. They endeavored to, and did—unless we attach ourselves to words alone, reject the idea upon which the referendum is founded, and blind ourselves to the great political movement that culminated in the Seventh Amendment—make reservation of the power to refer every act of the Legislature with only certain enumerated exceptions. * * *

"The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority"—citing *Cooley, Constitutional Limitations* (6th Ed.) p. 39.

And in that case one of our learned associates, Judge Mackintosh, concurred with the majority and wrote a special concurring opinion in which he said:

"By the adoption of the initiative and referendum amendments the people of this state became a part of the legislative branch of the state government, and all legislative actions, except those especially exempted, are subject to their participation. The reasons which have led up to this modern form of legislation are as set forth in Judge Chadwick's opinion and, upon both authority and reason, no curtailment of this power should now be judicially sanctioned. If the people have declared their intention to assert their authority over the Legislature in acts many of which are of temporary or small importance, it was surely their intention to preserve to themselves the right of reviewing legislative action of lasting and great importance. * * * It would be idle to say that the referendum could be exercised in the unimportant matters and not in the important.

"The dissenting opinion of Judge Parker indulges in altogether too narrow and restricted an interpretation of the right of referendum, and seems to be entirely out of harmony with the course of the decisions of this court upon this and kindred matters arising under laws affecting modern legislative and governmental functions. By strict adherence to the dictionary definitions, this dissenting opinion crushes the spirit of the constitutional provisions under consideration, and if it were the prevailing view in this case would mark a step backward by a court which has come to be recognized as rather liberal in its interpretation of legislation aimed at the correction of social and public evils."

And yet we have here not merely a step backward, but a long march backward in the interpretation of the force and effect of the referendum clause of the Seventh Amendment.

The emergency declared is that the act "is necessary for the state government and its existing institutions."

Apply the simplest rules of construction to this declaration of emergency and it must fall.

It is not, and does not pretend to be, an act carrying an appropriation for either existing or future public institutions.

It abolishes existing institutions and substitutes new ones.

In *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810, we held, Judge Parker concurring, that the Seventh Amendment to the Constitution, § 1, subd. (b), giving the right of referendum upon all laws except such as may be necessary for the "immediate preservation of the public peace, health or safety, (and the) support of the state government and its existing public institutions," contemplates "support" as including appropriations for current expenses, maintenance, upkeep, continuation of existing functions, as well as appropriations for such new buildings and conveniences as may be necessary for the deeds and requirements of the state in relation to its existing institutions, but did not contemplate exemption from the referendum where the law brought the state into a new activity, or provided for a new function, so that it might be fairly said that it did not pertain to the support of the government as then organized, or to any (then) existing institution.

That precisely covers the situation here.

The present act abolishes 70 existing institutions and substitutes new ones to go into existence April 1, 1921.

Nor can it be said that it is necessary for the future support of the state government as it must be organized for the future, for the language of the Constitution is that an emergent matter must be for the "support of the state government and its existing public institutions"; and by no possible straining of language can it be said that anything is emergent unless it is immediate, or approximately so, and nothing can be in immediately necessitous circumstances unless it is in existence.

Here we have the Constitution with its Seventh Amendment before us, and an act of the Legislature with a declaration of an immediate emergency, which is manifestly, as every one knows, a mere pretense. It constitutes a positive legislative usurpation or power reserved by the people to themselves, and the majority say that the declaration is final and conclusive by the mere negation that it is nonjusticiable. We have weakly

vacillated from the rule adopted in the *Brislawn Case*, supra. We have placidly closed our judicial eyes to a legislative usurpation of rights withdrawn and reserved "by apt and certain words" to the people by the Seventh Amendment. We have abrogated judicial power to inquire into the validity of a legislative assertion of power; we have judicially countenanced the nullification of the Seventh Amendment as to the referendum—a result devoutly desired by some, but not by any considerable number, of the people. It is an impotent outcome to labors in framing and adopting the amendment, withdrawing and reserving from the Legislature power to fully and finally legislate in all matters except a few instances, that seemed to promise vastly more. At any rate, the law has become unsettled and its continuity broken.

The courts are the conservators of the rights guaranteed by the Constitution to the people and to the individuals composing the people.

"It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question or the party be popular or unpopular.

"Courts should be more constant and determined else the law becomes unsettled and may even become an object of scorn and derision."

The referendum right and power of the people may be a slow and clumsy system and may be objectionable to many. But this is a government eminently "of the people, by the people, and for the people," and they adopted this system and made it a part of the fundamental and paramount law. It is not for us to destroy it by judicial construction.

For the foregoing reasons, I dissent.

The emergency clause attached to this act should be stricken under the Seventh Amendment of the Constitution, so as to permit the act to be subject to the referendum.

TOLMAN, J., concurs.

MAIN and MITCHELL, JJ. We concur in the conclusion arrived at in the dissenting opinion written by Judge Holcomb, for the reason that the *Brislawn Case* was correctly decided and is controlling. It would serve no useful purpose to further discuss that case. The only way for an inquiring mind to determine whether the majority or the minority view of it is correct is to read that opinion and consider its application to the law here under consideration. If there is any difference between the two cases, the present case is more clearly subject to the referendum than was the *Brislawn Case*.

(60 Mont. 242)

SANKEY v. CHICAGO, M. & ST. P. RY. CO.
(No. 4345.)

(Supreme Court of Montana. May 31, 1921.)

1. Damages ¶5—"General damages" and "special damages" defined.

"General damages" are such as naturally and necessarily result from the act of which complaint is made, while "special damages" are such as are the natural, but not the necessary, consequences of such act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages; Special Damages.]

2. Carriers ¶105(2)—Carrier not liable for special damages for delay in shipment of stock food unless it has notice of circumstances.

Where plaintiff purchased stock food and had it delivered on the 9th of February to defendant railway with instructions to ship it to a certain point, and the shipment was not made on the 10th by the railway company because of lack of equipment, nor on the 11th because it was Sunday, when no trains were commonly run, but was made on the 12th, held, that a claim by plaintiff for injuries to his stock from lack of food was a demand for special damages, for which the carrier was not liable unless it had notice at the time of the shipment of the urgency of expeditious delivery; Rev. Codes, § 6065, having reference to general damages.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Elmer Sankey against the Chicago, Milwaukee & St. Paul Railway Company. Verdict for the plaintiff. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

E. K. Cheadle, of Lewistown, for appellant.

Charles J. Marshall, of Lewistown, for respondent.

HOLLOWAY, J. This action was brought to recover damages alleged to have been suffered by plaintiff as the result of unreasonable delay on the part of the railway company in making delivery of a shipment of feed. The plaintiff alleges that in February, 1917, he was the owner of 128 hogs, which he was feeding at Hilger, Mont.; that he procured his feed at Lewistown and shipped it to Hilger over the defendant's railway; that on February 9 he purchased two tons of ground barley at Lewistown, had it delivered to the railway with proper directions to ship it to Hilger; that defendant accepted the shipment and issued its bill of lading. It is further alleged that the shipment was delivered in ample time on the 9th; that it should have been shipped to its destination on the 10th, but that the railway company negligently delayed the shipment until the 12th; that plaintiff was without feed for his hogs and was unable to procure feed, with the re-

sult that his hogs were injured and delayed in their preparation for market and plaintiff was compelled to feed them for six days additional in order to put them in as good condition as they were on the 10th, to plaintiff's damage in the sum of \$200.50, for which amount judgment was demanded. All allegations of negligence or damage were denied in the answer.

The trial of the cause resulted in a verdict in favor of plaintiff for the full amount claimed, and judgment was entered accordingly. Later the court sustained defendant's motion for a new trial, and plaintiff appealed from the order.

The evidence introduced by plaintiff follows closely the allegations of his complaint. Nowhere did he testify or contend that he gave the railway notice, or that it had notice, that the feed was intended for immediate use, that he was without feed, or that the damages claimed might reasonably be expected to result from the delay which ensued. The evidence discloses, on the contrary, that the railway company did not have such notice. It also appears that the 11th of February was Sunday; that the railway company did not run any train on its Hilger branch on Sundays; that it forwarded the shipment on Monday, the 12th, by the second train leaving Lewistown after the shipment was received, and that lack of equipment prevented the shipment on the 10th.

[1] All of the damages claimed by plaintiff are special damages. General damages are such as naturally and necessarily result from the act of which complaint is made. Special damages are such as are the natural, but not the necessary, consequences of the act of which complaint is made. *Root v. Butte, A. & Pac. Ry. Co.*, 20 Mont. 354, 51 Pac. 155; *O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166.

[2] The authorities are practically uniform in holding that, in order to charge a carrier with special damages arising from delay in the shipment of freight such as is involved here, notice of the urgency of the shipment must be brought home to the carrier. The decided cases are too numerous to be cited. Reference to many of them will be found in *Merriam on Claims between Shippers and Carriers*, § 404. In 10 C. J. § 433, p. 302, the rule is stated concisely as follows:

"One who seeks to recover special damages for breach of a contract of carriage must show that such damages were within the contemplation of both parties to the contract; otherwise he can recover only such damages as in the usual course of things flow from the breach. And he must show notice to the carrier at the time of the shipment of special circumstances from which said damages might arise."

See, also, 4 R. C. L. pp. 936-938; *Daube Kapp v. C. & T. Ry. Co.*, 39 Tex. Civ. App. 24, 86 S. W. 797.

Section 6065, Revised Codes, which determines the general damages recoverable in an action of this character, provides:

"The detriment caused by a carrier's delay in the delivery of freight is deemed to be in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery."

In the absence of some showing that the railway company had notice of the urgency of this shipment, the plaintiff was not entitled to recover special damages, and the court did not err in granting a new trial.

The order is affirmed.
Affirmed.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur.

(60 Mont. 289)

STURM & DRAKE v. ROBERTS ELEVATOR CO. (No. 4347.)

(Supreme Court of Montana. May 31, 1921.)

1. Appeal and error \Leftrightarrow 1001(1)—Verdict supported by positive evidence conclusive.

Where four witnesses testified as to the market price of hay on a specified date, the appellate court cannot say that there was no evidence to support a verdict fixing a valuation as of that date.

2. Evidence \Leftrightarrow 597—Where witnesses fix the value of hay at from \$15 to \$26, a verdict finding the value at \$19 is not unsupported.

Where testimony was given as to the market value of hay ranging from \$15 to \$26 per ton, there was sufficient evidence to support a verdict for the plaintiff on a basis of a market value of \$19 per ton, though no witness testified as to that exact valuation.

3. Sales \Leftrightarrow 417—Evidence of excess of market price of hay over contract price entitles buyer to substantial damages.

Under Rev. Codes, §§ 6056, 6082, evidence which discloses that the market price of hay at the time and place of delivery was in excess of the contract price is sufficient to entitle plaintiff buyer to substantial damages for failure to deliver hay pursuant to contract for the sale thereof.

Appeal from District Court, Carbon County; A. C. Spencer, Judge.

Action by Sturm & Drake, a corporation, against the Roberts Elevator Company. Judgment for the plaintiff, and defendant appeals from the judgment and from an order overruling its motion for a new trial. Affirmed.

Frank P. Whicher, of Red Lodge, for appellant.

William V. Beers, of Billings, for respondent.

REYNOLDS, J. Plaintiff brought action against defendant on two causes of action to recover damages for failure to deliver hay pursuant to the terms of two contracts for the sale thereof. Judgment was rendered in favor of plaintiff. Motion for new trial was made and overruled. Defendant appeals from judgment and from order overruling motion.

Several assignments of error are made by defendant, but under the provisions of rule 10, subd. 3, of this court (53 Mont. xxxv, 167 Pac. x) only one can be considered; i. e., insufficiency of the evidence to justify the verdict.

It is contended that the evidence is insufficient to support the verdict for the following reasons: (1) There is no evidence of any market price of hay on January 1, 1917, being the date specified in the contract for delivery thereof; (2) there is no evidence to support the particular amount which the jury returned in their verdict; (3) there is no evidence of any special damage to the plaintiff.

[1] We are unable to see the force of the first reason above mentioned, for no less than four witnesses testified as to the market price of hay on January 1, 1917, at place specified for delivery.

[2] Under the second reason it is urged that, inasmuch as a mathematical calculation shows that the jury arrived at its verdict on a basis of a market value of \$19 per ton for the hay, and there was no evidence given as to that exact valuation, there is no basis for a verdict for the particular amount given. The evidence, however, discloses that testimony was given as to the market value ranging from \$15 to \$26 per ton and is also alleged in appellant's brief. So long as there is substantial evidence showing a valuation in excess of that allowed by the jury, then we must hold that the evidence is sufficient to support the verdict in that respect.

[3] It is contended that there is no evidence of actual damage, for the reason that it does not appear that plaintiff suffered actual damage, had any particular use for the hay, had contracted to sell this hay to other parties, or had been obliged to go into the open market and purchase hay to fill its own contracts or supply its own needs. Under the statutes of this state the evidence is sufficient to entitle plaintiff to substantial damages if it discloses that the market price at time and place of delivery was in excess of the contract price. Rev. Codes, §§ 6056, 6082; Pritchett v. Jenkins, 52 Mont. 81, 155 Pac. 974. The same construction has been

given by the Supreme Court of California upon similar statutes. *Bullard v. Stone*, 87 Cal. 477, 8 Pac. 17.

It is apparent from the foregoing that the evidence was sufficient to support the verdict.

The judgment and order overruling motion for new trial are affirmed.

Affirmed.

BRANTLY, C. J., and COOPER, HOLLOWAY, and GALEN, JJ., concur.

(CO Mont. 246)

CLARY v. FLEMING. (No. 4371.)

(Supreme Court of Montana. May 31, 1921.)

1. Appeal and error §728(2), 743(2) — Assignments to rulings on evidence failing to point out specific evidence and page of transcript insufficient.

Assignments of error involving the rulings of the trial court on objections to evidence, but failing to point out any specific evidence objected to, or the page or pages of the transcript on which such rulings can be found, are insufficient, under Rule of Court 10, subd. 3b (53 Mont. xxxvi, 167 Pac. x).

2. Contracts §111—Agreement to convey lot in consideration of husband's failure to fight divorce action collusive and void.

Agreement by a wife to convey to her husband a lot standing in her name in consideration of his failure to fight her divorce action was collusive and void as against public policy.

3. Frauds, statute of §56(7)—Wife's agreement to convey lot to husband void where not in writing.

A wife's oral agreement to convey a lot to her husband in consideration of his failure to fight her divorce action, if deemed an agreement for a property settlement such as is permissible under the statute, is void, under Rev. Codes, § 3695, because not in writing.

4. Trusts §72—Trust arises in favor of party who furnishes money for purchase in name of another.

Rev. Codes, § 4538, is declaratory of the common-law rule that, if one person takes to himself the title of property purchased with the money of another, he takes it charged with a trust in favor of such other.

5. Trusts §86—Presumption is that conveyance to husband, wife, etc., made as gift by party furnishing money.

If property is purchased by one with his own money, and title is placed by him in another to whom he stands in a confidential relation as husband, wife, parent, child, or such other relation, there is a rebuttable presumption that the conveyance is made as a gift.

6. Trusts §89(5)—Evidence establishing resulting trust as between husband and wife should be convincing.

In any case in which it is sought to establish a resulting trust by reason of a convey-

ance made by or in behalf of a husband to his wife, the evidence establishing such trust relation should be clear and convincing and practically free from doubt.

7. Trusts §89(1)—Evidence insufficient to establish resulting trust in favor of husband.

Evidence held insufficient, in case of a conveyance to a wife for which her subsequently divorced husband furnished the consideration, to overcome the presumption of gift and establish a resulting trust in favor of the husband.

8. Trusts §365(4)—Husband claiming resulting trust as to land purchased for wife held guilty of laches.

Husband who furnished consideration for conveyance taken in his wife's name, now claiming after she had divorced him, remarried, and died, that the conveyance was one on resulting trust for him, held guilty of inexcusable laches in prosecuting his claim.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by O. M. Clary, as administrator of the estate of Margaret Wolf, deceased, against A. L. Fleming. From judgment for defendant, and from order overruling his motion for new trial, plaintiff appeals. Reversed and remanded.

C. W. Buntin, Charles J. Marshall, and O. J. Dousman, all of Lewistown, for appellant.
E. K. Cheadle, of Lewistown, for respondent.

REYNOLDS, J. This action was brought by plaintiff against defendant for the purpose of ejecting defendant from a certain lot in the original town site of Moore and quieting title in plaintiff thereto. The case was tried to the court without a jury. Findings were made in favor of defendant, and judgment followed. Motion for new trial was made and overruled. Plaintiff appeals from the judgment and order overruling motion.

Margaret Wolf, deceased, was formerly Margaret Fleming, and the wife of A. D. Fleming, the defendant. In May, 1905, a deed was made by Montana Town-Site Company to Margaret Fleming conveying the premises. As an affirmative defense the answer alleges that defendant paid certain sums of money on the contract for the purchase of the lot, that no consideration was ever paid by Margaret Fleming for the execution and delivery of the deed, and that immediately prior thereto it was agreed between defendant and his wife that he should allow the deed to run to her as grantee in consideration of her promise that she would convey the lot to him at any time upon request. The answer also alleges that she obtained a divorce from him in 1909, at which time, as a settlement of their property interests, she promised that she would convey to him the lot after entry of decree of di-

vorce, and that in reliance upon her promise he made no appearance in the divorce proceedings, and no written agreement was made respecting their property interests. These allegations are traversed by reply. The proofs, however, fail to show what agreement was made between defendant and his wife at the time of or prior to the execution and delivery of the deed to her, or even that any agreement was made. Defendant testified that immediately prior to the granting of the divorce she promised him that, if he would not fight the divorce, she would convey to him the premises, together with a half interest in other property held in her name. He also testified that he made demand upon her several times for a conveyance of the lot, and that she put him off from time to time with promises that she would make the conveyance. After the divorce, she married one F. E. Wolf.

Margaret Fleming did not record the deed immediately after receiving it, but held it until March, 1915. On the 14th of March, 1913, defendant, learning that her deed had not been recorded and assuming that it had been lost, procured another deed from Montana Town-Site Company, which deed was issued as a duplicate of the former one, but in the name of defendant. This deed was recorded March 15, 1913. On March 25, 1913, the original deed to Margaret Fleming was recorded. On the 21st of May, 1915, Margaret Wolf, formerly Margaret Fleming, died, and plaintiff was appointed administrator of her estate. By reason of the recording of the deed to defendant, this action was brought.

It is the contention of defendant that, under the facts stated, Margaret Fleming took the title to the premises in trust, and that he is entitled to have the title quieted in himself.

[1] Twelve errors are assigned, but many of them are not entitled to consideration. These insufficient assignments of error involve the rulings of the court upon objections to the introduction of evidence, but each of them fails to point out any specific evidence objected to, or the page or pages of the transcript upon which such rulings can be found. It is altogether too much to expect that this court will go through an entire transcript and pick out rulings that it may conclude that appellant desires to attack by such assignments. The rule requires:

"When error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." Rule 10, subd. 3b, 53 Mont. xxxvi, 167 Pac. x.

Reference should also be made to the page of the transcript where the objectionable ruling may be found.

One of the errors assigned is that the court erred in finding that the consideration

for the lot was paid by defendant, and that the property was held in trust by Margaret Fleming for defendant. The case may be disposed of upon this assignment of error, and therefore it will be unnecessary to consider any of the other alleged errors.

[2, 3] The alleged agreement whereby Margaret Fleming promised to convey to defendant the lot in consideration of his failure to fight the divorce action was clearly collusion and against public policy, and was therefore void. Even if it be deemed an agreement for a property settlement such as is permissible under the statute, it is likewise void because not in writing. Rev. Codes, § 3695. Thus no further consideration need then be given to the legal effect of this agreement.

[4] The vital question in the case is whether or not there was created a resulting trust in favor of defendant by reason of the fact that he paid the purchase price of the lot and the expense of improving the same, while the title was taken in the name of his wife. We do not think that the answer sets forth a resulting trust under this theory, but nevertheless will dispose of the question on the merits. Defendant relies upon section 4538 of the Revised Codes, which reads as follows:

"When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

This statutory provision is merely a restatement of the common law; for it has been held from time immemorial that, as a general rule, if one person takes to himself the title of property purchased with the money of another, he takes it charged with a trust in favor of the one who furnished the consideration. This provision is intended to reach those cases whereby one party has violated the confidence or trust reposed in him by another and in buying property has taken title to himself, or wrongfully retained title, when, as a matter of fact, he had no interest therein. It is intended as a protection to the one who makes the actual investment against any fraudulent dealing on the part of one who may be acting for him in the matter. There are, however, exceptions to the rule as stated. If the property is purchased by one with his own money, and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, or such other relation that one may naturally have a claim upon the bounty of the other, then the presumption is that the conveyance is made as a gift. *Taylor v. Miles*, 19 Or. 550, 25 Pac. 143; *Hamilton v. Hubbard*, 124 Cal. 603, 65 Pac. 321, 66 Pac. 860; 51 Am. Dec. note 754, 755; *Whitten v. Whitten*, 70 W. Va. 422, 74 S. E. 237, 39 L. R. A. (N. S.) 1028,

Ann. Cas. 1915D, 647. See, also, numerous citations in *Lafayette Street Church Society of Buffalo v. Norton*, 202 N. Y. 379, 95 N. E. 819, 39 L. R. A. (N. S.) 906. The Supreme Court of Oregon, in the case of *Taylor v. Miles*, supra, considering a similar question, uses this language:

"But the presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no natural or legal obligation resting on the purchaser to pay the consideration for another. When the purchaser takes the conveyance in the name of his wife, the sale [rule?] is reversed, and equity raises the presumption that the purchase and conveyance was intended to be an advancement or gift. 'Whenever,' says Mr. Pomeroy, 'the real purchaser—the one who pays the price—is under a legal or even a moral obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift, and no trust results.' 2 Pom. Eq. Jur. par. 1039."

The Supreme Court of California, from which state our statute was taken, in the case of *Hamilton v. Hubbard*, supra, has given a similar construction to the statute in the following language:

"Ordinarily, indeed, where a conveyance is made to one, and the consideration paid by another, a trust is 'presumed' in favor of the latter. Civ. Code, § 853. But this presumption arises only in transactions between 'strangers to each other' (1 Perry, Trusts, § 126), and is not indulged where the conveyance is to the 'wife or child, or other person, for whom (the person paying the consideration) is under some natural, moral, or legal obligation to provide.' In such cases the presumption is 'that the purchase and conveyance were intended to be an advancement for the nominal purchaser.' 1 Perry, Trusts, § 143; Hill, Trusts, 97, and note. The transaction was therefore a gift to Mrs. Hamilton, and, under the express provisions of the Code, her separate property. Civ. Code, § 162."

There are some California cases holding that in certain instances this statute is applicable to dealings between husband and wife, parent and child, but in each of those cases there appears a breach of confidence or trust whereby a trust *ex maleficio* results; but we are unable to find any case in which a resulting trust is presumed when a husband voluntarily takes the title in the name of his wife and there has been no breach of faith on her part.

[5] While in such cases the presumption is that the conveyance was intended as a gift, yet it is a rebuttable presumption. In this case, however, there is nothing to rebut this presumption, as the record is entirely devoid of any evidence whatever showing that there was any understanding or agreement between defendant and his wife that the conveyance should not be deemed a gift.

[6-8] In any case in which it is sought to establish a resulting trust by reason of a conveyance made by or in behalf of a husband to his wife, the evidence establishing such trust relationship should be clear and convincing. It should be practically free from doubt. 10 L. R. A. 401, and notes; *Parker v. Newitt*, 18 Or. 274, 23 Pac. 246; *Coe v. Coe*, 75 Or. 145, 145 Pac. 674. This principle is especially applicable where the defendant must establish his case by his own testimony as to oral conversations between himself and his former wife, whose lips are now sealed by death. From our view of the facts of this case, we are not satisfied that defendant's testimony is entitled to full credence. It must be remembered that the deed was made to defendant's wife in 1905, and in 1909 a complete separation took place resulting in an absolute divorce. No articles of separation covering a settlement of property were executed as is customary in property settlements between man and wife who are about to be permanently separated. After the divorce she married another man and continued to live as his wife until 1915, when she died. At no time within the ten years after the delivery to her of the deed, or the six years ensuing after the divorce, did he take any action to enforce any claim against this property. It is true that he testifies that he made several demands upon her for a conveyance of it, but we cannot know whether or not she would admit that he made such demands if she were able to speak, and there is no proof of any kind in corroboration of his story. From the time the deed was delivered to her she took possession of and assumed dominion over the property, paid the taxes on it, rented it, and in every respect treated it as her own, and did nothing in any way acknowledging any interest of defendant in the property, save her possible promise that she would convey it to him, as testified to by him. These circumstances, in our mind, present a condition of laches on the part of defendant that is inexcusable, if he was in her lifetime claiming in good faith that he was entitled to this property. The mere fact that he allowed her to retain the legal title and the actual dominion of it for her lifetime without substantial question, and then, upon her death, asserted his claim when he knew that it was impossible for her to contradict any statement that he might make, bears the mark of bad faith. This court has considered a case somewhat similar in principle and expressed itself very emphatically as to the effect of such laches. *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758. The court in the case cited, speaking through Mr. Justice Sanner, used this language:

"Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a

right; it is the practical application of the maxim, 'Equity aids only the vigilant'; and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable. Therefore has it often been held by this court that, while a mere delay short of the period of the statute of limitations does not of itself raise the presumption of laches (*Wright v. Brooks*, 47 Mont. 90, 130 Pac. 968; *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 815, yet 'good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation, where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime.' *Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 86; *Brundy v. Canby*, supra. What constitutes a material change of condition has been the subject of much judicial discussion and some judicial dissension; but, whatever doubt there may be as to the other circumstances, it never has been questioned, to our knowledge, that the death of one of the parties to the transaction is such a change."

Defendant has so slept on his rights, if he ever had any, that his contention utterly fails to appeal to the sense of justice and equity of this court.

The judgment and order overruling motion for a new trial are reversed, and the cause is remanded to the district court, with directions to enter judgment for plaintiff pursuant to the prayer of the complaint.

Reversed and remanded.

BRANTLY, C. J., and COOPER, HOLLO-WAY, and GALEN, JJ., concur.

(45 Nev. 120)

DEFANTI v. ALLEN CLARK CO.*
(No. 2459.)

(Supreme Court of Nevada. June 6, 1921.)

1. Corporations \S 298(3)—Special meeting of directors in absence of some directors not notified illegal and action invalid unless ratified.

Except in cases where it is impossible or impracticable to give notice, a special meeting of the directors of a corporation held in the absence of some of the directors and without any notice to them is illegal, and the action taken at such a meeting, though by a majority of the directors, is invalid, unless subsequently ratified.

2. Corporations \S 477(2)—Mortgage authorized at special meeting attended by only two of three directors invalid where no notice given third.

A corporate mortgage authorized by two of the three directors at a special meeting of the board of directors of the corporation, of which no notice was given its third member, is an invalid act.

3. Corporations \S 482(5)—Burden on corporation to show invalidity of mortgage duly executed.

In suit to foreclose a corporation's mortgage, where the mortgage itself, signed by the president and secretary of the corporation, with its seal affixed, was introduced in evidence, the burden was on the corporation to show its invalidity.

4. Corporations \S 477(8)—In suit to foreclose unauthorized mortgage, held that it would be unconscionable to permit defendant to shield itself under its corporate entity.

In suit to foreclose a corporation's mortgage authorized at a directors' meeting at which only two of the three directors were present, the other not having been notified, in view of the fact that the evidence did not convince the court that the money borrowed on the mortgage was not applied with the knowledge and acquiescence of the corporation, and the fact that opportunity for the mortgagee to obtain other security is lost, it would be unconscionable to permit defendant to shield itself under its corporate entity and decree of foreclosure will be affirmed, though the mortgage was unauthorized.

5. Corporations \S 482(9)—Allowance of attorney's fee, on foreclosure not unauthorized when resolution authorizing mortgage was silent in relation thereto.

Where the resolution of directors authorizing a mortgage was silent as to attorneys' fees, in suit to foreclose the mortgage which provided for attorneys' fees, executed pursuant to such resolution, the court is not authorized to allow such fees.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge

Action by A. Defanti against the Allen Clark Company, a corporation. From judgment for plaintiff, defendant appeals. Judgment modified, and as modified affirmed.

Hoyt, Norcross, Thatcher, Woodburn & Henley, and John D. Hoyt, all of Reno, for appellant.

J. H. Daly, of Sparks, for respondent.

SANDERS, O. J. This action was brought by a mortgagee to foreclose a mortgage executed by the vice president and the secretary of the Allen Clark Company, a corporation formed under the laws of this state, with its seal affixed, to secure the payment of a promissory note payable to the mortgagee, respondent herein, for the sum of \$3,500. The defense pleaded and relied upon at the

trial by the corporation appellant to defeat the mortgage was, in short, that the debt is valid, but the mortgage given to secure it is not. The ground of this claim is that Allen L. Clark, a director of the company, had no notice of the special meeting of the directors at which a majority of its board passed and adopted a resolution authorizing the vice president and secretary of the corporation, in the absence of Allen L. Clark, its president, from the state, to give its note for the sum of \$3,500 to the plaintiff or to some other person who would loan to the company that amount of money and to execute its mortgage to secure its payment. The mortgage recites the preamble of the resolution, and the resolution recites the purposes for which the money was to be applied, namely, to the payment of the sum of \$2,500 due upon the purchase price of certain real estate contracted for by the corporation and other debts. It is not denied that the money was borrowed and loaned in most perfect good faith for the uses and benefits of the company; in fact, the corporation in its answer to the complaint expresses its willingness that plaintiff may have judgment as in an action for money loaned for the sum of \$2,500, with accrued interest, amounting to the sum of \$300, and for any additional amount of the principal sum borrowed shown to have been actually used for the benefit of the company. It is not denied that the plaintiff mortgagee knew when he accepted the security that Allen L. Clark, a director of the company and its president, was absent from the state of Nevada, and had no notice of the special meeting at which the mortgage was authorized. In this situation the corporation contends that the only judgment that could legally have been rendered was for a money judgment. The trial court decided against these contentions, and made a general finding to the effect that the money was loaned in good faith for the benefit of the corporation, and that the latter had received adequate benefits from the full sum borrowed, and rendered its decree of foreclosure together with a judgment for attorney's fees in the sum of \$608. The corporation appeals.

The appellant makes the same contention in this court as it did in the lower court, namely, that conceding the company received the benefits of the money, the mortgage being invalid for the reasons stated, the decree of foreclosure must be reversed and a judgment ordered in favor of the plaintiff and against the defendant for the sum of \$2,800. We are of the opinion that the evidence tends to show that the company actually received adequate benefits from the full amount borrowed. At any rate, there is nothing in the record to convince us to the contrary.

[1] Passing to the legal question involved, as to the validity of the mortgage, we concede that, except in cases where it is impossible or impracticable to give notice, a special

meeting of the directors of a corporation held in the absence of some of the directors, and without any notice to them, is illegal, and the action at such a meeting, although by a majority of the directors, is invalid, unless subsequently ratified. 3 Fletcher, Cyc. Corp. § 1868.

The general corporation law of this state provides, *inter alia*, that a majority of the whole number of trustees or directors shall form a board for the transaction of business, and that every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act, subject to the provisions of the by-laws and of the laws of this state. Rev. Laws, § 1127. The question as to when the trustees or directors shall be considered as duly assembled is not settled by the statute. This seems to have been left by the lawmakers to the corporation itself to be covered by its by-laws.

[2] It is provided in the by-laws of the Allen Clark Company that notice of a special meeting of its directors (composed of three members) shall be given to each director by mail or in person. Without reviewing the familiar reasons for the necessity of such a regulation for the proper conduct of the business and affairs of a corporation, it must be conceded that a mortgage authorized at a special meeting of the board of directors, of which no notice was given its third member, is an invalid act.

But it is not denied that it was within the power of the Allen Clark Company to execute the mortgage. In the case of *Edwards v. Carson Water Co.*, 21 Nev. 496, 31 Pac. 381, the court quotes with approval from the case of *Dexter Horton & Co. v. Long*, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867, the syllabus of which case is (and we think it expresses correctly what the case decides) that—

"Where a mortgage by a corporation was not authorized by its trustees, but was executed by its president and secretary, who were two of its three trustees, and the corporation received the benefits of the mortgage, the defects in its original execution will be regarded as cured by ratification."

The Washington court, citing authorities, bases its conclusion upon the doctrine that where money has been obtained by a corporation upon its securities, which were unauthorized in the first instance, and the money was applied for the benefit of the company with the knowledge and acquiescence of the stockholders, the company and the shareholders are estopped to defeat the mortgage. This doctrine is recognized (with limitations) by this court in the case of *Yellow Jacket S. M. Co. v. Stevenson*, 5 Nev. 224. In the case of *Jones v. G. & I. Co.*, 101 U. S. 622, 25 L. Ed. 1030, the court sanctioned and applied this doctrine to corporations, upon the principle that equity neither enforces forfeitures

nor lends its aid to the assurance of a mere legal right contrary to the equity and justice of the case.

[3] Appellant asserts, however, that it had no knowledge of the existence of the mortgage until a few days prior to the bringing of this action for its foreclosure, and consequently had no time within which to repudiate the transaction, and that therefore the doctrine of receipt of benefits, acquiescence, and ratification cannot be charged against it, and has no place in this case. To support this position we are directed to the testimony of Allen L. Clark, the director who had no notice of the special meeting at which the purported mortgage was authorized, and its president. In this the appellant is unfortunate. It would have been in a much better position if it had relied upon the invalidity of the mortgage to defeat foreclosure, and had stopped there. But we assume that as the mortgage is signed by the president and secretary of the corporation, with its seal affixed, when introduced in evidence the burden was upon the corporation to show its invalidity; and since the corporation concedes that at least \$2,800 of the sum borrowed was actually applied for the benefit of the corporation, the only defense open to it to defeat the foreclosure was to repudiate the mortgage through Allen L. Clark, its president, upon the assumption that it had no knowledge of its execution. As we interpret the record, it is evident that the trial court disbelieved Clark's testimony in toto, and we confess that in view of his particular relation to the corporation and the character of his testimony, we are not impressed with its sincerity or verity.

With what might be considered stupidity, he testified that the corporation was organized by himself and wife, with a subscribed capital stock of 10,000 shares, of the par value of \$——, but that he did not know for what purpose the corporation was formed. He states, in effect, in the course of his examination, that he and his wife just formed it; that she attended to its affairs and business when there was anything to be done; and that he was absent from Nevada from July, 1918, to May, 1919.

The evidence shows that Allen L. Clark, the husband, owned 1,000 shares, his wife Emily 8,999, and W. J. Luke one share, of the capital stock of the corporation. These three persons constitute all of its shareholders and compose its directorate. Allen L. Clark is its president, W. J. Luke its vice president, and Emily Clark, in her lifetime, was its secretary and treasurer. Luke is conceded to be only a nominal officer and shareholder. The mortgage was executed in September, 1918. Emily Clark died in May, 1919, shortly after her husband had returned to Nevada. This suit was commenced in October, 1919. In the interim between May and October, 1919, Allen L. Clark, the president

of the company, had access to its corporate books, although there is evidence tending to show that they were in the hands of third parties. However, there is nothing in the record to show that he might not have obtained possession and control of them upon demand.

The mortgage was placed of record in the recorder's office of Washoe county shortly after it was delivered. The loan was personally negotiated by Emily Clark, wife of Allen L. Clark, to protect the property of the corporation from being sacrificed, as well as to pay other existing obligations. The evidence tends to show that the property of the corporation, after the death of Emily Clark, was threatened with litigation. During all of this time Allen L. Clark, its president, remained perfectly silent until his solicitors set up the defense of the invalidity of the mortgage and no knowledge on the part of the corporation of its execution. The questions propounded to him to elicit evidence to show lack of knowledge by the shareholders of the corporation were so leading as to put the answers thereto in his mouth, and we are in doubt as to whether or not the witness knew of the purport or purpose of the questions. It is true he testified that he had no knowledge of the transaction. It is not reasonable to believe this testimony, for no business man would be so indifferent to his own interests or to those of the corporation, under the circumstances, as to disclaim such knowledge.

Furthermore, the evidence tends to show that the trial court may have been warranted in drawing the inference that notice to Allen L. Clark of the special meeting, which was at the time urgent, would have been a mere matter of form and would have accomplished nothing.

[4] The evidence not being such as to convince us that the money borrowed upon its security was not applied with the knowledge and acquiescence of the corporation, we are of the opinion that to permit the company to shield itself under its corporate entity, under the facts of this case, and now disaffirm the mortgage, when every opportunity for its mortgagee to obtain any other security is lost, would be unconscionable. Entertaining this view, we conclude to affirm the decree of foreclosure, even though the mortgage was unauthorized.

[5] It is urged that the court erred in adjudging and decreeing that in addition to the costs of suit defendant be taxed an attorney's fee of \$608. Counsel insist that such a sum is unreasonable, and that the judgment should be modified. Whether or not the sum allowed is reasonable we do not stop to inquire, for the reason that we are clearly of the opinion that the court was not authorized to allow attorney's fees for any sum. The terms of the resolution authorizing the mortgage should be as broad as the

mortgage itself, which is not the case here. It affirmatively appears upon the face of the resolution that it is silent as to attorney's fees. The officers were authorized only to borrow \$3,500, give the company's note, and secure it by mortgage. The note and mortgage go beyond this authorization. The note provides for a reasonable attorney's fee, and the mortgage for an attorney's fee of 15 per cent. of the amount collected. The lower court allowed plaintiff's attorney a fee of \$80 for negotiating the loan, and the 15 per cent. as aforesaid.

In an action for the foreclosure of a mortgage against a corporation, the plaintiff is not entitled to recover counsel fees if the resolution of the corporation authorizing the execution of the mortgage does not provide that the payment of counsel fees shall be secured by it. *Schallard v. Eel River Nav. Co.*, 70 Cal. 144, 111 Pac. 590. And where the resolution did not expressly authorize the officer to contract to pay attorney's fees in case of suit, such a provision in a note is invalid. *Thomas v. Wentworth Hotel Co.*, 18 Cal. App. 403, 117 Pac. 1041, 1046.

We conclude to modify the judgment by striking therefrom the attorney's fees, amounting to the total sum of \$608, and permit the decree of foreclosure to stand.

The judgment as thus modified is affirmed.

DUCKER, J., concurs.

COLEMAN, J. I concur in the order.

Conceding that the meeting at which the execution of the note and mortgage was authorized was not duly called, and that for that reason the mortgage was voidable, I am strongly of the opinion that the corporation should be estopped from attacking the validity of the mortgage, under the circumstances of the case. It received the money upon the strength of the mortgage, and cannot retain the same and be heard to say that the mortgage is not binding. This is the general rule as to ultra vires contracts (10 Cyc. 1156; *Wisconsin L. Co. v. G. & W. Tel. Co.*, 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387; *Wayte v. Red Cross Pro. Society* [C. C.] 166 Fed. 372), and the process of reasoning leading to the result in those cases, which is equally applicable here, as well as good morals, impel a like conclusion under the facts of this case.

Furthermore, I am of the opinion that the trial court was justified, under the evidence, in concluding that the transaction was ratified by Allen L. Clark. Of course, in doing so, it must have totally disregarded the positive testimony of Clark to the effect that he knew nothing about the mortgage in question until a demand for the payment of the interest a few days before the foreclosure proceedings were instituted. His testimony, as a whole, does not commend itself to the court. Though having been away from Reno

for some months, he returned a few days before the death of Emily Clark, his then wife, who, so far as appears, left him as the owner of all of the stock in the company, except one share, which was held by Mr. Luke simply to qualify him as a director and officer of the company. Mr. Clark is certainly the only surviving officer of the company who had any material interest in its affairs, yet he testified that he had not looked into its condition enough to learn of the mortgage in question; and this, too, in the face of the fact that soon after the death of the wife he obtained from the bank the canceled checks of the company, some of which were upon a part of the borrowed money. It is quite remarkable that he should manifest sufficient interest in the status of the company to get the canceled checks, but not to prosecute an investigation as to all of its transactions during his absence. But while he testified flatly that he knew nothing of the mortgage in question until payment of the interest was demanded, his evidence as to the conversations which took place when the interest was demanded does not indicate any surprise at learning of the existence of the mortgage, but, to my mind, indicates that he knew of its existence. He said:

"Well, he asked me if I could pay the interest, and I told him I couldn't pay it all, but could pay him half of it now, and, if he would wait a few days until rent was paid, I could pay him the other part of it. He couldn't do it, he said. I told him to go and see my lawyer about it, then, and he didn't go."

This testimony was given on direct examination. It is true that thereafter, in reply to a suggestive question by his counsel, he did state that he told the party demanding the interest that he knew nothing about the mortgage prior thereto. But in view of the character of the examination, and of all the circumstances, the trial court had a right to reject so much of his testimony as it saw fit.

While it is not a matter of which we can take judicial notice, I think it perfectly proper for me to call attention to certain improbable evidence given by Mr. Clark. Evidently for the purpose of bolstering up his contention that he did not know of the existence of the mortgage in question, he testified that he thought the indebtedness which was discharged by the money borrowed from respondent had been paid out of \$3,500 received as insurance money on the Ralston street property. The fact is that only \$1,000 was received from that insurance, and it had not been paid when he gave the testimony alluded to, as it was necessary to bring suit to recover it, which was finally disposed of on February 28 last. See *Clark v. London Assur. Corp.*, 195 Pac. 809. In view of the fact that this witness has been a party to, or has given testimony in, several suits which have come to this court within the last three years

(Allen Clark Co. v. Francovich, 42 Nev. 321, 176 Pac. 250; Allen Clark Co. v. Moran, 42 Nev. 356, 176 Pac. 413; Clark v. Clark, 189 Pac. 676; Clark v. London Assur. Corp., supra, and the instant case), it may be, of course, that he has become somewhat confused as to facts, but it might stand him in hand to be more guarded in giving testimony.

(45 Nev. 110)

DONOGHUE et al. v. TONOPAH ORIENTAL MINING CO. (No. 2467.)*

(Supreme Court of Nevada. June 6, 1921.)

1. Mines and minerals §23(1) — Noncompliance with resolution of Congress as to filing notices to hold claims without work during war held not to affect rights.

Joint resolution of Congress suspending requirements of annual assessment work on mining locations during the years 1917 and 1918, though mandatory in terms, does not cut off the rights of defendants, locators of mining claims, as against plaintiffs, subsequent locators overlapping defendants' prior location, where defendants' failure to file notices of desire to hold their claims in the proper county was not pursuant to any attempted fraud or deceit, where they had no intention, shown by competent, clear, and satisfying proof, of abandoning their claims, where there was good faith and an open, honest effort to comply by filing notices in the appropriate county, and where the neglect or omission to file the notices was that of others and not attributable to the claim owners, nonresidents of the district involved.

2. Mines and minerals §23(1)—Resolution of Congress suspending annual assessment work susceptible of two interpretations will be given that best comporting with reason.

Joint resolution of Congress suspending the requirements of annual assessment work on mining claims during the years 1917 and 1918, being susceptible of two interpretations, will be given that which best comports with reason and justice, particularly in an equitable action to quiet title involving questions peculiarly equitable in their nature.

3. Equity §24, 62 — Equity neither enforces forfeitures nor aids in assertion of legal right contrary to justice.

Equity does not enforce forfeitures nor extend its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case.

Coleman, J., dissenting.

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by Dave Donoghue and others against the Tonopah Oriental Mining Company, a corporation. From judgment for plaintiffs, defendant appeals. Reversed, with directions.

Hugh Henry Brown and Walter Rowson, both of Tonopah, for appellant.

W. R. Gibson, of Tonopah, for respondents.

SANDERS, C. J. The complaint in this action is the short form of a complaint to quiet title to real estate. This action, however, was brought to determine an adverse claim to a certain piece of mining ground situate in the Tonopah mining district, Nye county, Nev., segregated from the public domain by conflicting lode mining locations (that of the plaintiffs overlapping the prior location of the defendant).

The case differs from ordinary actions of this character in that the record shows, and it is conceded to be the fact, that plaintiffs base their right to locate the ground, primarily, upon the assumption that the failure and neglect of defendant's predecessors in interest to comply literally with the proviso contained in a joint resolution of Congress caused the ground to revert to the public domain and rendered it subject to relocation. The resolution referred to was approved on October 5, 1917, by the Sixty-Fifth Congress. It is entitled:

"Joint resolution to suspend the requirements of annual assessment work on mining claims during the years nineteen hundred and seventeen and nineteen hundred and eighteen." U. S. Stats. L. 1917-18, p. 343.

The resolution reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That in order that labor may be most effectively used in raising and producing those things needed in the prosecution of the present war with Germany, that the provision of section twenty-three hundred and twenty-four of the Revised Statutes of the United States which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements to be made during each year, be, and the same is hereby, suspended during the years nineteen hundred and seventeen and nineteen hundred and eighteen: Provided, that every claimant of any such mining claim in order to obtain the benefits of this resolution shall file or cause to be filed in the office where the location notice or certificate is recorded on or before December thirty-first, of each of the years nineteen hundred and seventeen and nineteen hundred and eighteen, a notice of his desire to hold said mining claim under this resolution: Provided further, that this resolution shall not apply to oil placer locations or claims. * * *"

In the case at bar it is conceded that the claim owners had no idea or intention of abandoning their mining ground prior or subsequent to the 31st day of December, 1918; but, on the contrary, the testimony shows, and it is not disputed, that the owners in 1917 filed for record in the recorder's

office of Nye county (where the certificate of location was recorded in 1915) their notice of desire to hold their claims under the resolution of Congress for both years 1917 and 1918, apparently believing that the one notice would answer for both years. In this, under a ruling of the Department of Justice, they were mistaken, and it became necessary for them, in order to obtain the benefits of the resolution, to file a like notice for the year 1918. They attribute their failure to file the notice in the recorder's office of Nye county for the year 1918, as they had done in 1917, to the following facts and circumstances:

The claim in dispute is one of a group consisting of four contiguous claims, known generally as the "Homestake Group." The history of the ground covered by the group dates from the formation of the Tonopah mining district. The group in 1917 was owned in common by three persons, all of whom were absent from the state of Nevada in 1918. One of the owners died in that year. The dividing line between Nye and Esmeralda counties cuts through the group, leaving the claims partly in Nye and partly in Esmeralda county. The exact location of the true line between these counties was a matter of doubt, speculation, and uncertainty until after the year 1913, when the Legislature enacted a law authorizing the officials of these counties to re-establish it. Assuming that this was done, nevertheless much of the testimony in the case shows that the dividing line, in so far as it affects the ground covered by the group, was still a matter of doubt. But one claim of the group here in controversy is in Nye county. Much testimony was offered by the defendant to show that the owners of the group and others were in doubt as to how the dividing line as established affected the group and other mining ground in its vicinity.

The proof shows that in 1918 one of the owners lived at Los Angeles and the other at Sacramento, Cal. Each wrote urgent letters, one to his friend in Tonopah and the other to his father-in-law, also residing there, to do all that was necessary and required to be done to hold their claims under the resolution of Congress for the year 1918. The friend of the owner living in Sacramento prepared the required notice and presented it to the recorder of Nye county for filing, in the month of December, 1918. He was informed by the recorder that the proper place for filing the notice was in the recorder's office of Esmeralda county, at Goldfield, Nev. Thereupon he caused the notice to be filed in the recorder's office in said county, on or about the 27th day of December, 1918. Relying on the representation of the recorder of Nye county as being official and correct, he gave no further consideration to the matter, believing, of course, that he had complied, for and on behalf of

his friend, with the requirement of the resolution of Congress.

The other owner, living in Los Angeles, wrote his father-in-law on the 10th of December, 1918, to do for him all that was necessary and required to be done under the resolution to hold his claims, stating therein that he did not want to give them up. This was followed by another communication, of December 20, 1918, in which he inclosed a formal notice of desire to hold the claims in accordance with the resolution of Congress, not knowing of the steps taken by his co-owner to hold the ground, and instructed his father-in-law to file the notice in Tonopah, Nye county. The father-in-law was of the same opinion as the county recorder of Nye county, that Goldfield was the proper place for the recordation of the notice, basing his opinion upon his own experience, with the uncertainty of the whereabouts of the true dividing line between Nye and Esmeralda counties as it passed through the Homestake Group and other mining locations in that vicinity; and it was his opinion also that as the property consisted of a group of claims the notice required could as well be filed in either county, and therefore he caused the notice to be filed in Esmeralda county.

The trial court, in arriving at its ultimate conclusion, disregarded all defendant's evidence, and decided that the failure of defendant's grantors to literally comply with the proviso operated as a forfeiture of the ground; that plaintiffs having entered upon the ground and made a valid relocation, the forfeiture was completed, and rendered a decree confirming and quieting title in plaintiffs. The defendant appeals.

We do not think it was the intention of Congress that the proviso should be interpreted so as to result in injustice, oppression, or absurd consequences. The particular situation, as disclosed by the above statement of facts, made the question of the interpretation of the proviso one to be influenced and controlled by the broad and important inquiry whether it was the intention of Congress to declare a forfeiture where the claim owner honestly and in good faith endeavored to comply with the terms of the proviso, but failed for the reasons above stated.

It is not a question of construction of the proviso, but one of interpretation as to whether or not Congress intended that its terms should be so inflexible as not to permit of exceptions. We think the meaning and effect of a public resolution of this character is to be determined under broad rules of liberal interpretation, especially as it appears upon the face of the resolution that it was approved when the government was confronted with imminent exigencies, emergencies, and perils. It is true that every claim owner was not engaged directly in helping to win the war with Germany, which was the

moving cause of the resolution. But Congress evidently assumed that every able-bodied citizen, or person who had declared his intention to become such, holding mining ground under the government's conditional grant, stood ready in return for its favor to bend his energies and lend his substance to the aid of the government in its time of need. But it is insisted that this public purpose yields to the strict letter of the proviso, which when interpreted literally shows that the assessment work was suspended for the benefit of individual claim owners, and that a claim owner who had failed to file or cause to be filed his notice of desire to hold lost his claim, and had no standing in a court of law or equity. We are not construing the proviso; it needs no construction. We are endeavoring to find the intention of Congress where a claimant failed and neglected, without fault of his own, but through an honest mistake, attributable to others, to cause to be filed in the proper recorder's office his notice of desire to hold his ground.

[1] If the proviso is solely for the benefit of the individual claim owner, we are not in accord with an interpretation that nullifies its beneficent purposes. We think that reflection inevitably leads to the conclusion that exceptions, which are present and concurring in this case, arise from a failure to comply literally with the terms of the proviso. First, there is no fraud or deceit; second, no intention, shown by competent, clear, and satisfying proof, to abandon the claims; third, there is good faith, and an open and honest effort to comply; and, fourth, excusable neglect or omission of others to file the notice, not attributable to the claim owner.

This interpretation is supported, in a measure, by that of the Interior Department in a case arising under the Suspensory Act of 1893 (28 U. S. Stat. 6). The act of 1893, suspending the assessment work for that year, came before the department in *Cain et al. v. Addenda Mining Co.*, 24 Land Dec. 18. The owner was permitted to hold the ground under the resolution, though the company had not filed any declaration of intention whatever. It is true that it was in a contest which involved fraud of the worst kind, still the ruling indicates that each case arising between claim owners and third parties for failure to comply with the resolution is to be controlled and decided upon its own particular facts and circumstances.

[2, 3] It is true, from the situation developed from the trial of this case, that the representatives of the true owners of the

ground in dispute, though acting in good faith, upon their own showing, could have taken the precaution, being in doubt, to file the notice in both Nye and Esmeralda counties; but their omission so to do, under the particular circumstances, should not be visited upon the owners. In arriving at this conclusion, we are mindful that it is not the province of courts to concern themselves with the injustice and inconvenience or hardships of a law where its meaning is plain. Such a matter is addressed to Congress. But where it is clear that a strict and literal interpretation of a public resolution, concerning land in which the government has a proprietary interest, will result in manifest injustice, we may scrutinize it closely to see if it will not admit of some other interpretation. We take it that Congress is presumed to have intended an interpretation which would avoid results of this character. We freely admit that the language of the proviso is susceptible of the interpretation that it is mandatory in terms, but we are of the opinion that its resulting effect is doubtful and susceptible of two interpretations, and under the well-settled rule we give it that interpretation which best comports with reason and justice. *State v. Dovey*, 19 Nev. 396, 12 Pac. 911; *State v. Kruttschnitt*, 4 Neb. 178. See, also, 11 Ency. U. S. Sup. Ct. Rep. p. 151. It must be understood that this is an equitable action to quiet title that involves questions peculiarly equitable in their nature. Equity neither enforces forfeitures nor extends its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Jones v. G. & I. Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Defanti v. Allen Clark Co.*, 196 Pac. 549.

Entertaining the view that the facts in this case are such as in equity show the defendant to have the better right to the possession of the ground, it is the order that the judgment of the lower court be reversed, with directions to render and cause to be entered a decree in favor of the defendant, in accordance with the prayer of its affirmative defense, without further proceedings.

It being conceded that our conclusion is decisive of the case, we do not discuss other important and interesting questions.

It has been suggested that the case involves a federal question. We will pass upon that, should occasion arise, at the proper time.

DUCKER, J., concurs.

COLEMAN, J., dissenting.

(45 Nev. 131)

**BUCK v. BOERLIN et al., BOARD OF
MINERAL COUNTY COM'RS.**
(No. 2513.)

(Supreme Court of Nevada. June 18, 1921.)

Statutes \S 76(2), 94(2)—Act authorizing county to issue bonds to purchase, extend, and equip a power and telephone line held not unconstitutional.

St. 1920-21, c. 45, providing for issuance of bonds by Mineral county for the purchase of a power and telephone line and for extension and equipment thereof, is not in violation of Const. art. 4, \S 20, providing that the Legislature shall not pass local or special laws regulating county business, and sections 21 and 25, requiring that the system of county and township government shall be uniform, and that in all cases where a general law can be made applicable all laws shall be general and uniform, so that the board of county commissioners cannot be prohibited from proceeding under such act.

Original proceeding in prohibition by J. Holman Buck against Henry Boerlin and others, as members of the Board of County Commissioners of Mineral county, Nev. Proceeding dismissed.

Ryland G. Taylor, of Tonopah, for petitioner.

J. H. White, Dist. Atty., of Hawthorne (Hugh Henry Brown and Walter Rowson, both of Tonopah, of counsel), for respondents.

COLEMAN, J. Pursuant to the act approved March 4, 1921 (Stats. 1920-21, p. 80) providing for the issuance of bonds by Mineral county in the amount of \$150,000 for the purchase of a power and telephone line, and for the extension and equipment thereof, the board of county commissioners of that county, at a regular meeting, duly authorized the issuance and sale of bonds for the purpose designated in the act mentioned. This is an original proceeding in prohibition to restrain said board from consummating the purchase and extension of said lines upon the ground that the board is without jurisdiction to authorize the issuance and sale of said bonds, for the reason that the said act is unconstitutional, null, and void. It is contended that the act is violative of article 4, \S 20, of our Constitution, which provides that the Legislature shall not pass local or special laws regulating county business, and of sections 21 and 25 of the same article, requiring that the system of county and township government shall be uniform, and that in all cases when a general law can be made applicable all laws shall be general and of uniform operation throughout the state.

It is not urged that the purpose sought to be accomplished by the act is not a public one. We think there is no merit in either of

the views urged upon us. In fact, it is well settled in this state to the contrary. In *State v. Lytton*, 81 Nev. 67, 90 Pac. 855, substantially the same questions were disposed of, the court there holding that an act of a similar character was not violative of either of the sections mentioned. The only difference between that case and the one at bar is that the act there in question authorized the sale of bonds for the building of a new courthouse and jail, while in this case the act authorizes the sale of bonds for the raising of money for the acquiring, extending, and equipping of power and telephone lines. In both cases the act authorizes the sale of bonds for a public purpose.

The Legislature has, during the last few years, authorized several counties to sell bonds for the improvement of highways and other public purposes. If the act in question is void, no good reason can be urged why other acts authorizing the sale by a county of bonds for a public purpose should not be void. This court, in the case mentioned, and previous ones, has settled the questions before us, and the welfare of the state demands that they be deemed settled for all time, whether settled right or wrong.

For the reasons given, we are of the opinion that there is no merit in either of the points urged upon us, and it is ordered that this proceeding be, and the same is hereby, dismissed.

SANDERS, C. J., and DUCKER, J., concur.

(106 Or. 274)

MOZOROSKY v. HURLBURT.

(Supreme Court of Oregon. June 3, 1921.)

1. Bail \S 3—Sheriff authorized to take bail for appearance of prisoners in meane process in civil actions.

At common law, and under modern statutes, the sheriff has a right to take bail for the appearance of prisoners arrested in meane process in civil actions.

2. Bail \S 3—Judicial officers with power to determine cases have power to take bail.

Generally, all judicial officers having the power to hear and determine cases have the power to take bail; such power being a necessary incident to the right to determine a cause.

3. Bail \S 6—Discretionary with court or magistrate empowered to fix amount.

The amount of bail is addressed exclusively to the judicial discretion and sense of the court or magistrate empowered to fix the amount.

4. Bail \S 3—Arrested debtor entitled to bail pending appeal from adverse judgment in habeas corpus proceeding.

Debtor against whom judgment had been rendered under Or. L. \S 8264, and who had been

arrested in execution of the body under sections 218, 259, was entitled to bail under Const. art. 1, § 14, on appeal from an adverse judgment in habeas corpus proceedings, on the ground that his arrest was in violation of section 19.

5. Habeas corpus — 33—Appropriate remedy in aid of bail.

A writ of habeas corpus is an appropriate and proper remedy in aid of bail.

In Banc.

Appeal from Circuit Court, Multnomah County; George W. Stapleton, Judge.

Application for habeas corpus by Joseph Mozorosky against T. M. Hurlburt. From an adverse judgment, plaintiff appeals. Petition to be admitted to bail pending appeal allowed.

Sol Swire obtained a judgment against plaintiff, Jos. Mozorosky, for the sum of \$1,600, under the provisions of section 8264, Or. L. The brief states that plaintiff appealed from that judgment to this court. After the rendition of the judgment, Swire procured the arrest of Mozorosky under sections 259 and 218, Or. L., claiming that in case of a gambling debt recovered under section 8264, Or. L., execution for the body might be issued and the debtor arrested. Plaintiff was arrested on April 16, 1921, and has since been imprisoned. Various efforts have been made to obtain his release. He became a bankrupt on April 22, 1921. Habeas corpus proceedings were instituted in the circuit court. From an adverse judgment plaintiff perfected an appeal to this court, which is now pending. Plaintiff petitioned the circuit court to be allowed to take the poor debtor's oath, which was refused, whereupon he petitioned the circuit court for bail pending the appeal of the habeas corpus proceedings. Bail was denied him. Plaintiff prays this court that he may be admitted to bail pending the proceedings in this cause. Service of this application was made upon the defendant on May 10, 1921. No answer or brief has been filed on his behalf.

Thomas Mannix and Dan E. Powers, both of Portland, for appellant.

Henry E. McGinn and Edward J. Brazell, both of Portland, for respondent.

BEAN, J. (after stating the facts as above). We are not concerned in the consideration of this application with the merits of the case. It is contended upon the part of plaintiff that his arrest is covered by none of the provisions of section 259, Or. L., and that the Constitution of Oregon (article 1, § 19) provides that there should be no imprisonment for debt, except in case of fraud or absconding debtors. It is asserted by counsel that there is no provision in our Code for admitting the plaintiff to bail upon an appeal in a habeas corpus proceeding, and we infer this was the reason

he was not allowed bail by the trial court. Article 1, § 14, of our Constitution provides thus:

"Bail.—Offenses, except murder and treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable when the proof is evident or the presumption strong."

It is said in 3 R. C. L. p. 5, § 2:

"In many particulars the rules relating to criminal and civil bail are the same. In either case the principal is considered as being released from the custody of the law and placed in the custody of keepers of his own selection. But a distinction exists in a number of instances due to the different purpose inherent in the two modes of procedure. The object of bail in civil cases is either directly or indirectly to secure the payment of a debt or other civil duty; while the object of bail in criminal cases is to secure the appearance of the principal before the court, for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond or recognizance; while payment by the bail in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains. While the subjects of civil and criminal bail are not here treated separately, the distinction between the rules governing the two species of bail, where material, is pointed out."

[1,2] At common law and under modern statutes, the sheriff has the right to take bail for the appearance of prisoners arrested in mesne process in civil actions. It is stated as a general rule that all judicial officers having the power to hear and determine cases have the power to take bail. It is undoubtedly a necessary incident to the right to hear and determine a cause. 3 R. C. L. p. 21, § 22; Venderfort v. Brand, 126 Ga. 67, 54 S. E. 822, 9 Ann. Cas. 617, and note; Ex parte Alexander, 59 Mo. 508, 21 Am. Rep. 393.

[3] The power to fix bail has always been regarded as a judicial one, and in its nature essentially belonging to courts. The principle of fixing the amount of bail addresses itself exclusively to the judicial discretion and sense of the court, or magistrate empowered to fix the amount.

[4] The matter of bail on appeal in habeas corpus proceedings is not specifically provided for in our statute. To include in our Code all such particulars would make the volumes too cumbersome. Our Constitution and statute are plain in regard to bail in criminal cases, and it would seem that the lawmakers deemed such provisions a sufficient declaration of the principle that one should not be deprived of freedom, except in the case of the grave crimes mentioned, until final adjudication authorizing and compelling such penalty. It would seem that the greater would

include the less in this particular. It is an inherent right in every person that they shall not be restrained of their liberty except by due course of law. To deny bail to the plaintiff might in the end practically deprive him of the privilege of an appeal in the habeas corpus proceeding. This right of appeal is not questioned.

The matter of bail on appeal in habeas corpus proceedings, arising out of imprisonment on civil process, was in question in the case of *Syverson v. Foster*, 84 Wash. 58, 146 Pac. 169, L. R. A. 1915E, 340. The court there declared thus:

"One appealing from an order refusing to vacate a body execution, upon the ground that it violates the constitutional provision against imprisonment for debt, is entitled to be admitted to bail pending the appeal [on habeas corpus]."

[5] In a note to the latter case in L. R. A. 1915E, 340, it is stated to the purport that a man's right to his liberty, pending an appeal from a judgment upon which a body execution has been issued, should be at least as sacred as his right to his liberty pending an appeal from a conviction on a criminal charge, seems axiomatic.

"Bail in civil cases before trial of the cause was known to the common law (2 Pollock & M. History of English Law p. 592); likewise the writ of habeas corpus (page 593)."

The general rule is that it is within the sound discretion of the court to refuse or to admit the defendant to bail after conviction and pending appeal, unless the discretion is taken from the court by statute. See note to *Re Schrieber*, 37 L. R. A. (N. S.) 693.

In *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, at page 956, the Supreme Court of the United States recognized the existence of the inherent power in courts to admit to bail in civil cases pending upon appeal. It is there said, at page 63 of 190 U. S., at page 787 of 23 Sup. Ct. (47 L. Ed. 781):

"We are unwilling to hold that the circuit court possess no power in respect to admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."

In passing upon this question, we again assert that we do not take into consideration, or desire to have any expression herein influence, the merits of this case. The writ of habeas corpus is an appropriate and proper remedy in aid of bail.

In view of the condition of the docket in this court, we consider it essential to a fair administration of justice, and in conformity to the spirit, if not the letter, of our Constitution and laws, that the plaintiff should be admitted to bail until the question of whether or not he can be legally incarcerated for the debt upon which judgment was obtained by *Swire* is finally determined.

The cases cited and those which we have been able to find, although they are not numerous, indicate that in a civil proceeding an appellate court is not narrowly restricted by forms or procedure. In *Ledford v. Emerson* (143 N. C. 527, 55 S. E. 969) 10 L. R. A. (N. S.) 362, the syllabus reads:

"An appellate court may treat a habeas corpus proceeding to secure the release of one in custody under a body execution as a motion to recall the execution and discharge the defendant, a decision upon which would be appealable."

See, also, *U. S. v. Griswold* (D. C.) 11 Fed. 807, 810, and *Taylor v. Fleckenstein* (C. C.) 30 Fed. 99. We notice the mode of procedure in criminal cases prescribed in section 1040, Or. L., as something of a guide. This section reads thus:

"After an indictment found, and upon an appeal, a defendant cannot be admitted to bail except by the court or judge thereof where the action is pending, or in which the judgment appealed from is given."

Plaintiff should be allowed to give bail in the sum of \$2,000, and to go at large upon executing a written bond under seal in favor of the defendant sheriff with good and sufficient sureties, qualified as for bail upon arrest, to be approved by the circuit court or judge thereof and filed in that court, conditioned that if his imprisonment on execution be adjudged to be lawful upon the appeal, he will surrender himself to the custody of the sheriff of Multnomah county for continuance of such imprisonment, or pay the judgment upon which the execution was issued in the case of *Sol Swire* against plaintiff, *Jos. Mosorosky*, but not exceeding the sum of \$2,000.

It is so ordered.

(100 Or. 637)

STATE v. STILWELL

(Supreme Court of Oregon. June 8, 1921.)

1. Statutes §226—It is usually assumed a statute copied from laws of another state is taken with the construction placed on it.

When a statute is copied from the laws of another state, it is usually assumed that it is taken with the construction placed upon it by the courts in which it originated.

2. Criminal law §125—On affidavit of prejudice of judge, improper to change venue.

On the filing of an affidavit of prejudice against the judge, it was improper, under Or. Laws, § 45-1, to direct change of venue to another county; the provision contemplating change of judge.

3. Criminal law §576(4)—Dismissal of indictment not warranted because of delay aided by defendant.

Where defendant first filed an application for a continuance, and on it being overruled filed affidavit of prejudice pursuant to Or. Laws, § 45-1, and the judge erroneously transferred the case to another county where over defendant's motion for remand the case went to trial resulting in a disagreement, and was then remanded to the original county, the indictment should not be dismissed under section 1701, declaring that if defendant whose trial has not been postponed on his application, or by his consent, be not brought to trial at the next term of court in which the indictment is triable after it is found, the court must order the indictment to be dismissed unless good cause to the contrary is shown, for defendant first moved for a continuance, and even the granting of his motion for a change of judge would have operated to delay, so that the change of venue cannot be deemed to have resulted in a delay solely without defendant's consent.

In Banc.

Appeal from Circuit Court, Union County; Dalton Biggs, Judge.

F. E. Stilwell was indicted for perjury, and, from an order overruling his motion to dismiss the indictment, he appeals. Affirmed.

This is an appeal from an order overruling defendant's motion to dismiss an indictment against him. The facts are as follows: On October 7, 1919, defendant was indicted by the grand jury of Union county for the crime of perjury, and on December 20 was arraigned and entered his plea of not guilty. The case went over until the succeeding term of court, which began on the first Monday in February, 1920, and during that term the case was set for trial on March 22, 1920. On March 10 the defendant filed a motion for continuance, which was denied. On March 18 he filed an affidavit of prejudice under section 45-1, Or. L. (Olson's Comp.), which section is as follows:

"No judge of a circuit court of the state of Oregon shall sit to hear or try any suit, action

or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the suit or action to another department of the same court, or call in a judge from some other court, or apply to the chief justice of [the] Supreme Court to send a judge to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court."

The motion requested that some other judge be called in to try the case. The court thereupon made an order granting a change of venue to Umatilla county. On April 28, 1920, the defendant filed a motion in the circuit court of Umatilla county asking that the cause be remanded to Union county for trial, which motion was supported by an affidavit to the effect that the change of venue had not been granted at his request and that he had not consented and did not consent to such change and objected to a trial in any county but Union, where the alleged crime was alleged to have been committed. This motion was denied, and a trial was had in Umatilla county, resulting in a disagreement.

Thereafter and on May 25 the circuit court of Umatilla county made an order rectifying the application to remand the case to Union county; that the court, not being fully advised, had denied said motion; and further that on being advised it was without jurisdiction to try the case, it remanded the same to Union county for trial. When the cause was remanded the defendant filed a motion supported by his affidavit, for a dismissal of the cause pursuant to section 1701, Or. L., which section reads thus:

"If a defendant indicted for a crime, whose trial has not been postponed upon his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court must order the indictment to be dismissed, unless good cause to the contrary be shown."

The motion was overruled, and the defendant appeals.

Geo. T. Cochran and C. H. Finn, both of La Grande (Cochran & Eberhard and C. H. Finn, all of La Grande, on the brief), for appellant.

Ed Wright, Dist. Atty., of La Grande, and A. A. Smith, of Baker (John S. Hodgins, of La Grande, and George M. Brown, Atty. Gen., on the brief), for the State.

McBRIDE, J. (after stating the facts as above). [1-3] While a reading of section 45-1, supra, might seem at first glance to

authorize the court to grant a change of venue in any case where an affidavit of prejudice is filed, the authorities seem to hold the contrary doctrine, and particularly the Supreme Court of the state of Washington, from the laws of which state the section quoted was copied. *State v. Superior Court*, 88 Wash. 344, 153 Pac. 7; *State v. Superior Court*, 88 Wash. 669, 153 Pac. 1078; *State v. Superior Court*, 106 Wash. 507, 180 Pac. 481.

When a statute is copied from the laws of another state, it is usually assumed that it is taken with the construction put upon it by the courts of the state in which it originated; and in that view we hold that the circuit court had no authority to change the place of trial to Umatilla county upon the showing of prejudice made by defendant in his affidavit. But it does not follow that because the court made a mistake in its ruling upon that subject, whereby the cause went over for the term, the defendant is absolutely entitled to have the indictment dismissed. The statute says in substance that it must be dismissed "unless good cause to the contrary be shown." The court has jurisdiction in a proper cause, with a proper affidavit, to change the place of trial of a criminal action, and has jurisdiction of the general subject-matter.

It appears from the record that the court erred in its construction of the statute, and granted a change where it had no jurisdiction; but, taking the whole record, we are of the opinion that the delay occasioned by the change was not such as to justify a dismissal of the cause. The defendant was first in the field asking for a delay. He filed an affidavit asking for a continuance, to procure the attendance of a witness, and when this was overruled he filed the affidavit of prejudice. It is well known to judges and lawyers that it is not always possible to send a judge from his own circuit to another to hear a case, without more or less delay. Judges have the business of their own circuits to look after, and the Chief Justice of the Supreme Court not infrequently has to make inquiry in several districts, involving correspondence by letter or telegraph, in order to find a judge whom he can assign without detriment to the public business, so that these applications frequently have the effect of putting the case over the term, a consequence which the defendant might have foreseen and possibly did foresee when he made his application.

We are of the opinion that the record, taken as a whole, shows good cause why the indictment should not be dismissed.

The order of the circuit court is affirmed.

BROWN, J., took no part in the consideration of this case.

(100 Or. 679)

**ANDERSON v. WALLOWA NAT. BANK
et al.**

(Supreme Court of Oregon. June 8, 1921.)

1. Brokers \S 49(1)—Broker entitled as compensation to receive excess beyond fixed amount cannot recover without showing completed cash sale.

Where a contract provided that, if plaintiff should secure a purchaser, he would be entitled to all sums in excess of a certain amount, plaintiff, to recover, must show either that he consummated the contract, and by affecting a completed cash sale created a fund out of which he is to be paid, unless he was prevented from consummating the same by the acts of defendant owners.

2. Contracts \S 278(1), 279(1) — No recovery on contract without performance or tender of performance.

One who would recover on a contract must first show performance on his part or a valid tender of performance which was rejected by the opposite party.

3. Brokers \S 63(5) — Tender need not be made where it would be vain.

No one is required to do a vain thing, and so a tender is unnecessary where it is apparent it would be refused, as in the case of defendant landowners who notified a purchaser procured by plaintiff broker that no sale could be consummated until after the expiration of the time during which the broker was authorized to sell.

4. Brokers \S 63(5) — In case of executory contract of sale, unconditional tender is unnecessary to charge owners with liability to broker for procuring purchaser.

An unconditional tender is not necessary, in case of an executory contract of sale, where payment and delivery of deed are to be performed contemporaneously, and hence an unconditional tender in specie as in case of a debt is not necessary to charge the owners with liability to a broker who procured a purchaser ready, able, and willing to buy.

5. Brokers \S 49(1) — Broker must furnish binding contract executed by purchaser or bring buyer and seller together.

To entitle a broker to recover commissions from his employer, he must either furnish his principal with a binding contract executed by the purchaser able to buy, and on whom, if he fails to buy, the seller may have recourse, or he must bring the purchaser and seller together or in communication so that they themselves may contract and conclude the sale.

6. Brokers \S 58—Oral agreement to purchase land will not entitle broker to recover commission.

A broker cannot recover commissions merely because he entered into an oral agreement with a prospective purchaser; for such agreement does not satisfy the statute of frauds (Or. L. \S 808), and would be unenforceable by the owner.

(198 P.)

7. Brokers \Leftrightarrow 85(6) — Statements made by prospective purchaser to broker admissible in evidence.

Where plaintiff conveyed land to defendant bank under an agreement that, if he could sell it within a stipulated time, he should receive all of the purchase price in excess of a fixed sum, and plaintiff interested a purchaser, but did not enter into a binding contract with him, statements made by the prospective purchaser to plaintiff, being in effect statements made to the bank, were admissible in an action brought against the bank which plaintiff claimed deprived him of his commissions by informing the prospective purchaser that no sale could be made until the termination of the period of plaintiff's authority.

8. Brokers \Leftrightarrow 54 — Where no binding contract was made, broker, to recover, must show that he produced purchaser ready, able, and willing.

In an action by a broker who claimed compensation, though no contract was made, he must show that he produced a purchaser ready, able, and willing to buy, but that the vendor refused to sell.

9. Trial \Leftrightarrow 207 — Where no binding contract was made, evidence of declarations by purchaser to broker and principal should be limited to issue whether purchaser was produced.

Where plaintiff, who had an agency to sell land within a given period and receive all above a fixed sum as commission, asserted that he produced a purchaser ready, able, and willing, but that defendant refused to consummate the sale and deprived him of his commission, evidence of declarations by the purchaser to plaintiff and to defendants' officers, while competent on the question of whether the purchaser was ready, able, and willing to purchase, should be limited by instructions to that issue.

10. Brokers \Leftrightarrow 85(8) — Sentiment of bank directors not communicated to broker or his purchaser inadmissible in suit for compensation.

In an action by a broker who claimed that he produced a purchaser, but that defendant bank would not sell, etc., evidence that some of the directors suggested a sale on more favorable terms, not communicated to either plaintiff or the purchaser, was inadmissible.

11. Trial \Leftrightarrow 194(11) — Instruction as to right of broker to compensation held to invade province of jury.

Where plaintiff, who had a limited agency for the sale of land, claimed that he produced a purchaser, ready, able, and willing, but that defendant refused to sell, an instruction stating that, if the prospective purchaser expressed his willingness and readiness to purchase under the terms of an oral contract made with plaintiff, and was able to make the payments required, plaintiff was entitled to recover if the failure to consummate was due to the evasive acts of the defendant, was improper as invading the province of the jury by making a mere verbal expression of willingness conclusive, although the purchaser after expiration of plaintiff's agency offered very much less for the property.

12. Brokers \Leftrightarrow 87 — Broker not entitled to interest on recovery.

A broker who claimed to have produced a purchaser ready, able, and willing to buy held not entitled to interest on recovery.

13. Appeal and error \Leftrightarrow 882(13) — Instruction following stipulation as to recovery harmless.

Where the parties entered into a stipulation which erroneously allowed recovery of interest, an instruction authorizing such recovery is harmless, being, at the most, invited error.

14. Brokers \Leftrightarrow 88(10) — Instruction as to ability of purchaser held misleading.

In an action by a broker who claimed compensation on the theory that he produced a purchaser ready, able, and willing, an instruction stating that it was incumbent on plaintiff to prove that he had produced such purchaser, and that, if defendants represented to the purchaser they would sell after the expiration of the period of the broker's authority on terms different from those on which the broker was authorized to sell, defendants would be deemed to have accepted the purchaser's ability to pay as satisfactory, was misleading; for the mere fact that defendants might be willing to deal with the purchaser at some other time on other terms would not imply an admission that at the time produced he had ability to pay.

15. Trial \Leftrightarrow 194(10) — Instruction on ability of purchaser procured by broker to pay invasion of province of jury.

Where plaintiff claimed commission on the theory that he produced a purchaser ready, able, and willing to buy, but defendants declined to sell, an instruction that it was incumbent on plaintiff to show that the purchaser was able to pay in the manner provided for in the contract, but, if the purchaser had money in bank or arrangements with a bank whereby his check would be honored for an amount sufficient to consummate the deal, he was able to purchase, was improper, invading the province of the jury, and misleading as indicating that defendants would be bound to accept the check in lieu of the cash.

16. Brokers \Leftrightarrow 63(1) — Where sale is to be for cash, broker must show ability to pay it, and principal is not in default for not accepting checks.

Where broker was authorized to sell for cash, he must show ability of purchaser to pay cash, and the mere fact that the purchaser had arrangements with a bank to honor his checks is not sufficient to entitle the broker to recover from the principal, who failed to consummate the deal, for the principal could not be compelled to accept such checks.

17. Brokers \Leftrightarrow 88(10) — Evidence held to justify request to instruct as to producing purchaser in compliance with contract.

In a suit for commission by a broker claiming to have produced a purchaser to whom defendants refused to sell, evidence of negotiations between the purchaser and a defendant bank as to extending credit to him in case he purchased, justified a request to instruct that, if the purchaser asked defendants to carry a

part of the amount owing, even if they were willing to wait for a part of the money, this was not a compliance with the contract to make a sale for cash, and did not show the purchaser was ready, able, and willing to purchase on the terms specified.

18. Trial ¶203(2)—Court must charge on all theories supported by evidence.

It is the duty of the court in presenting the law of the case, to instruct on the law applicable to all theories of the case that are supported by any competent evidence.

19. Brokers ¶85(8)—Where broker claimed to have produced purchaser, latter may testify as to reason why he did not purchase.

In an action by a broker claiming to have produced a purchaser ready, able, and willing to buy, but to whom defendants declined to sell, the purchaser may testify to a breach of the contract or refusal to perform by defendants as a reason why he did not purchase.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by Edwin A. Anderson against the Wallowa National Bank and another. From a judgment for plaintiff, defendants appeal. Reversed, and remanded for new trial.

Although the action is against two defendants, the Wallowa National Bank and the Enterprise Mercantile & Milling Company, for convenience the defendants will be alluded to either as such parties or as "the bank." A résumé of the complaint shows that about November 8, 1915, the plaintiff conveyed to the defendants 1,840 acres of land in Wallowa county. On the same day the plaintiff and the defendants made an agreement in writing whereby the plaintiff was appointed the exclusive agent of the latter from that date until June 1, 1916, to sell the land, for which the defendants were to receive \$13,887.96, with interest at 10 per cent. per annum from November 8, 1915, to the date of sale. There were mortgages on the land concerning which it was provided that the buyer should assume and agree to pay them, and that the plaintiff should receive from the defendants as commission for making such sale any excess of the purchase price obtained over the amount of cash to be paid to the defendants upon their delivering a deed of the premises. The complaint further says that on May 29, 1916, the plaintiff produced W. J. Morrow as a buyer of the land, and, acting under the authority of the contract, entered into an agreement with Morrow whereby the plaintiff promised to sell to Morrow for and on behalf of the defendants, and Morrow agreed to buy the land at the price of \$32,500, paying \$13,887.96 with interest at 10 per cent. from November 8, 1915, to May 30, 1916, and that the purchaser should assume and agree to pay all the other mortgage indebtedness referred to,

and further to pay the difference between \$32,500 and the aggregate of claims against the land, direct to the plaintiff. It is then alleged that—

"The said W. J. Morrow was then and there able, ready, and willing to pay the purchase price for said lands and premises then and there agreed upon, and in accordance with the terms specified in the agreement hereinbefore mentioned between the plaintiff herein and defendants."

The plaintiff's pleading narrates that on or about May 30, 1916, the defendants informed Morrow that the plaintiff had no right to sell the property, to offer the same for sale, or to procure a buyer therefor, and refused to make a deed to Morrow, but told him that after June 1, 1916, they would be in a position to deal directly with him and would sell him the property for a less sum than that agreed upon between Morrow and the plaintiff. Claiming that, if the contract had been performed, the plaintiff would have received the sum of \$9,648.81, the plaintiff prays for judgment against the defendants, that they be required to pay into court the amount due on one of the mortgages, or to satisfy it of record, and for the money mentioned, together with interest thereon at the rate of 6 per cent. from May 30, 1916, and for costs.

The answer admits the corporate character of the defendants and the delivery of the plaintiff's deed to the defendants, but denies all other allegations except as set forth in the answer. The defendants say that on November 8, 1915, they made and signed a writing appointing the plaintiff their agent to sell the land at any time on or before June 1, 1916; that under that contract they were to receive \$13,887.96, with interest at 10 per cent. per annum from November 8, 1915, to the date of the deed, all to be paid in cash on delivery of that instrument. It also recites the mortgages mentioned in the complaint and avows that the deed should be made subject to those mortgages, and mentions certain other conditions about the right of defendants to improve the land and the right of the plaintiff to remain in possession. It is further averred that the contract provided that, if the defendants should pay the mortgages or interest, or taxes on the land, the amounts so paid should be returned to them with interest at the rate of 10 per cent. per annum in cash. They say that they complied with all the terms of the contract, and that during the life of the contract they did not sell the land or any part thereof, set out the amounts of money they paid to discharge incumbrances on the land and for which the property was liable, aver their willingness to convey the land, but say that the plaintiff did not produce any purchaser ready, able, or willing to buy the same.

The reply is in these words:

"Denies each and every material allegation therein contained not hereinbefore specially admitted in the complaint."

A jury trial resulted in a verdict in favor of the plaintiff for \$8,025.03. From the ensuing judgment the defendants appeal.

A. S. Cooley, of Enterprise, for appellants.

A. L. Morgan, of Moscow, Idaho (A. Fairchild, of Enterprise, and Morgan & Boom, of Moscow, Idaho, on the brief), for respondent.

BURNETT, C. J. (after stating the facts as above). In order more clearly to understand the case an epitome of the testimony will be convenient. The admitted contract was introduced in evidence without objection. It provides that the plaintiff "may sell the lands at any time on or before June 1, 1916, and upon the said Edwin A. Anderson's securing a purchaser for said lands said corporations agree to convey said lands to such purchaser by proper deed. But the agency of the said Edwin A. Anderson as herein made, and his right to sell said lands, shall expire on said 1st day of June, 1916." As recited in the answer, there are sundry provisions about the incumbrances upon the land and the right of the bank to be reimbursed for such sums as it would pay in discharging those obligations and the taxes. The contract concludes with these provisions:

"The said Edwin A. Anderson is hereby given the exclusive right to sell said lands during the life of this contract, and during the life thereof said corporations, or either of them, shall not sell said lands, nor any part thereof.

"If said lands are sold by the said Edwin A. Anderson, then the purchaser thereof shall assume said mortgages. And the said Edwin A. Anderson shall receive as his commission for sale of the same any sum or sums received for said lands over and above the sums herein required to be paid to said corporations upon the delivery of such deed."

As shown by the testimony, there never has been any dispute about the terms of the agency contract given to Anderson.

There is testimony to the effect that Morrow came from Eastern Washington into Wallowa county in quest of land, having been advised by one of Anderson's advertisements that this property was for sale. He spent three days in examining it, and, as he says, asked Anderson what would be the least he would take for the land, when the latter told him \$32,500, and Morrow agreed orally to pay that amount. They arranged then to meet at Enterprise the next day, May 30, to compute the amount due to the bank under the contract and to close the transaction. Morrow's testimony is to the effect that on arriving at Enterprise, where the bank was situated, on the evening of May 29 in advance of Anderson, he met two of the directors of the bank, who were also officers of

the other defendant. One of them, on learning his mission there, told Morrow that he could not get a deed from Anderson, and that the latter had no right to sell the land and nothing could be done about the matter until after June 1. They invited him, he says, to meet the directors of the bank in the evening, to talk over the matter, and according to Morrow's testimony it was there reiterated that Anderson could not make the deed and that the bank could not do anything until after June 1. The postponement of the performance and the declaration of the bank that nothing could be done until after the 1st of June are also narrated by the witness Nessley, a real estate agent who at one time had the same land for sale. Morrow says he told the directors of the bank at the meeting in the evening that he had agreed with Anderson about the purchase price and the amount thereof and that he was ready to make the deal. He testified concerning the amount of property he had and said that, if necessary, he could have paid the whole purchase price of \$32,500 in cash.

During the trial, according to the record, the parties stipulated about the amounts due on the several incumbrances and agreed that "on the 29th day of May, 1916, the total amount owing by plaintiff to defendants, together with other indebtedness existing against this land and which should be paid or assumed by any purchaser, was the aggregate amount of \$24,474.97," and that, if the plaintiff made a sale of the land as alleged at the price of \$32,500, and if he should recover in the action, the amount to be recovered is \$8,025.03, with interest thereon at the rate of 6 per cent. per annum from May 29, 1916, to the date of the verdict.

It is admitted by the plaintiff that on his arrival at Enterprise on the morning of May 30 he did not talk with any of the officers of the defendants, did not ask them to make a deed, and did not go near them. The testimony further shows that the bank officers told Morrow that they wanted to get their money out of the property. Morrow left Enterprise May 30 and did not return until about June 20, at which time the bank offered him the land for \$25,000, approximately the amount of its claim and incumbrances against the property, and he made a counter offer of only \$24,000. There was some testimony that at different later interviews the bank offered to extend him credit, if he would make a payment of \$4,000 or \$5,000 down, and that he told defendants, if he had any dealings or needed any money, he would get it at another bank, where he was acquainted. The testimony indicates that there were some negotiations about a possible sale on credit to Morrow. The officers of the defendants strongly deny telling Morrow that nothing could be done until after June 1, and say they told him that until after June 1 they could not

make any sale without the consent of Anderson, who had exclusive power to effect the sale. They offered to show that in the absence of both Morrow and Anderson the directors held a meeting at which there was considerable talk of discounting their claim of \$24,474.97 and selling the property at a less figure than that.

It well may be doubted whether the reply, denying as it does the "material" allegations of the answer, raises any issue. There is authority for saying that to deny the "material" allegations is but to raise a conclusion of law, and that, inasmuch as the pleader has not pointed out what he deems to be material, the denial in that form is insufficient to raise a question of fact. In view of the disposition to be made of this case, however, it is not necessary to elaborate this point, as the defect may be remedied by an amendment of the reply.

[1, 2] We must bear in mind at the outset that Anderson was obligated to effect a sale of the land, and that only out of the excess of the purchase price received over the amount of the liens against the property was he to receive his compensation. Before he can collect a broker's fee under such a contract, he must accomplish what he undertook to do, and by effecting a completed cash sale create a fund out of which he is to be paid, unless the defendants prevented the accomplishment of that purpose. His pleading shows an agreement on the part of Morrow to pay direct to him that surplus. He sues not for damages for breach of the contract of employment, but as for a balance due upon a performed contract. His position is analogous to that of a buyer in an executory contract for the purchase of land. It is a familiar principle that he who would recover on a contract must first show performance on his part, or a valid tender of performance which is rejected by the other party. In *Catlin v. Jones*, 52 Or. 337, 97 Pac. 548, in speaking of an executory contract, Mr. Justice Eakin said:

"If both parties are present, and neither of them tenders performance, then both are in default, and neither of them can sue the other for breach; so that, if either party would enforce the contract, or seek to recover damages for nonperformance by the other, he must do more than show his default. He must also show performance on his own part or a tender to perform."

[3, 4] Having entered upon the process of effecting an actual sale of the property, from the realized purchase price of which he was to receive his remuneration, it is the duty of the plaintiff to carry out that process to its ultimate completion, unless prevented by the defendants. When the defendants offered the land for sale, although the plaintiff was not bound to buy it himself, yet, if he would earn his fee, he must produce some one to act as

a purchaser, or, in other words, to assume the role of vendee under an executory contract for the sale of real property. This would include the payment of the money concurrently with the execution of the deed. The payment or offer to pay is excused, however, if the defendants refused to receive the money or refused in advance to perform the contract. There was testimony, as already intimated, contested it is true by the defendants, to the effect that they told Morrow, when he announced to them that he was ready to close the deal, that nothing could be done until after June 1. This was sufficient to dispense with an actual offer to pay the money. No one is required to do a vain thing, and, if the defendants would not do anything until after June 1, the tender was excused. *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *McPherson v. Fargo*, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723; *McLeod v. Morrison*, 66 Wash. 683, 120 Pac. 528, 38 L. R. A. (N. S.) 783; *Kuhlman v. Wieben*, 129 Iowa, 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666. The case of an executory contract containing concurrent covenants to be performed by the parties is to be distinguished, on the subject of tender, from a case where one owes an ascertained debt to another. In the latter case the tender must consist in the actual production of the money due and offer of it to the creditor to whom it is due. In *Lewis v. Craft*, 39 Or. 305, 64 Pac. 809, it was held that:

"Under a contract of sale by which goods are to be paid for upon delivery, the seller has complied with his part of the contract when he has the required goods ready at the time and place agreed upon and offers to deliver them upon payment of the price—it is not necessary to tender them unconditionally."

The principle is the same in the instant case. Payment of the money and delivery of the deed were concurrent acts to be performed simultaneously. Unconditional tender by either party is not required in any event, and affirmative offer to perform is excused on behalf of either party, if the other has already refused to comply with the contract.

The distinction between the tender of the amount due upon a debt and offer of performance of an executory contract containing mutual covenants is pointed out in *Smith v. Lewis*, 26 Conn. 110. The controversy there was over a contract for the conveyance of realty and other property. The court said:

"Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due is

money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."

In brief, as to the subject of nonsuit, the plaintiff was excused from further prosecution of the process of effecting a completed sale of the property by the fact, which the jury was authorized to find from the evidence, that the defendants refused to execute a deed to the land until after June 1.

[5, 6] We pass now to the assignments of error appearing in the abstract. When the plaintiff was testifying as a witness in his own behalf, he narrated the conversation with Morrow, the proposed purchaser on the premises in question on May 29 to the effect that the latter asked the witness what was the least he would take for the land involved, and the question was propounded: "And what did you tell him?" The objection was made that the question was incompetent, hearsay, and not binding upon the defendants, unless the plaintiff "took a contract binding the purchaser to take the land at that price, or produced a purchaser to the defendants at that price." The objection was overruled, and the witness answered: "I told him \$32,500." The witness was then asked: "And what did he say?" The same objection was made and overruled, and the action of the court thereon is assigned as error. In *York v. Nash*, 42 Or. 321, 71 Pac. 59, *Hardy v. Sheedy*, 58 Or. 195, 113 Pac. 1133, *Henry v. Harker*, 61 Or. 276, 118 Pac. 205, 122 Pac. 298, *Grindstaff v. Merchant's Investment & Trust Co.*, 61 Or. 310, 122 Pac. 46, and *Taylor v. Peterson*, 76 Or. 77, 147 Pac. 520, the doctrine is laid down that in the performance of a contract of a broker to secure the sale of land he must do one of two things before he can recover his commission from his employer. The first is he may furnish his principal a binding contract executed by an intending purchaser who is able to buy and upon whom, if he fails to buy, the principal may have recourse. Or the broker must bring the buyer and seller together or in communication with each other, so that they may themselves make the contract and conclude the sale. The plaintiff has

pleaded both these alternatives, and his pleading is traversed. If he would prove that he had secured a binding contract, it must comply with the statute of frauds, which, as formulated in section 808, Or. L., declares that the agreement is void and no evidence of its contents shall be received, other than the writing, or secondary evidence of its contents, in the cases prescribed by law, when it is "for the leasing for a longer period than one year, or for the sale of real property, or any interest therein."

[7-9] The verbal conversation between Anderson and Morrow on the ranch was nothing more than an oral agreement respecting the terms of the sale of the real property. It could not have been enforced against either party. The bank could not have taken advantage of it and compelled Morrow to pay. But the rehearsal of the conversation between the plaintiff and Morrow on the ranch was not necessarily offered for that purpose. We must remember that Anderson had been appointed the agent for the bank to effect the sale. For that purpose he represented the bank and was authorized to enter into negotiations and receive an offer. Declarations of Morrow to Anderson were in effect declarations to the bank, because made to an agent having authority for that purpose. They stand on precisely the same basis as statements made by Morrow directly to the bank through its managing officers. An authority directly in point is *McDonald v. Smith*, 99 Minn. 42, 108 N. W. 291. See, also, *Obenauer v. Solomon*, 151 Mich. 570, 115 N. W. 696; *Smith v. Lyons Salt Co.* (Mo. App.) 177 S. W. 1057; *Luhn v. Fordtran*, 53 Tex. Civ. App. 148, 115 S. W. 667; *Fordtran v. Stowers*, 52 Tex. Civ. App. 226, 113 S. W. 631. Of course, the ultimate fact to be proved, in the absence of securing a binding contract, is that at the time the seller and the proposed purchaser were brought together the latter was ready, able, and willing to buy the land on the terms prescribed in the offer, or in this instance in the contract of agency. Manifestly what Morrow said directly to the bank at that time was admissible in evidence. Indeed, the conversation in the meeting at the bank was had with agents of that institution, to wit, the directors. The declarations made to the other agent, namely, the plaintiff, commissioned as he was under his contract of agency, are of the same quality. In determining the ultimate question of whether Morrow was ready, able, and willing to buy at the time he came in contact with the directors of the bank, the weight to be given to his declarations to Anderson is for the jury to determine. The evidence was competent to go to the jury in the effort to establish the second of the two alternatives mentioned, namely, to produce a purchaser who was ready, able, and willing to buy. The jury should be instructed that this testimo-

ny is limited to that purpose; for it is incompetent to prove a binding contract upon which either the seller or the purchaser could sue the other. On the other hand, if there were no negotiations between the broker and the proposed purchaser, the former would not have done anything towards securing a buyer for the land. The negotiations between the broker and the purchaser must be carried to the stage where the latter is produced to the seller and is then ready, willing, and able to buy on the terms offered; and it is with that end in view that the conversation between Anderson and Morrow on the ranch, when reported to the bunk by the latter, was admissible in evidence.

[10] Several exceptions are predicated upon the offer of the defendants to show that at a meeting of the board of directors of the bank, held in the absence of and without the knowledge of either Morrow or Anderson, some of the directors were in favor of taking even less than the amount of their claims against the land. This was not shown to have been communicated to either Morrow or Anderson. The court rightly denied the admission of such evidence. It was clearly self-serving and consequently inadmissible.

[11] Over the exception of the defendants the court gave to the jury this instruction:

"You are instructed that, if you find from the evidence that plaintiff, Edwin A. Anderson, negotiated with W. J. Morrow for the purchase of the lands described in plaintiff's complaint, and that as a result of such negotiations, the said W. J. Morrow expressed to the defendants, or either of them, his willingness and readiness to purchase said lands under the terms and conditions of the contract between plaintiff and defendants, and if you further find from the evidence that the said Morrow was able to make the payments provided for in said contract, the plaintiff is entitled to recover from the defendants, notwithstanding the fact that the purchase was never 'consummated,' if you find also from the evidence that the failure to 'consummate' said purchase and sale was due to the refusal to perform said contract on the part of the defendants, or either of them, or to dilatory or evasive acts on the part of the defendants, or either of them, or to attempts on the part of the defendants, or either of them, to deal with said Morrow on other terms than those named in the contract in suit."

While "expression of his willingness and readiness" may be evidence to go to the jury on the ultimate fact that he was indeed willing and ready, it is only evidence and no more, and not even then conclusive. The charge quoted invaded the province of the jury in that it gave decisive effect to that expression, or, in other words, made the defendants liable because Morrow merely said he was ready and willing, when in fact he may not have been so. As against this expression of readiness or willingness to pay the required amount in cash, the jury was entitled to consider that he made no tender,

did not demand a deed, and about June 20, some three weeks later, offered only \$24,000 for the land. The jury had a right to consider that Morrow's conduct spoke louder than his words, and that, although in words he indicated he was ready, able, and willing, yet in fact he was not. This instruction would exclude these circumstances and render the defendants conclusively liable upon his bare expression of willingness and ability to pay.

[12, 13] Another exception was taken to a charge which in substance excludes from the jury's consideration anything about what the services of Anderson were reasonably worth and upon the stipulation of the parties told it in substance that, if Anderson was entitled to recover at all, he should recover \$8,025.03, with interest at the rate of 6 per cent. per annum from May 29, 1916, to the date of the verdict. This was based upon the stipulation of the parties appearing in the record, although under the case of *Sargent v. American Bank and Trust Co.*, 80 Or. 16, 154 Pac. 759, 156 Pac. 431, interest is not recoverable in such a case. Having followed the stipulation, the instruction in that respect is harmless. At the most it is an instance of invited error.

[14] Exception was taken to the following charge:

"I further instruct you that it is incumbent upon the plaintiff in this action to prove that he found and produced a purchaser who was ready, willing, and able to purchase said lands and premises upon the terms offered by the defendants herein, in their contract with the plaintiff, Anderson; and I further instruct you that, if you find from the evidence in the case that the said plaintiff did produce a purchaser who was ready and willing to purchase the land upon the terms named, and if you further find from the evidence that the said defendants, on or about the said 29th day of May, 1916, sought to induce said purchaser not to make said purchase at that time, or if you find that the said defendants, or any of them, by and through their officers or agents, or either of them, represented to said purchaser that they would sell and transfer the said lands and premises to the said purchaser after the 1st day of June, 1916, upon terms other than those named in the Anderson contract, or upon any terms, then the court instructs you that in that event the defendants would be deemed to have accepted the said purchaser's ability to pay as satisfactory."

This instruction was misleading. The contract required payment in cash, and the mere fact that the defendants were willing to deal with Morrow at some other time and on some other terms does not necessarily imply an admission that on May 30 he had the ability to pay cash for the full amount of the purchase price.

[15, 16] Again, the defendants excepted to this instruction:

"The court instructs you that it is incumbent upon the plaintiff in this case to show by a pre-

ponderance of the evidence that Morrow was able to pay for the lands in the manner provided for in the contract between plaintiff and defendants. This does not mean that he must have had the cash with him at the time he was negotiating for said lands, but if you find from all of the evidence that the said Morrow had money in the bank, or had arrangements with a bank at the time he was negotiating for said lands, whereby his check would be honored for an amount sufficient to 'consummate' said deal, then you should find that the said Morrow was able to purchase the land in accordance with said contract between plaintiff and defendants."

This gives conclusive effect to the evidence about Morrow's having money in the bank or arrangements with some bank to honor his check. It invades the province of the jury and is misleading, as indicating that the defendants would be bound to take his checks on the bank as cash, without reference to whether the bank was solvent or not. As said in 11 C. J. 24:

A cash sale is "one for ready money, as distinguished from one on credit; a sale conditioned on payment concurrent with delivery and not a sale on credit; one where delivery and payment are to be concurrent acts and are to be performed at the same instant of time; a completion of the transaction by the execution of a conveyance and the payment of the consideration at the same time, ending and closing the matter by one process; a sale for the money in hand."

Again, 30 Cyc. 1187, says:

"Payment can be made other than in money, if the contract so provides or the creditor consents thereto or acquiesces therein, but not otherwise."

The text elaborates the doctrine that payment in cash means payment in money, unless the parties agree to some other medium of payment. Taken in connection with the excerpt from *Smith v. Lewis*, supra, it is profitable to read the application of the doctrine by Mr. Justice Eakin in *Catlin v. Jones*, supra, to the effect that in transactions of this kind it is sufficient to take them to the jury, if it be shown by the evidence that the purchaser was so situated that he could promptly produce the cash to complete the transaction. It is not enough that he has property out of which the money could be made. *Watters v. Dancey*, 23 S. D. 481, 122 N. W. 430, 139 Am. St. Ry. 1071; *Dent v. Powell*, 93 Iowa, 711, 61 N. W. 1043. It is required that he be able simultaneously with the delivery of the deed to pay the money. Such transactions are not done in the twinkling of an eye. The defendants should have time to write their deed and execute it. The purchaser should be able with similar promptness to furnish the money, and for the consummation of the transaction it is required that it be cash.

[17, 18] The court rejected an instruction asked for by the defendants in this form:

"If Morrow asked defendants to 'carry' a part of the amount owing to them; in other words, if he asked of them that they take only a part of what was owing to them and to wait a time for the balance of it, and even if defendants were willing to wait for a part of the money owing to them, still this was not a compliance with the terms of the contract and does not show that Morrow was ready, able, and willing to purchase upon the terms specified in the contract."

There was evidence in the record to the effect that some negotiations were had between Morrow and the bank about extending credit to him in case he purchased. This was sufficient to justify this request. It is well supported by authority that in presenting the law of a case to the jury the court must instruct on the law applicable to all theories of the case that are supported by any competent evidence. *Lewis v. Craft*, supra.

[19] It appears in the record that the plaintiff was denied the right to show by Morrow why the latter did not purchase the land. Morrow would be entitled to testify to any breach of the contract or refusal to perform the same by the defendants as a reason why he did not purchase the land, because they should be charged by such a reason. His own whim or caprice or unwillingness for which the defendants were not responsible would not be material here. Allusion to this is made in order that controversy on that point may not occur at a future trial.

For the reasons indicated, the judgment is reversed, and the cause remanded for a new trial.

McBRIDE and HARRIS, JJ., concur in the result.

(100 Or. 673)

STILWELL v. McDONALD et ux. *

(Supreme Court of Oregon. June 8, 1921.)

1. Animals §26(5)—Replevin lies to enforce agister's lien.

Under Or. L. §§ 10227, 10229, replevin lies to recover possession of cattle wrongfully taken from one who has a right to retain possession of them for the satisfaction of his lien for pasturing them.

2. Animals §26(4)—Agister's lien waived by contract.

Under Or. L. § 10229, the right to a lien for pasturage may be waived, and is waived and defeated by a pasturage contract providing that the owner of the cattle may remove them from the premises at any time at his option.

3. Animals §26(5)—Complaint held not to show rescission of waiver of agister's lien.

In action of replevin to recover possession of cattle, the right to possession of which was

claimed under a lien for pasturage under Or. L. § 10227, plaintiff did not show such performance of the pasturage contract by him as entitled him to rescind it, and thereby escape the effect of a waiver of such lien in the contract where, instead of averring due performance generally, under section 88, he alleged merely that he pastured the cattle, without stating his performance of other provisions of the contract, such as looking after and salting the cattle.

4. Contracts — 267 — Rescission denied defaulting party.

One may not rescind a contract on which he is in default.

5. Animals — 26(5) — Complaint to enforce agister's lien held defective in describing cattle.

In action of replevin to recover possession of cattle, the right to possession of which was claimed under a lien for pasturage under Or. L. § 10227, complaint held defective, in that the description of the cattle was too indefinite to support a judgment.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by F. E. Stilwell against George McDonald and wife. From judgment of dismissal, plaintiff appeals. Affirmed.

Admittedly the plaintiff and the defendant Lida McDonald made the following contract, which they signed:

"This agreement, made and entered into this 13th day of March, 1919, by and between F. E. Stilwell, party of the first part, of La Grande, Oregon, and Lida McDonald, party of the second part, of Pendleton, Oregon, witnesseth:

"The party of the first part, for and in consideration of the sum of \$.55 per head for the season of 1919 for 125 head of cattle, commonly known as beef cattle, and \$4 per head for 125 head of cattle, commonly known as stock cattle, suckling calves gratis, agrees to furnish pasture for said designated cattle for the season of 1919 on the ranch belonging to F. E. Stilwell, commonly known as the T. L. Ranch, consisting of about 3,000 acres about 8 miles west of La Grande.

"Party of the first part agrees to properly look after the said cattle and furnish salt for the same during the season of 1919.

"Party of the second part has the right to add 50 more head of horses or cattle under the same conditions as above stated.

"Party of the second part has the right to remove any of said cattle or horses from the said premises at any time at his option.

"The party of the first part hereby acknowledges the sum of \$300 in hand paid, the balance to be paid the 1st day of August, 1919.

"The party of the first part assumes no responsibility for theft or loss of any of said cattle or horses, while in his possession.

"In case the party of the second part does not put on more than 250 head, party of the first part agrees not to put on more than 50 additional head of stock.

"Dated at La Grande, Oregon, this 18th day of March, 1919."

The only allegation of performance of the contract on the part of the plaintiff is as follows:

"That by virtue of this contract the plaintiff did pasture thereon, and within the inclosed premises of plaintiff, a large number of defendant's said cattle during the said season, to wit, about 304 head of which a large number, to wit, 152 head, were of the description described in the said contract as beef cattle, and that a large number thereof, to wit, 152 head, were of the description described in the said contract as stock cattle."

It is charged in the fourth amended complaint that by reason of the pasturage the defendants on August 1, 1919, were indebted to the plaintiff in the sum of \$1,368, of which only \$690 had been paid, leaving a balance of \$678 unpaid. It is averred that the defendants did not pay this balance on August 1, 1919, and that prior to October 11, 1919, on which latter date the plaintiff was pasturing and had in his possession 152 head of said cattle, he notified the defendants that—"said contract of pasturage was broken and that he was so holding possession of said cattle for the purpose of securing his reasonable charges for said pasturage and of preserving and holding his lien upon said cattle for such reasonable charges for such pasturage." The amount mentioned is said to be a just and reasonable charge for the pasturage of the cattle. It is then alleged that on October 11, 1919, in Union county, Or., while the balance of \$678 remained unpaid, and after notification by the plaintiff that he was holding the cattle as under a lien, the defendants forcibly and wrongfully took said cattle from plaintiff's possession within said county, and further that ever since said time the plaintiff has been and is entitled to the immediate possession thereof. The cattle are valued at \$1,200, and the complaint states that "defendants still, at the date of the bringing of this action, wrongfully withheld and still withhold and retain in Union county, Or., said cattle from the possession of said plaintiff, all to his damage in the sum of \$700."

The circuit court sustained a general demurrer to this complaint, and as the plaintiff refused to plead further the action was dismissed, wherefore the appeal by plaintiff.

George T. Cochran, of La Grande (Cochran & Eberhard, of La Grande, on the brief), for appellant.

Crawford & Eakin, of La Grande, for respondents.

BURNETT, C. J. (after stating the facts as above). [1-4] Under section 10227, Or. L., "any person who shall depasture or feed

any * * * live stock," at the request of the owner or lawful possessor thereof, shall have a lien upon such property for his just and reasonable charges for the labor, care and attention he has bestowed, and the food he has furnished, and he may retain possession of such property until such charges are paid. By the following section, a procedure for enforcing the lien is prescribed. In section 10229 it is enacted that "the provisions of the last three sections shall not interfere with any special agreement of the parties."

It may well be conceded that replevin is a possessory action and that if personal property is wrongfully taken from one who has a right to retain that possession for the satisfaction of a lien which he has upon the property, he may maintain replevin to recover that possession. *Reinstein v. Roberts*, 34 Or. 87, 55 Pac. 90, 76 Am. St. Rep. 564, is a typical case of this kind. It is competent, however, for parties to waive their rights to a lien under the statute. Indeed, legislative utterance has been given to this principle in section 10229, Or. L., *supra*. It is especially provided in the contract that the "party of the second part has the right to remove any of said cattle or horses from the premises at any time at his option." This clause defeats the right of the plaintiff to retain the possession of the cattle, unless the complaint states facts enough to warrant us in disregarding the contract. In other words, it is incumbent upon the plaintiff to show not only a right to rescind the contract, but also that it has actually been rescinded. The plaintiff does not state generally that he has duly performed the contract on his part, as well he might under section 88, Or. L., but contents himself with saying that he pastured the cattle. The other clause of the contract, to the effect that he was to look after them properly and furnish salt for them during the season of 1919, receives no attention from the pleader. No party has a right to an action on the contract unless he himself has performed it or has been prevented from full performance by some act or default of the other party. By a parity of reasoning, he has no right to rescind a contract upon which he is in default. By failing to aver his complete performance of the contract, the plaintiff does not disclose a condition which entitles him to sweep aside the contract and regard it as destroyed. The clause relating to the right of the second party to remove the stock from the premises at any time at his option, remains unimpaired, for all that appears in the complaint. The conclusion is

that the defendants have a contractual right to take possession of the cattle, and hence no wrong has been committed against the plaintiff which he is entitled to redress by replevin.

[5] Another objection to the complaint, urged by the defendants, is that the description of the cattle is so indefinite as to afford no foundation for a judgment. If the plaintiff would recover a judgment in replevin, he must in his complaint formulate a description of the property sought to be replevined which carried into the judgment and thence into the execution will enable the officer enforcing the writ to identify the chattels. The writ must be founded upon a valid judgment. The judgment in turn cannot be more comprehensive in its scope than the complaint upon which it is founded. *Guille v. Wong Fook*, 13 Or. 577, 11 Pac. 277, is a leading case on the subject here involved. There, the plaintiff sought to replevin "68 head of hogs on the macadamized road in said county, on the place formerly kept by Wong Hin Soon." This description was characterized by the court as very indefinite. The verdict however was "for the immediate possession of that portion of property described in the complaint, to wit, 49 hogs." It was there held that the verdict was not sufficient to support a judgment, owing to the indefiniteness of the description. Here, the complaint states that the plaintiff pastured 304 head of cattle. True enough, he says that 152 were beef, and an equal number stock cattle; but he says that on October 11, the date of the taking, the plaintiff had in his possession 152 head of said cattle. Whether this latter number referred to stock or beef cattle is not stated. The description would apply equally to steers, cows, yearlings, two year olds, or to any other of the cattle on a thousand hills. Under the authority of *Guille v. Wong Fook*, *supra*, the description is so indefinite as not to support replevin. Which 152 head of cattle out of the larger number of 304 were intended by the pleader cannot be determined from the complaint. The defect in the description therein contained is fundamental, and unless the property is so described in the initiatory pleading that one taking the description could be able to identify the property with reasonable certainty, the judgment and the consequent writ would be defective.

The demurrer was properly sustained, and the judgment is affirmed.

BEAN, J., concurs in the result.

(100 Or. 641)

ANDERSON v. RICHARDS.

(Supreme Court of Oregon. June 8, 1921.)

1. Adverse possession §110(3) — Complaint held to sufficiently allege that possession was exclusive.

In a suit to quiet title, a complaint alleging that plaintiff had been and still was in possession of the premises up to the line fence inclosing them, and that his possession had been at all times and still was open, notorious, continuous, uninterrupted, and adverse and under claim of right and color of title thereto, as against the whole world, sufficiently showed that the possession was exclusive without directly so alleging.

2. Adverse possession §106(2) — Bars action to recover possession after statutory period.

Adverse possession for ten years, as provided by Or. Laws, § 4, is a bar to an action by the owner to recover the possession thereof.

3. Adverse possession §13 — Visible, notorious, and exclusive possession under claim of ownership to the knowledge of the owner is essential to "adverse possession."

To establish adverse possession so as to divest the owner of his title, the evidence must show a possession visible, notorious, and exclusive under a claim of ownership continuing for 10 years and the owner must have knowledge of such possession and claim.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

4. Vendor and purchaser §232(1) — Visible, notorious, and exclusive possession charges purchaser with knowledge.

Visible, notorious, and exclusive possession under a claim of ownership is sufficient to put a purchaser upon notice and charge him with knowledge of such claim.

5. Adverse possession §66(2) — May ripen into title though taken by mistake, but not if held without intention of claiming beyond true line.

Where a person enters and occupies land not embraced in his title, claiming it as his own, for the statutory period of 10 years, he acquires title thereto though his entry and possession was under a mistake; but if possession was held under mistake or ignorance as to his true line, and with no intention to claim beyond the true line when discovered, such possession is not adverse, and cannot ripen into a title as against the real owner.

6. Adverse possession §66(1) — Immaterial who built fence to which party claims.

Where a party claiming title by adverse possession claimed and occupied to a fence, it was immaterial that other persons aided in the construction of the fence.

7. Adverse possession §110(4) — Allegation of title supported by proof of adverse possession for statutory period.

In a suit to quiet title, plaintiff's allegation of title in fee is supported by proof of adverse possession for the statutory period.

8. Adverse possession §106(4) — Vests perfect title.

Adverse possession of real estate for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holder of the title and all the world, and entitles him to all remedies incident to possession under a written conveyance.

9. Adverse possession §114(1) — Evidence held to make prima facie case of possession under claim of ownership.

Evidence that plaintiff and his ancestors had been in open, visible, notorious, and exclusive possession of land for 10 years, that it was enclosed with a substantial fence, that an orchard had been planted and costly and permanent improvements constructed, and that plaintiff had treated the premises as his own, made a prima facie case for plaintiff, and raised the presumption that his entry was one of right and his claim one of ownership, and entitled him to prevail, in the absence of any showing that his entry and holding were in subordination to defendant's title.

10. Adverse possession §11 — Depends on intent, to be determined by what party has done.

Adverse possession is founded upon the intent with which the occupant has held possession, and this intent is to be determined by what he has done.

11. Adverse possession §43(6) — Possession of ancestor and heir may be tacked.

The adverse possession of a party and his ancestor may be tacked to complete the bar of the statute of limitations.

12. Appeal and error §1009(1) — Findings of value though not binding in suit to quiet title.

In a suit to quiet title, the findings of the trial judge, who heard the testimony and viewed the premises and the boundary fence involved in the litigation, are of value in the consideration of the evidence by the Supreme Court, though not binding upon that court.

En banc.

Appeal from Circuit Court, Union County;
J. W. Knowles, Judge.

Action by B. E. Anderson against John Richards. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit to quiet title. E. E. Anderson, plaintiff and respondent, is the owner of lot 6, and John Richards, defendant and appellant, is the owner of lot 7, in block D, of the townsite of Cove, Union County, state of Oregon. The plaintiff alleged in his complaint, among other things:

"That plaintiff has been, and still is, in possession of said premises up to the line fence inclosing the same, and that his possession has been at all times, and still is, open, notorious, continuous, uninterrupted, and adverse, and under claim of right and color of title thereto as against the whole world. * * *

"That plaintiff's line fence inclosing his said

premises between defendant's said lot and plaintiff's said lot and premises is a good substantial fence, and has been located and maintained where the same now stands as the dividing line between plaintiff's and defendant's said lots and premises since the year 1897.

"That on * * * the 8th day of March, 1920, * * * the defendant, without the knowledge or consent of plaintiff, wrongfully and unlawfully entered and trespassed upon plaintiff's said premises, and tore down and destroyed the said east line fence upon plaintiff's said premises, and rebuilt said line fence in and upon plaintiff's said premises a distance of some eight or ten feet, claiming title to said strip of plaintiff's said premises, including the row of cherry trees, growing thereon; that immediately thereafter plaintiff removed the said fence and rebuilt and restored the said fence on the east line of his premises to its original position thereon.

"That defendant claims and asserts title to said strip of plaintiff's said lot and premises on the east thereof. * * *

The court heard the testimony of 22 witnesses, viewed the premises, and thereafter made the following findings of fact:

"That plaintiff is the owner in fee and in possession of lot 6 in block D of the original townsite of Cove, Union county, Oregon, together with the buildings and improvements thereon.

"That said premises are now, and have been since the year 1897, inclosed with a good substantial fence; that there is situate thereon a good substantial dwelling house, together with good outbuildings, and that there is growing thereon shrubbery and fruit trees which are of great value to this plaintiff; that plaintiff has been, and still is, in possession of said premises up to the line fence inclosing the same, and that his possession has been at all times, and still is, open, notorious, continuous, uninterrupted, and adverse, and under claim of right and color of title thereto as against the whole world.

"That the defendant is the owner and in possession of lot 7 in said block D of said original townsite of Cove adjoining plaintiff's said lot and premises on the east, and that plaintiff's line fence inclosing the said premises, between defendant's said lot and plaintiff's said lot and premises, is a good substantial fence, and has been located and maintained where the same now stands as a dividing line between plaintiff's and defendant's said lots and premises since the year 1897; that upon plaintiff's said premises along and near said dividing line fence between plaintiff and defendant, plaintiff has growing a number of large cherry trees, which are of great value to plaintiff.

"That on or about March 8, 1920, in the temporary absence of plaintiff, the defendant, without the knowledge or consent of the plaintiff, wrongfully and unlawfully entered and trespassed upon plaintiff's said premises, and tore down and removed the said east line fence upon plaintiff's said premises, and rebuilt said line fence in and upon plaintiff's said premises a distance of some eight or ten feet, claiming title to said strip of plaintiff's said premises; that immediately thereafter plaintiff removed the said fence, * * * and rebuilt his said fence

on the east line of his said premises; that the defendant claims and asserts title to said eight or ten foot strip of plaintiff's said lot on the east thereof, and threatens to, and will unless restrained by the order of this court, again remove and destroy plaintiff's said line fence, and again rebuild same over and upon plaintiff's said premises. * * *

The court concluded as a matter of law:

"That the plaintiff is entitled to a decree quieting his title to said lot 6 in block D of the original townsite of Cove, Union county, Oregon, and that said decree declare plaintiff to be the owner in fee of said lot and premises up to the fence where now located on the east side thereof, and that said fence be decreed to be the true line between plaintiff and defendant;"

—and a decree was entered in accordance therewith.

The defendant appeals to this court, assigning that the court erred—

"In overruling defendant's objection to the admission of any testimony in the case on the ground that the complaint did not state facts sufficient to constitute a cause of suit.

"In decreeing that the line upon which the old fence was built and upon which the fence now stands is the true line. * * *

"In enjoining defendant from moving or attempting to move said fence.

"In allowing plaintiff his costs and disbursements.

"In not finding and decreeing for defendant, and against plaintiff, that the strip of land mentioned in the complaint was within the boundaries of said lot 7, and defendant the owner thereof."

R. J. Green, of La Grande, for appellant.
Crawford & Eakin, of La Grande, for respondent.

BROWN, J. (after stating the facts as above). [1] The defendant challenges the sufficiency of the complaint for the reason that plaintiff does not aver in express terms that his possession was exclusive. Plaintiff alleges:

"That he [plaintiff] has been, and still is, in possession of said premises up to the line fence inclosing the same, and that his possession has been at all times, and still is, open, notorious, continuous, uninterrupted, and adverse, and under claim of right and color of title thereto as against the whole world."

We believe that the element of exclusiveness of plaintiff's possession sufficiently appears from the use of the words contained in the allegation just recited.

It has been held that it is necessary to allege exclusive possession; *Alexander v. Meyers*, 33 Neb. 773, 51 N. W. 140, holding allegation of actual, open, notorious, continuous, and adverse possession insufficient. But the better rule is believed to be that the element of exclusive possession may sufficiently appear from the use of other words. 1 *Stand. Ency. of Proced.* p. 628, citing *Jackson v.*

Snodgrass, 140 Ala. 365, 37 South. 246; Hesser v. Slepman, 35 Wash. 14, 76 Pac. 295; Bellingham Bay L. Co. v. Dibble, 4 Wash. 764, 31 Pac. 30; Keaton v. Sublett, 109 Ky. 106, 58 S. W. 528. A pleading will be deemed sufficient in alleging title by adverse possession when it shall appear therefrom that such possession was actual, open, notorious, visible, exclusive, continuous, and uninterrupted for a period of 10 years. 2 C. J. 259, 260.

The complaint in the instant case is sufficient. It not only pleads title by adverse possession, but alleges that the plaintiff is the owner in fee of the said premises.

In an opinion by Mr. Justice Lord in Parker v. Metzger, 12 Or. 407, 7 Pac. 518, the following was quoted with approval:

"In Leffingwell v. Warren, 2 Black, 605, the Supreme Court of the United States says: 'The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder.' So in School District v. Benson, 81 Me. 384, the court say: 'A legal title is equally valid, when once acquired, whether it be by disseizin or by deed; it vests the fee-simple, although the mode of proof, when adduced to establish it, may differ. * * * When the title is in controversy, it is to be shown by legal proof, and a continuous disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by an exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character—the absolute dominion over it—and the appropriate mode of conveying it is by deed.' See, also, Barwick v. Thompson, 7 Term Rep. 488; Beckford v. Wade, 17 Ves. Jr. 87; Moore v. Luce, 29 Pa. St. 260; Lessee of Thompson's Heirs v. Green, 4 Ohio St. 223; Newcombe v. Leavitt, 22 Ala. 631; Chiles v. Jones, 7 Dana, 528."

To like effect are the cases of Neal v. Davis, 53 Or. 423, 435, 99 Pac. 69, 101 Pac. 212; Spath v. Sales, 70 Or. 269, 141 Pac. 160.

[2-4] It is the established law of this state that adverse possession for the term of 10 years, as provided by section 4, Or. L., is a bar to the action by the owner to recover the possession thereof. To establish adverse possession so as to divest the owner of his title, the evidence must show a possession visible, notorious, and exclusive, under a claim of ownership, continuing for 10 years, and the owner must have knowledge of such possession and claim; and such possession and occupancy is sufficient to put a purchaser from another upon notice, and charge him with knowledge of such claim. Bohlman v. Coffin, 4 Or. 313; Petrain v. Kiernan, 23 Or. 455, 32 Pac. 158; Exon v. Dancke, 24 Or. 110, 32 Pac. 1045; Ambrose v. Huntington, 34 Or. 488, 56 Pac. 513; McNear v. Gulstin, 50 Or. 377, 92 Pac. 1075.

In Chapman v. Dean, 58 Or. 477, 115 Pac. 154, it was held by this court that—

In order "to acquire title by adverse possession the possession must be hostile, under a claim of right, actual, open, notorious, exclusive, and continuous."

In Smith v. Badura, 70 Or. 58, 139 Pac. 107, this court said:

"Fencing a lot, building thereon, and occupying it exclusively sufficiently indicates an intention to claim title adverse to all the world."

In Quinn v. Willamette Pulp & Paper Co., 62 Or. 549, 554, 126 Pac. 1, 3, Mr. Justice Bean said:

"What is an adverse and exclusive possession depends very much on the character of the land and the purposes for which it is adapted, * * * intended, and * * * used."

To like effect is 1 R. C. L. p. 694, par. 3. It was said in City of Silverton v. Brown, 63 Or. 418, 423, 128 Pac. 45, 47:

"The possession of land may be shown by the evidence of different modes of possession, such as inclosure, the erection of buildings, or other improvements, or in any way that clearly indicates an exclusive appropriation of the land by the person claiming to hold it."

[5] In a number of cases this court has held that, where a person enters and occupies land not embraced in his title, claiming it as his own for the statutory period of 10 years, he acquires title thereto, though his entry and possession was under a mistake. Caufield v. Clark, 17 Or. 474, 21 Pac. 443, 11 Am. St. Rep. 845; Ramsey v. Ogden, 23 Or. 350, 31 Pac. 778; Rowland v. Williams, 23 Or. 515, 520, 32 Pac. 402; Sommer v. Compton, 52 Or. 173, 180, 96 Pac. 124, 1065; Dunnigan v. Wood, 58 Or. 119, 112 Pac. 531; Moore v. Fowler, 58 Or. 292, 295, 114 Pac. 472; Parker v. Wolf, 69 Or. 447, 133 Pac. 463. However, if the evidence shows that possession was held under mistake or ignorance as to his true line, and with no intention to claim beyond the true line when discovered, such possession is not adverse, and cannot ripen into a title as against the real owner. King v. Brigham, 19 Or. 570, 25 Pac. 150; Caufield v. Clark, supra.

[6] There is testimony tending to show that others than Anderson or his predecessors aided in the construction of the line fence. This does not affect the case one way or the other. It was held in Sommer v. Compton, supra, that—

"If a fence is used as a boundary it is immaterial who constructed it; the question is whether the party claiming adverse possession claims and continues to occupy it; the burden of proving adverse possession is upon him who claims the benefit of it. Shuffleton v. Nelson, 2 Sawy. 540, Fed. Cas. No. 12822; Gardner v. Wright, 49 Or. 628, 91 Pac. 286; Alt-schul v. Casey, 45 Or. 182, 76 Pac. 1063."

[7] Anderson's allegation of a title in fee is supported by proof of adverse possession for the statutory period. *Neal v. Davis*, 53 Or. 423, 99 Pac. 69, 101 Pac. 212.

[8] Adverse possession of real estate for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holder of the title and all the world, and we have seen that he is entitled to all remedies which are incident to possession under written titles. The title is created by the existence of the facts, and not by an exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for ten years will operate to convey a complete title to the plaintiff as much as any written conveyance. *Parker v. Metzger*, 12 Or. 407, 7 Pac. 518; *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455; *Joy v. Stump*, 14 Or. 361, 12 Pac. 929; *Thomas v. Spencer*, 66 Or. 361, 133 Pac. 822; *Spath v. Sales*, 70 Or. 269, 273, 141 Pac. 180.

[9] Anderson proved that he and his ancestors had been in open, visible, notorious, and exclusive possession of the land within his inclosure for a period of more than 10 years; that the land was inclosed with a substantial fence; that an orchard had been planted thereon and had borne fruit for many years; that costly and permanent improvements had been constructed, and that plaintiff had in all things treated the premises within his inclosure as his own. This evidence made a prima facie case for the plaintiff, and raised the presumption that his entry had been one of right, and his claim one of ownership; and the defendant failing to show that such entry and holding had been in subordination to his title, or to the title of those under whom he held, then plaintiff rightfully prevailed over defendant.

[10, 11] Adverse possession is founded upon the intent with which the occupant has held possession, and this intent is to be determined by what he has done. *Rowland v. Williams*, supra. The possession of Anderson and his ancestor may be tacked to complete the bar of the statute of limitations. There is no break or interruption in the possession for a period of 10 years. Anderson's possession is connected with that of his predecessor, and the whole is a continuous possession. *Rowland v. Williams*, supra.

[12] In the hearing of this case in the court below the trial judge heard the testimony of the witnesses, viewed the premises and the boundary fence involved in this litigation, and his findings of fact, while not binding upon this court, are of value in our consideration of the evidence.

In the case of *Tucker v. Kirkpatrick*, 86 Or. 677, 169 Pac. 117, Mr. Justice McCamant, in expressing the opinion of this court, wrote:

"The first question to be determined on this record is one of fact. The testimony is irreconcilable on the vital question of whether the contract was made as alleged. The lower court saw the witnesses and heard their testimony; his opportunities for determining the issue of fact arising on this conflicting testimony were better than ours and great respect is due to his findings. *Scott v. Hubbard*, 67 Or. 498, 505 (136 Pac. 653); *Hurlburt v. Morris*, 68 Or. 259, 272 (135 Pac. 531); *Goff v. Kelsey*, 78 Or. 337, 348 (153 Pac. 103); *Shane v. Gordon*, 84 Or. 627, 630 (165 Pac. 1167)."

Finding no error in the record, this case is affirmed.

BENSON, J., not sitting.

(82 Okl. 118)

CITY OF CLAREMORE v. SOUTHWESTERN SURETY INS. CO. (No. 10155.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Trial \S 141—Where defendant fails to rebut plaintiffs' case, verdict should be directed.

Where the evidence introduced by the plaintiffs makes out the plaintiffs' case, and the defendant introduces no evidence to rebut it, the court should instruct a verdict for plaintiffs.

2. New trial \S 65—Grant of new trial after direction of verdict held error with respect to question of law.

Where a surety company signs as surety a maintenance bond for a paving contractor, which bond contains the following stipulation:

"Whereas, the New State Paving & Construction Company having guaranteed under the contract with the City of Claremore, dated the 5th day of July, 1910, that the asphalt macadam described in said contract, for the consideration and under the conditions therein mentioned, shall be constructed with such materials and in such manner that the same shall endure for a period of five years from and after the completion and acceptance of the same, and shall be maintained by the party of the first part at its own expense, free from any and all failures and breaks during said period: Now, therefore, if said pavement shall endure for a period of five years from and after the completion and acceptance thereof, and shall be maintained by the party of the first part at its own expense, free from any and all failures, breaks, and imperfections during said period of five years, as herein provided, then this obligation shall be void, otherwise to be in full force and effect." And after the expiration of the five years the city, as beneficiary in the bond, commenced an action to recover the full penalty in the bond, and its petition sufficiently charged a breach thereof, and the surety company admitted the execution of the bond and that the same had been breached, and the uncontradicted testimony of the plaintiff conclusively showed that such breach had resulted in damages to the city in an amount far in excess of the amount

of the penalty, and the defendant demurred to the evidence of the plaintiff and moved for an instructed verdict in its behalf, which was overruled by the court, and, the defendant declining to offer any testimony, the court instructed the jury to return a verdict in favor of the plaintiff, which verdict was returned, and upon which the court accordingly rendered judgment, and the defendant thereafter filed its motion for a new trial, which was sustained by the court, and the verdict and judgment were set aside, from which latter order the plaintiff appealed. *Held*: (a) That under the record the plaintiff was entitled to have the judgment rendered in its favor that was rendered; (b) that the trial court materially erred with respect to a pure, simple, and unmixed question of law in granting a new trial; (c) that the judgment of the trial court granting a new trial be reversed, and the cause remanded, with directions to the trial court to set aside the judgment appealed from, leaving the judgment in favor of the plaintiff intact.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

Action by the City of Claremore against the Southwestern Surety Insurance Company. Judgment for plaintiff was set aside, and it appeals. Reversed and remanded, with directions.

L. S. Robson, of Claremore, for plaintiff in error.

Fred P. Bronson and Glenn Alcorn, both of Muskogee, for defendant in error.

JOHNSON, J. The city of Claremore, a municipal corporation, hereinafter called the plaintiff, commenced this action in the district court of Rogers county to recover against the defendant, Southwestern Surety Insurance Company, a corporation, upon a contractor's maintenance bond signed by the defendant as surety given to indemnify the plaintiff against defects in certain blocks of paving constructed by the New State Paving & Construction Company under a contract with the city for a period of five years, the amount sued for being \$4,381.67.

After the issues joined, the cause was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff for the amount sued for. Thereafter the defendant filed a timely motion for a new trial, which was sustained by the court, and judgment was set aside, and from the judgment of the court sustaining the defendant's motion for a new trial and setting aside verdict and judgment in favor of the plaintiff the plaintiff has regularly commenced this proceeding in error.

The record discloses that at the close of the plaintiff's testimony the defendant demurred to the same and moved for an instructed verdict in favor of the defendant, which being overruled by the court, the defendant declined to offer any testimony. Thereupon the court instructed the jury to return a verdict in favor of the plaintiff for the amount sued for.

The record discloses that, when the court overruled the defendant's demurrer to the evidence and motion for instructed verdict, the following proceedings were had:

"By the Court: Mr. Alcorn, is there a question of fact in this case for a jury to pass upon at this time under the conditions of this record, that you know of?"

"By Mr. Alcorn: If your honor has not erred in the admission of testimony, and I must assume that you have not, there seems to me to be but little controversy as to the facts.

"By the Court: The testimony of this expert—you have saved your point; you got your record on it. If it is of no value, you are entitled to a verdict.

"By Mr. Alcorn: If it is of no value, we are entitled to a verdict, and your honor has refused to grant that and overruled our demurrer. If it is any value, he has sworn under his solemn oath that damages amount to \$7,100, considerable in excess of the amount paid for and more than the amount of the bond. I don't care to argue this case.

"By the Court: I don't know of any controverted question in it.

"By Mr. Alcorn: I don't care to go on record at this time as saying there is no controversy. There is some facts here, but I leave that solely to your honor to do as you care to with. I don't know whether they will ask for an instructed verdict."

The defendant's motion for new trial contained all the statutory grounds, and also a motion was filed by the defendant for judgment, notwithstanding the verdict. The court sustained the defendant's motion, but assigned no reason therefor.

Counsel for both parties in their brief refer to the oft-announced rule of this court "that, in the matter of granting a new trial, the discretion of the trial court is very wide," and "that its action in doing so will not be set aside on appeal unless it clearly appears that in granting a new trial it has taken an erroneous view of some pure, unmixed question of law, and that this erroneous view resulted in the order." *St. L. & S. F. Ry. Co. v. Wooten*, 37 Okl. 244, 132 Pac. 479; *National Refrigerator, etc., Co. v. Elsing*, 29 Okl. 334, 116 Pac. 790; *Stapleton v. O'Hara*, 33 Okl. 79, 124 Pac. 55; *Jamieson v. Classen Co.*, 33 Okl. 77, 124 Pac. 67; *Ardmore Lodge v. Dawson*, 33 Okl. 37, 124 Pac. 66.

This rule has never been departed from by this court, and been reannounced and reiterated in at least a score of later cases than the ones cited supra.

In the case of *Byers v. Ingraham*, 51 Okl. 440, 151 Pac. 1061, the third paragraph of the syllabus is as follows:

"Where certain facts in issue in a cause are established by uncontroverted testimony, it is not necessary for the trial court to submit such facts to the jury for finding, and it is not error for the court to tell the jury that such facts are established and to announce the law appli-

cable to such facts and to direct the jury to find accordingly."

[1] And again in the case of *Hamilton v. Blakeney*, 185 Pac. 141, this court said:

"When plaintiff introduces sufficient evidence to prove his case, and defendant's evidence does not conflict therewith, or when the evidence of defendant, together with all legitimate inferences in its favor, fails to present a defense, the court should direct a verdict for the plaintiff."

See *Homeland Realty Co. v. Robison*, 39 Okl. 595, 139 Pac. 585; *Cockrell v. Schmitt*, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737, 16 Ann. Cas. 56; *Moore v. Leigh-Head Co.*, 48 Okl. 228, 149 Pac. 1129. The latter rule is equally as well established by the decisions of this court as the former.

As before stated, the defendant offered no testimony upon the trial, and counsel for the defendant say in their brief:

"The record in this case discloses only two real issues of fact, as we point out above: (1) Was there a breach of the defendant's bond? (2) What was the amount of damages sustained by the plaintiff by reason of that breach? For the purpose of this brief, it may be admitted by the defendant that there was a breach of the maintenance bond sued upon, thus leaving the second issue raised at the trial, and the questions arising therefrom, for the decisions of this court. The defendant will therefore confine its arguments to such questions in an effort to show that the trial court properly granted its motion for a new trial, and that the ruling of that court should not be disturbed."

[2] Counsel for defendant then argues only two propositions in his brief: First, the ruling of the trial court in sustaining defendant's motion for a new trial should be upheld unless clearly erroneous; second, the trial court erred on questions of law on the trial of this cause, and the motion for a new trial was properly sustained on any or all of the grounds for a new trial set forth in paragraphs 5, 6, 7, 9, 10, 11, 12, and 13 in defendant's motion for a new trial, and, after citing the authorities *supra*, argues in his brief that the judgment rendered in favor of the plaintiff was erroneous because the plaintiff failed to prove any damages.

The record does not support this contention of counsel, but, on the other hand, the proof was clear and uncontradicted that the cost of repairing the blocks of paving would be far in excess of the amount sued for and recovered. It being clear from the record and from the admission of counsel in his brief that the only question we have for consideration on this appeal is as to whether or not the plaintiff proved the amount of damages for which it obtained judgment, and, the uncontradicted testimony of the plaintiff showing conclusively that to repair

the defects in the paving to conform with the plans and specifications of the contractor would have cost at the end of the five-year period for which the maintenance bond was given, to wit, July, 1915, far in excess of the amount of the judgment, we entertain no doubt, and it is manifest from the record, that the trial court erred as a matter of law in setting aside the judgment. The defendant surety company admitted that it signed the bond as surety, and its counsel in their brief admitted that there had been a breach of the bond, and, as plaintiff's proof conclusively showed that it had been damaged in an amount greatly in excess of the amount of the judgment, it is clear from the record that it was entitled to have the judgment rendered in its favor that was rendered. In these circumstances it is clear to us that it would be manifestly unjust to the plaintiff to be put to the delay and expense to again try the case, and that the judgment of the trial court granting a new trial was erroneous, and is not supported by law.

The judgment is reversed, and the cause remanded, with directions to set aside the judgment so rendered, leaving the judgment of the trial court in favor of the plaintiff intact.

HARRISON, O. J., and ELTING, KENNAMER, and MILLER, JJ., concur.

(82 Okl. 122)

CONTINENTAL REFINING CO. v.
HELTON. (No. 10185.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

Appeal and error \S 1001(1)—Verdict supported by competent evidence not disturbed.

In a civil action triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict of the jury will not be disturbed on appeal.

Error from District Court, Creek County; Gaylord R. Wilcox, Judge.

Action by J. A. Helton against the Continental Refining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cheatham & Beaver, of Bristow, for plaintiff in error.

J. A. Watson, of Bristow, and C. B. Rockwood, of Sapulpa, for defendant in error.

JOHNSON, J. This is an appeal from the superior court of Creek county, Hon. Gaylord R. Wilcox, Judge.

J. A. Helton, as plaintiff, commenced an action in the superior court of Creek county August 31, 1917, against the Continental Refining Company, a corporation, defendant, to recover damages for the pollution of a stream or water course known as Sand creek. The cause was tried to the court and jury, and resulted in a verdict and judgment in favor of the plaintiff in the sum of \$1,000, to reverse which this proceeding in error was regularly commenced.

For convenience, the parties will hereinafter be referred to as plaintiff and defendant, respectively, as they appeared in the trial court.

The plaintiff alleged in his petition that he was the owner of the 160 acres of land described in his petition and that Sand creek traversed his land for a distance of about one mile, and charged that the defendant, in June, 1915, began the operation of a refinery, which was located upon the banks of the said stream about one mile distant from the said land of the plaintiff, and which said refinery was located in said stream above the said land of plaintiff, and that the defendant, in its process of refining oil at its said refinery, continuously thereafter drained and allowed to flow into said stream the waste water and poisonous substance from said refinery, the chemical properties of which are unknown to the plaintiff, and which has polluted and continues to pollute the said stream to the great damage of the plaintiff.

The plaintiff alleged that he used the said farm as a stock farm, keeping a large number of brood mares and cows for breeding purposes upon his said farm, and also kept young stock and other stock for profit, which realized a good and handsome income to the amount of more than \$1,000 per year clear profit to the said plaintiff. But, since the pollution of said stream by the wrongful acts of the defendant company, the plaintiff has been forced to give up his said farm for the uses and purposes of a stock farm on account of the water of said stream being polluted as above stated, being dangerous to the live stock, and also said water had the effect of causing the mares and cows that drank the said polluted water when upon the said farm of the plaintiff to become barren, and the said cows and mares would no longer breed and raise colts and calves, to the damage of the plaintiff, and that, on account of the polluted stream of water

above stated, the value of the land of the plaintiff has diminished, and the rental value of said premises has diminished.

The foregoing was the basis of his damages, and he sued to recover the sum of \$8,000. The defendant joined issue by its answer, consisting of a general denial.

The defendant's petition in error states seven grounds of error: (1) Overruling the motion for a new trial; (2) overruling the demurrer to the plaintiff's evidence; the third allegation of error is abandoned; (4) the giving of instructions numbered 3 and 4; (5) the refusal to give defendant's requested instructions numbered 1, 2, and 3.

We have examined the entire record in the case, and from such examination we have concluded that there is no merit in the defendant's appeal, for the reasons that there is competent evidence reasonably tending to support the verdict of the jury, and the amount thereof, and the complaint of the defendant as to the receiving and exclusion of evidence over its objection, and giving and refusing instructions, did not constitute error, for the reason so often announced by this court that, "in a civil action, triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal." *McCoy v. Wosika*, 75 Okl. 3, 180 Pac. 967; *Bunker v. Harding et al.*, 174 Pac. 749; *Blasdel et al. v. Gower*, 173 Pac. 644; *Shawnee Nat. Bank v. Pool*, 167 Pac. 994; *Chicago, R. I. & P. Ry. Co. v. Pruitt*, 170 Pac. 1143.

The record presents a case where the evidence was clearly in conflict, but the plaintiff supported his cause by competent evidence, which, for the most part, was disputed by the testimony of the defendant. The court fairly submitted the cause to the jury, and the rulings of the court on the admission of evidence were not prejudicial to the defendant, and it is evident that the jury believed the testimony of the plaintiff's witnesses, and, under the same, the amount of the verdict is not excessive; and for these reasons, and under the authorities cited, the judgment is therefore affirmed.

HARRISON, C. J., and ELTING, MILLER, and KENNAMER, JJ., concur.

(82 Okl. 120)

PRODUCERS' SUPPLY CO. v. MAPLE LEAF OIL CO. (No. 10132.)

(Supreme Court of Oklahoma. May 31, 1921.)

*(Syllabus by the Court.)***1. Landlord and tenant §142(7)—Measure of damages for injury to leasehold estate stated.**

The measure of damages for injury to a leasehold estate is the difference in the market value immediately before and after the injury, subject to the qualifications that, if such property as may be destroyed or removed, although it is a part of the realty, has a value without reference to the soil on which it stands or out of which it grows, a recovery may be for the value of the thing destroyed or removed, and not for the difference in the value of the land or leasehold before and after such destruction or injury.

2. Mines and minerals §81—In action for damages to estate under oil and gas lease, evidence as to value of lease several months before injury held error.

In an action to recover damages to a leasehold estate held under an oil and gas lease for injuries alleged to have been committed on the 11th day of November, 1915, wherein the trial court over objections permitted the introduction of testimony as to the value of the lease several months prior to the date of the alleged injury, *held*, that the same constitutes reversible error.

Appeal from District Court, Tulsa County; N. E. McNeill, Judge.

Action by the Maple Leaf Oil Company against the Producers' Supply Company for injury to a leasehold estate. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to grant new trial.

Bell & Fellows, of Tulsa, for plaintiff.

O. R. Thurwell, of Tulsa, for defendant.

KENNAMER, J. The Maple Leaf Oil Company, defendant in error, commenced this action in the district court of Tulsa county to recover from the Producers' Supply Company, plaintiff in error, \$7,000 damages. The parties herein will be referred to as they appeared in the court below. The plaintiff for cause of action in substance alleged that it was the owner of a 32½-acre lease in Creek county, Okl., equipped for producing oil and gas; that on or about the 11th day of November, 1915, the defendant, without any right or authority, entered in and upon said land, broke and destroyed the power, and removed property therefrom, the amount of the property being removed being unknown to the plaintiff; that the value of the lease on November 11, 1915, was the sum of \$7,000 and that the value of the lease after the acts complained of was the sum of \$3,500. The defendant denied in general the allegations of

the petition, alleging that it secured title to the personal property on said lease by a purchase at a sheriff's sale for taxes, but that when it endeavored to take possession of the property it was enjoined by the plaintiff. Upon the issues joined a trial was had to a jury, which resulted in a verdict of \$1,500 for the plaintiff. The court in accordance with the verdict of the jury entered judgment for the plaintiff for the sum of \$1,500. To reverse this judgment the defendant has appealed to this court, presenting three assignments of error:

First. The court erred in overruling the motion of the defendant for a new trial.

Second. The court erred in overruling the demurrer of the defendant to the evidence of the plaintiff.

Third. The court erred in admitting evidence of the plaintiff over the objections of the defendant.

We have carefully examined the pleadings in this cause and the entire record, and we are of the opinion that the third assignment of error should be sustained. The trial court over the objection of the defendant permitted the plaintiff to introduce testimony as to the value of the lease alleged to have been injured several months prior to the date on which it is alleged that the defendant entered upon the premises and injured the property. The plaintiff in his petition alleged that the lease was worth \$7,000 on the 11th day of November, 1915, the date on which the defendant was charged with having entered upon the premises and commenced to destroy and remove the equipment used in operating the lease; that by reason of the wrongful acts of the defendant the value of the lease was depreciated \$3,500. It is apparent upon the issues joined that the court should have confined the introduction of the plaintiff's testimony as to the value of the lease immediately prior to the time of the entry or to the date of the entry of the defendant upon the lease.

In the case of *De Arman v. Oglesby*, 49 Okl. 118, 152 Pac. 356, this court held:

"In a suit for damages for the destruction of a growing crop, such damages are to be estimated as of the time of the injury, and the measure to be applied is compensation for the value of the crops in the condition in which they were at the time of their destruction."

It is apparent in the case at bar that the plaintiff should have been required to confine his testimony as to the value of the lease to the date on which the defendant is alleged to have made an unlawful entry upon said premises or immediately prior to the alleged date of the entry for the reason that property of this character has a fluctuating value; it may be valuable property one day and practically worthless the next day. The reason for invoking the rule in this case is

that the plaintiff did not bring this action for the loss of personal property, but elected to recover on account of injury to the leasehold estate.

[1] This court in the case of *Armstrong et al. v. May*, 55 Okl. 539, 155 Pac. 238, held:

"The true measure of damages for injuries to real estate is the difference in the market value of the real estate just before and just after the injuries complained of; but this rule, however, is subject to the exception that, if that destroyed, although it is a part of the realty, has a value without reference to the soil on which it stands, or out of which it grows, a recovery may be of the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction."

The same rule will be found in the following authorities: *Young v. Extension Ditch Co.*, 13 Idaho, 174, 89 Pac. 296; *Boise Valley Const. Co. v. Kroeger*, 17 Idaho, 384, 105 Pac. 1070, 28 L. R. A. (N. S.) 968; 8 R. O. L. § 44, p. 482.

[2] The introduction of testimony as to the value of the lease several months prior and subsequent to the alleged trespass of the defendant constitutes reversible error, and this cause must be reversed, and remanded for a new trial.

It is so ordered.

HARRISON, C. J., and JOHNSON, ELTING, and MILLER, JJ., concur.

(82 Okl. 1)

KANSAS CITY SOUTHERN RY. CO. v. CRAIG. (No. 10186.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Railroads — 365 — Making flying switch across footpath used by public negligence.

Where a railway company, by its agents, servants, and employees is switching its cars in its yards at a place where its right of way and yards are used as a footpath by a large number of people at all times of the day in going from one part of the town to the other, and such servants and employees of the railway company make what is known as a "flying or kicking switch," and the cut of cars so switched, are permitted to run down the track without having any person on them to control their movement or give warning of their approach, and cross the footpath so used by pedestrians, this constitutes negligence on the part of the railway company.

2. Railroads — 356(1) — Switching in yards used by public as footpath must be done with care.

Where a railway company has permitted or acquiesced in allowing the public to use its right of way and yards as a footpath or pas-

sageway at all times of the day and night, its agents, servants, and employees, knowing of such use, said railway company is bound to exercise such degree of care in switching its cars in said yards that would be commensurate with the danger to which persons would be exposed who might be using its yards as a pathway, and whose presence might reasonably be anticipated, considering the number of persons traveling through the yards.

3. Railroads — 358(1) — Care required as to licenses.

Where there has existed a license, either express or implied, to use of the right of way and yards of the railway company by the public as a footpath, and this has continued for a long period of time, and is known to the agents, servants, and employees of such railway company, the company is bound to use reasonable care to avoid injury to those persons whose presence there it may reasonably anticipate.

4. Sufficiency of evidence.

The evidence examined, and held, that it is sufficient to take the case to the jury.

Appeal from District Court, Le Flore County; W. H. Brown, Judge.

Action by M. T. Craig, administrator of the estate of Silas L. Craig, deceased, against the Kansas City Southern Railway Company, to recover for wrongful death of decedent. Judgment for plaintiff, and defendant appeals. Affirmed.

James B. McDonough, of Ft. Smith, Ark., for plaintiff in error.

T. T. Varner, R. P. White, and L. V. Reid, all of Poteau, for defendant in error.

MILLER, J. This action was commenced in the district court of Le Flore county by M. T. Craig, as administrator of the estate of Silas L. Craig, deceased, who appears here as defendant in error, against the Kansas City Southern Railway Company, a corporation, to recover damages for the death of Silas L. Craig, who was killed in the yards of the defendant company at Poteau on the 12th day of August, 1916. The case was tried before a jury, which resulted in a verdict in favor of the plaintiff in the court below for \$1,000. The court rendered judgment on the verdict, to reverse which the defendant appeals to this court, and appears here as plaintiff in error.

The facts briefly stated are: That the city of Poteau, at the time of the injury complained of, had a population of about 3,000 people, that the line of railroad, yards, and switching track of the said Kansas City Southern Railway Company ran through the city of Poteau, and that approximately 300 people resided on the east side of said railroad, yards, and switching tracks, and the remainder resided on the west side, this being the main part of town; that some of the

streets were not opened up through the yards of the railway company, but that the people on the east side of the tracks had been using the right of way and yards as a footpath to cross from the east side of the city to the main part of town; this use had been so constant and frequent that there was a well-defined path leading across the yards at about where Ward avenue would cross, if extended; that persons were constantly crossing at about that place, and it was here deceased was killed.

On said 12th day of August, 1916, at about 10 o'clock in the morning, deceased was crossing these yards and the railway company was switching some freight cars in the yards, and made what was known as a "flying switch, or kicking switch," and in doing this a cut of cars was kicked down the track with no person on the front end car to give warning or control the movement of this cut of cars. The caboose was the front end car, and it ran over deceased, and injured him to such an extent that he died within about an hour thereafter.

The plaintiff in error took exception to each and every instruction given by the court notwithstanding many of the instructions so given have been repeatedly upheld by the courts as proper instructions, and plaintiff in error assigns 40 assignments of error; then makes the following statement in its brief:

"The errors complained of at the trial, preserved in the motion for a new trial, and raised in the petition in error, may be grouped, and thus save labor and time to both court and counsel.

"These errors naturally group themselves into three classes. The first group is found in assignments 2 to 10, inclusive, in the petition in error, and relates to inadmissibility of certain evidence. The second group relates to the refusal of the court to direct a verdict in favor of the defendant. This question was raised by demurrer to the evidence, and by motion to direct a verdict, and by request for a peremptory instruction, and is covered by assignments 11 to 14, inclusive, and also 39 to 40, the latter alleging that there is no evidence to support a verdict. The next group relates to the giving and refusing to give certain instructions. This group of errors is covered by assignments 15 to 38, inclusive. Counsel for the plaintiff in error will discuss the second group of errors first."

We do not consider that any good purpose will be served by discussing in detail each and every one of the various assignments of error or contentions of plaintiff in error.

[1-4] We do not find that any prejudicial error was committed by the trial court in the admission of evidence and it is sufficient to take the case to the jury. *St. Louis-San Francisco Ry. Co. v. Donahoo* (No. 11058) 198 Pac. 81, April 19, 1921, not yet officially reported; *M., K. & T. Ry. Co. v. Wolf*, 76 Okl.

195, 184 Pac. 765; *St. Louis & San Francisco Ry. Co. v. Jones*, 78 Okl. 204, 190 Pac. 385; *St. Louis-San Francisco Ry. Co. v. Irene Teel* (No. 10024) 198 Pac. 78, decided by this court April 12, 1921, not yet officially reported. We have examined the instructions given by the court, and the law is fairly stated in the instructions, and without prejudice to the plaintiff in error.

The plaintiff in error contends that it is not shown that the agent of the railway company or its officers had knowledge that its right of way and yards were used as a passageway or footpath, and therefore it is not liable. The evidence discloses that practically all of the people residing on the east side of the right of way in the city of Poteau used this path or trail as a footpath or passageway, and people from the west side desiring to go to the east side used it. In view of this evidence, it cannot be said that the railway company did not have any knowledge of its being so used. The jury, by its verdict under proper instructions, have found that the railway company did have knowledge of all of these facts, and that the railway company was negligent. Its verdict is clearly supported by the evidence, and under an unbroken line of decisions of this court. It will not be disturbed. See *St. Louis-San Francisco Ry. Co. v. Donahoo*, *supra*, and cases there cited.

The other assignments of error have been examined, and, in our opinion, are without merit.

The judgment of the trial court is affirmed.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(82 Okl. 129)

FIRST NAT. BANK OF MOUNDS v. COX.
(No. 10173.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Damages §142—Special damages not necessarily resulting from injury must be specially pleaded.

Special damages which do not necessarily result from the injury complained of must be specially pleaded, except where they are conclusively presumed from the facts stated.

2. Attachment §375(1)—Measure of damages for wrongful detention of property under order of attachment under pleading of general damages stated.

For the detention of property wrongfully seized under an order of attachment against another person the owner's measure of damages, under the allegations of a petition pleading only general damages, is the value of the use of the property while detained, and the admission of evidence to establish special damages by the trial court constitutes reversible error.

(Additional Syllabus by Editorial Staff.)

3. Damages ~~§~~5—"General damages" and "special damages" distinguished and defined.

General damages are such as the law implies or presumes to have occurred from the wrong complained of, or such as the law holds to be the necessary result of the action of the defendant; while special damages are such as actually result from the action of the defendant, but are not such a necessary result as will be implied by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages; Special Damages.]

Appeal from County Court, Creek County; J. V. Frazier, Judge.

Action by A. B. Cox against the First National Bank of Mounds. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

Smith & Walker, of Sapulpa, for plaintiff in error.

W. V. Pryor and C. B. Rockwood, both of Sapulpa, for defendant in error.

KENNAMER, J. This action was tried in the county court of Creek county to a jury, resulting in a verdict in favor of A. B. Cox, plaintiff, defendant in error herein, for \$500 damages. The judgment was entered upon the verdict of the jury. The First National Bank of Mounds, defendant in the action, plaintiff in error herein, appeals. The parties will be referred to as they appeared in the trial court. The First National Bank of Mounds, some time in January, 1916, filed an action against W. B. Fitzpatrick, a nephew of A. B. Cox, and caused an attachment to issue. It appears that Fitzpatrick had been a customer of the bank and for a few years operating a mill and elevator in the town of Mounds, and had become indebted to the bank in a sum of about \$2,500, and before the filing of the attachment action had absconded; that the bank directed the sheriff of Creek county to levy the attachment upon the property set out in the petition of the plaintiff in this action, and which had been formerly operated and used by Fitzpatrick in conducting a mill and elevator business; that at the time Fitzpatrick absconded the plaintiff in this action was left in possession of the property and claimed to have purchased the same from Fitzpatrick, and when the order of attachment was levied upon the property Cox, the plaintiff in this action, filed, in the action between the bank and Fitzpatrick, a plea of intervention, asserting title to the property; that the district court of Creek county sustained his plea of intervention and decreed Cox to be the owner of the property and the attachment order dissolved; then Cox, the plaintiff in this cause, filed this action against the bank and alleged that the

property was unlawfully and wrongfully seized under the order of attachment, and that by reason of the wrongful seizure of the property he was damaged in the sum of \$500. The allegation in the petition filed by the plaintiff herein was a general allegation of wrongful seizure of the property by which he was thereby damaged in the sum of \$500. The defendant bank filed a general denial to the petition, and upon the issues joined the jury returned a verdict for the plaintiff Cox for \$500, and from the judgment rendered thereon the bank has appealed. Twenty-nine assignments of error are presented to the court in the petition in error. Most of the assignments present the question of error by the court in admitting incompetent, irrelevant, and immaterial testimony. Under the allegations of the plaintiff's petition upon which this action was tried the only damages that it was competent for the plaintiff to establish were general damages, which was the reasonable value of the use of said property during its wrongful detention, and it was prejudicial error for the court to permit the plaintiff to introduce testimony tending to establish special damages.

[3] In an action for damages in trespass or for wrongful levy of attachment upon property not the property of the defendant in the attachment action, where the allegations of the petition fail to plead special damages, general damages only may be recovered. General damages are defined to be such as the law implies or presumes to have occurred from the wrong complained of, or such damages as the law holds to be the necessary result of the action of the defendant. Special damages are such as actually result from the action of the defendant, but are not such a necessary result that will be implied by law. *O'Brien v. Quilan, Sheriff*, 35 Mont. 441, 90 Pac. 166. The authorities appear to uniformly hold that evidence of special damages cannot be introduced unless pleaded. 6 C. J. p. 519, § 1261; Second R. C. L. 908, § 120; 8 R. C. L. par. 157; *Bradley et al. v. Borin*, 53 Kan. 628, 36 Pac. 977; *Kennedy v. Van Horn*, 77 Okl. 100, 186 Pac. 483; *Missouri, K. & T. R. Co. v. Watkins*, 77 Okl. 270, 188 Pac. 99-102.

[1] In the case of *Kennedy v. Van Horn*, supra, this court, in an opinion by Owen, Chief Justice, said:

"The rule appears to be well settled that special damages must be pleaded, and it is error to admit proof of such damages in the absence of such allegation. 8 R. C. L. p. 612; 17 C. J. 1002; *Boyd v. Burke*, 14 How. 576, 14 L. Ed. 548; *Gumb v. R. Co.*, 114 N. Y. (69 Sickles) 411; *Tomlinson v. Town of Derby*, 43 Conn. 562."

[2] We conclude from an examination of this record that the court committed prejudicial error in admitting evidence to establish special damages. The Supreme Court

of Iowa, in the case of *Turner v. Younker et al.*, 76 Iowa, 258, 41 N. W. 10, announced the rule governing the measure of damages for wrongful seizure of property of a third party under an order of attachment as follows:

"For the detention of property wrongfully seized under an attachment against another, the owner's measure of damages is the value of the use of the property while detained." *Callahan Co. v. Chickasha Cotton Oil Co.*, 17 Okl. 544-559, 87 Pac. 331.

Under the general allegations of the petition in this action we are of the opinion that the reasonable value of the use of the property while detained is the rule to which the plaintiff should have been confined in the introduction of his testimony.

Upon a careful examination of the entire record, we are convinced that there has been a miscarriage of justice in the trial of this cause, and that the judgment should be reversed. It is therefore ordered that the judgment be reversed, and the cause remanded to the trial court, with directions to grant the defendant a new trial.

HARRISON, C. J., and JOHNSON, McNEILL, ELTING, and MILLER, JJ., concur.

(82 Okl. 125)

COGDALL et al. v. COTTRELL.
(No. 10195.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Mines and minerals ¶97—Agreement to purchase oil and gas leases held a partnership agreement.

Under an agreement by four parties to purchase a block of oil and gas leases, each party to own an undivided one-fourth interest in said leases, said leases being purchased for the purpose of sale and division of profits, constitutes the parties to the agreement a partnership.

2. Partnership ¶70—Partners occupy relation of trust and confidence toward each other.

Partners occupy a relation of trust and confidence toward each other, and are bound to exercise the utmost good faith in their transactions with each other, and must abstain from fraudulent conduct in their transactions with each other.

3. Partnership ¶340—Court held to have jurisdiction in action by partner at termination of partnership to establish interests.

Where a partnership relation has ceased to exist and there are no debts outstanding and the effect of the action is to establish the interest of one of the partners to the partnership and recover the same from copartners that have fraudulently withheld their interest in the assets of the terminated partnership,

the court is vested with jurisdiction to grant the relief.

Appeal from District Court, Garfield County; James B. Cullison, Judge.

Action by B. F. Cottrell against W. E. Cogdall and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Carl Kruse, of Enid, for plaintiffs in error.
A. L. Zinser, of Enid, for defendant in error.

KENNAMER, J. The defendant in error B. F. Cottrell, commenced this action in the district court of Garfield county against the plaintiffs in error, W. E. Cogdall, F. H. Bowers, and W. M. Shockley, to recover \$612.50 alleged to be due as his pro rata share of the sale of certain oil and gas leases which had been sold for the sum of \$2,850. The parties herein will be referred to as they appeared in the trial of the cause.

From the pleadings filed and the evidence introduced in the trial of the cause, B. F. Cottrell, F. H. Bowers, W. M. Shockley and Charles Carr in March, 1916, entered into an oral agreement in which it was stipulated that the parties were to secure a block of oil and gas mining leases on lands in Washington township, Garfield county, Okl., and that the parties further agreed that all such leases secured for convenience were to be taken in the name of F. H. Bowers, one of the defendants herein; that pursuant to the agreement they leased about 6,000 acres of land in which each of the parties had an undivided one-fourth interest in said leases; that some time after the leases were obtained Charles Carr sold his undivided one-fourth interest in the leases to Dr. D. S. Harris, and thereafter the said Harris sold the undivided one-fourth interest he had purchased to W. E. Cogdall, one of the defendants herein; that after W. E. Cogdall had become an owner of the undivided one-fourth interest formerly owned by Charles Carr, one of the original purchasers, it is alleged by the plaintiff in his petition that F. H. Bowers, W. M. Shockley, and W. E. Cogdall conspired together to defraud the plaintiff out of his interest in the leases and the proceeds to be derived from the sale of the same; that said defendants, without the knowledge or consent of the plaintiff, sold the leases to the Permian Oil Company; and that the defendant F. H. Bowers assigned and transferred the leases to said oil company, receiving the sum of \$2,850 as the purchase price of said leases. The defendants in their answer filed in the cause alleged that prior to the sale of the leases to the Permian Oil Company the plaintiff, B. F. Cottrell, had sold all his right, title, and interest in and to said leases, being an undivided one-fourth interest, to W. E. Cogdall, and on the date of the

sale of the leases to the Permian Oil Company had no interest in the leases, and the evidence of the defendants introduced tended to support their theory of the transaction. It is undisputed in this case that the plaintiff, under the original agreement of procuring the leases, did own an undivided one-fourth interest, and the decisive question in this cause is whether or not the plaintiff in the sale of the leases to the Permian Oil Company was defrauded in the transaction. The plaintiff contended in the trial of said cause that on September 30th Bowers, one of the defendants herein, sent Shockley, another one of the defendants herein, to see him with reference to selling his interest in the leases, and that Shockley told the plaintiff that they had a purchaser who would pay him \$100 for his interest in the leases; that he refused the proposition, stating that he would rather lose all he had in the leases than to sell for such a small sum; that after Shockley returned to Drummond and reported to Bowers, Bowers went to Enid and saw Cogdall, and that Cogdall mailed a check to the plaintiff for \$100, writing on the check "for interest in oil leases"; that when he received the check that he was busy sowing wheat and carried it sometime before cashing it, and that before he cashed the check he saw Shockley and Bowers, and they each told him that they had sold the leases and only received \$400 for them, and that the check was the oil company's check; that he did not know Cogdall at the time and did not know that he had bought the Harris interest in the leases, and that Bowers and Shockley finally convinced him that the leases had been sold for only \$400, and that he accepted the check and cashed it the same day that the leases were sold by the defendants for the sum of \$2,800. The respective contentions of the parties to this cause were sharply contested in the trial, but upon the issues joined the jury returned a verdict for the plaintiff for the sum of \$300. From the judgment entered in accordance with the verdict of the jury, the defendants have appealed to this court, and four assignments of error are presented for grounds for reversal of the judgment.

First. Error of the court in excluding evidence offered by the defendants.

Second. Error in refusing to give proper instructions and also in giving instructions which do not properly state the law.

Third. There is no evidence whatever in the record to support a verdict against the defendant W. E. Cogdall.

The first assignment argued in the brief of counsel for appellant is that the court erred in excluding evidence offered by the defendant. There is no merit in this assignment, as the evidence excluded merely tended to establish something that is admitted by all the parties to this controversy, and that is

that the plaintiff received a check for \$100 through the mail with a letter stating that it was in payment of his interest in the oil leases. All the parties agreed that he did receive the letter and check and the contents of the same.

[1] The second assignment of error complained of is on account of the court refusing to give instruction No. 4 requested by the defendant, to the effect that a person has a right to sell and transfer any property, and interest in property which he has without the consent and knowledge of others. The court did not err in refusing this instruction, as that was not the decisive issue in the cause. Instruction No. 5 by the defendant in substance requested the court to instruct the jury that it was unnecessary for the plaintiff to execute an assignment in writing in order to transfer his interest in the leases. That was not a material issue in the case. Under the second assignment, counsel complained of the action of the court in giving instructions Nos. 5 and 6, which are as follows:

"No. 5. You are instructed that where parties enter into an agreement to engage in a business and divide the profits and share the expenses equally, that such an agreement in the eyes of the law constitutes a partnership, and you are instructed that in a partnership every partner is required to exercise the utmost good faith towards his copartners, and a partner is not entitled to make a secret profit out of a business transaction connected with the partnership business; but that the partners are all entitled to share equally in all profits made in any transaction connected with the partnership business.

"No. 6. You are instructed that if the defendant or any of them prior to the alleged purchase of the plaintiff's interest in said leases by the defendant W. E. Cogdall had received any offers for said leases in excess of the sum of \$400 for an entire interest in said leases or 100 for a one-fourth interest, that it was their duty under the law to communicate such offers to the plaintiff. You are further instructed that if you find that the defendants, or any of them, had received an offer in excess of \$400 for said leases or the sum of \$100 for a one-fourth interest therein, and if the defendants or any of them purchased such leases of the plaintiff without disclosing to him the fact of such offers, such failure to disclose all the facts to the plaintiff would constitute fraud upon him, and your verdict should be for the plaintiff."

We cannot agree with the contention of counsel that instructions Nos. 5 and 6 as given by the court erroneously state the law. Counsel based their contention on the ground that there was error in giving the instruction that the plaintiff made no claim in his petition that the defendants were partners in dealing with the property in controversy. An examination of the petition discloses that it does state facts sufficient, if true, to constitute a partnership for the purpose of buying and selling the leases in controversy.

This court in the case of *Chowning v. Graham*, 74 Okl. —, 178 Pac. 676, held:

"A valid partnership may be formed for the purpose of buying up a single piece of real estate, selling it, and dividing the profits."

Upon a review of the record in this cause, we conclude that there did exist a partnership for the purpose of buying and disposing of the leases in controversy, and that the partnership contemplated a fair, just, and equitable division of the profits derived upon a termination of the business for which the partnership was entered into.

[2] In the transaction of the business between partners it is an imperative duty for each partner to deal in the utmost of good faith, and partners in business should not make any false representations or indulge in any concealments which may result in injury to a copartner.

In the case of *Nelson v. Matsch*, 38 Utah, 122, 110 Pac. 865, Ann. Cas. 1912D, 1242, the Supreme Court of Utah said:

"One of the fundamental principles of the law of partnership is that partners stand in a fiduciary relation to each other, and that it is the duty of each partner to observe the utmost good faith towards his copartners in all dealings and transactions that come within the scope of the partnership business. 22 Am. & Eng. Ency. Law, 114, and cases cited. And, where one partner by false representations obtains an undue advantage over a copartner in transactions connected with the partnership business, equity will grant the defrauded party relief. 'Partners occupy a relation of trust and confidence within the meaning of the rule, and in dealing with each other each is bound to disclose all material facts known to him and not known to the other.' 14 Am. & Eng. Ency. Law, 70. The rule is well stated in *Story on Partnership* (7th Ed.) § 172, in the following language: 'Good faith not only requires that every partner should not make any false misrepresentations to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any concealment and derives a private benefit therefrom he will be compelled in equity to account therefor to the partnership.' So in *Parsons on Partnership* (4th Ed.) section 151, it is said: 'From the requirement of perfectly good faith, it follows that no partner must deceive his copartners, for his benefit and their injury, either by false representations or by concealments. Thus, if he persuades them into any course of business, or to any single transaction by these means, and losses occur, he must sustain them or compensate for them. So, if he proposes to buy of them the whole or any part of their share of their business, and by any false statement or intimation on his part, or any concealment or prevarication, influences them to enter into an arrangement to effect his wishes, it will not

be obligatory on them.' In *Smith on Fraud*, section 114, the author says: 'Where a confidential relation exists and there is any misrepresentation, or concealment of a material fact, or any just suspicion of artifice, or undue influence, courts of equity will interfere and pronounce the transaction void, and, as far as possible, restore the parties to their original rights.' To the same effect are the following authorities: *Lindley on Partnership* (2d Am. Ed.) § 486; *Pomeroy v. Benton*, 57 Mo. 531; *Goldsmith v. Koopman*, 152 Fed. 173, 81 O. C. A. 465; *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 84 Am. St. Rep. 463."

[3] Counsel contend that if the court adopt the theory in this case that a partnership existed, then the action cannot be maintained. This court in the case of *Chowning v. Graham*, 74 Okl. —, 178 Pac. 679, supra, held:

"So long as the partnership relation exists and there are debts of the firm, the rule contended for by the defendant would apply because in that case, as stated in the *New Jersey* case, this rule is to secure the right of each partner to have the firm property applied to the payment of the firm debts. But in this case, where there was but a single transaction, where there were no debts outstanding, and where the object to the suit was to terminate the partnership by establishing the interest of one of the partners in the assets of the partnership, it was within the power of the court to render the judgment it did, decreeing the plaintiff an interest in the real estate and making him a tenant in common with the defendant."

In this case we conclude that the purpose of the partnership for which it was originally entered into had terminated prior to the time of filing the suit and that the plaintiff by this action was entitled to establish his interest in the assets of the partnership. Just why the jury rendered a verdict and the court entered judgment for \$300, when under all the testimony the plaintiff was entitled to recover the sum of \$612.50, is not material on this appeal; but the defendants will not be heard to complain because the jury failed to render a verdict in favor of the plaintiff for the amount he was entitled to recover, thereby letting them settle a debt for a less sum than was actually due. It is probable that the jury allowed some credit to the defendants for expenses and time expended in making the sale of the leases.

After a careful examination of the entire record, we are of the opinion that the judgment should be affirmed. It is so ordered.

HARRISON, C. J., and JOHNSON, McNEILL, ELTING, and MILLER, JJ., concur.

(82 Okl. 75)

WHITE et al. v. TULLAHASSEE REALTY CO. et al. (No. 10146.)

(Supreme Court of Oklahoma. May 24, 1921.)

(Syllabus by the Court.)

1. Pleading \S 193(5)—When petition demurrable as not stating cause of action stated.

A demurrer to a petition because not stating facts sufficient to constitute a cause of action can be sustained only where the petition contains defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action, and, if the facts stated therein entitled plaintiff to any relief, a demurrer for want of sufficient facts should be overruled.

2. Corporations \S 553(6) — For mismanagement of property equity court has inherent power to appoint receiver and to require accounting.

Where the property of a corporation is being mismanaged or is in danger of being lost to the stockholders through mismanagement, collusion, or fraud of its officers and directors, a court of equity has the inherent power to appoint a receiver for the property of such corporation, and to require its officers to make an accounting upon petition of the minority stockholders therefor.

Appeal from District Court, Wagoner County; Chas. G. Watts, Judge.

Action by A. White and another against the Tullahassee Realty Company and others. Judgment for defendants on demurrer, and plaintiffs appeal. Reversed and remanded, with instructions.

Brook & Brook, of Muskogee, for plaintiffs in error.

G. W. P. Brown, of Chicago, Ill., and R. Emmett Stewart, of Muskogee, for defendants in error.

PITCHFORD, J. This action was commenced by the plaintiffs in error in Wagoner county, Okl., against the defendants in error for judgment, declaring the property of the Tullahassee Realty Company to be a trust in the hands of the other defendants for the interest of all the stockholders, and praying for the appointment of a receiver to take charge of the books, papers, accounts, and property of the company, and to audit said books and accounts, and to conduct and manage the business and affairs of the company in accordance with law and the order of the court until further orders of the court.

A general demurrer to the petition was sustained, and the plaintiffs refused to plead further and elected to stand on their petition. Judgment was rendered against them. To reverse this judgment, this proceeding in error was commenced.

The petition is lengthy, but states, in substance, that in the year of 1910 the defend-

ants A. J. Mason, Ike Mason, and the plaintiff White formed a domestic corporation for the purpose of buying and selling land as an addition to the town of Tullahassee; that the capital stock of said company was \$1,500, of which amount White paid the sum of \$500; that the Secretary of State issued the necessary certificate; that, after the issuance of said certificate, the stockholders of said company chose officers in manner and form as required by law, by electing A. J. Mason as president, A. White as secretary, and Ike Mason as treasurer. Thereafter the company purchased 40 acres of land lying near the town of Tullahassee for the consideration of \$1,500. Afterwards the plaintiff W. W. Waters purchased one-fifteenth interest in the stock of said company and was chosen as treasurer.

The plaintiffs allege that they have repeatedly demanded certificates to be issued covering their shares of stock respectively; that the president, A. J. Mason, refused to call a meeting of the stockholders together, or hold any meeting, or issue said certificates; that the defendants refused to turn over any of the money belonging to plaintiff Waters as treasurer, or to give any information as to the business or finances of said company, and refused to recognize these plaintiffs as having any voice or rights in said company.

The plaintiffs further allege that there has been much of the property belonging to the company sold, and that large sums of money have been received by A. J. Mason, and that said money has not been legally accounted for; that no dividend has been declared or paid in the last six years. It is charged that A. J. Mason is systematically disposing of the funds of said company by appropriating said funds for his own use and benefit, and that he will continue so to do unless a receiver is appointed and an accounting had; that the defendants A. J., J. W., and Ike Mason have constituted themselves as the Tullahassee Realty Company and are running the business to suit themselves.

It is further charged that J. W. Mason has no stock in the company and is not entitled to represent any shares therein, but is in as a dummy, for the purpose of forming a quorum and making such orders as desired by the president; that the president has been repeatedly requested to call a meeting of the stockholders, but, when the meeting was called, the same would be immediately adjourned if these plaintiffs were present, and no business would be transacted; that the defendants have continuously and persistently refused to let either of the plaintiffs see the company's books they kept, if any they have, and continued to sell the property, and have dissipated the funds of said company, and will continue to do so unless a receiver be appointed; that the business is being carried

on in derogation of the by-laws of the company and the laws of the state of Oklahoma.

It is further alleged that, if the defendants are not prevented by an order of the court, they will dispose of all the property belonging to the company and appropriate all the proceeds arising therefrom to their own use, and to the irreparable damage of the plaintiffs, who each own shares of stock in said company, aggregating the sum of \$600, exclusive of commissions and dividends due the plaintiffs.

The prayer for judgment is as above stated. Under our civil procedure, all fictions in pleadings are abolished. In the construction of any pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties. The petition must contain the name of the court and the county in which the action is brought, and the names of the parties, plaintiff and defendant, and a statement of facts constituting the cause of action in ordinary and concise language.

If the plaintiffs in the case at bar could, upon trial, establish the allegations contained in the petition, there would be no question but that they had been grossly imposed upon. Under these allegations, the affairs of the company have been under the domination of the defendants, who have continued to violate the trust. The law requires of the majority in the control and management of a corporation the utmost good faith to the minority stockholders. It is of the essence of this trust that it should be so conducted as to produce for each stockholder the best return for his investment.

[2] This Tullahassee Realty Company was formed for certain purposes. Each stockholder in subscribing for stock and in paying therefor had a right to share in the proceeds of the enterprise in proportion to the amount he invested. Under the allegations of the petition, there can be no question but that a wrong has been perpetrated, and it is one of the fundamental principles of jurisprudence in all civilized countries "that for each wrong there should be a remedy." The Masons have entire control of the affairs of the company, and have utterly failed in their plain duty to the plaintiffs, not because of matters beyond their control, but because of fraudulent mismanagement and misappropriation of the funds. We make this statement on the theory that the demurrer confesses the truth of the allegations of the petition. The plaintiffs have a right to go into a court of equity and to insist that the defendants shall not be permitted to retain the money of these plaintiffs to be used for the sole advantage of the defendants, and a court of equity should not permit this injustice on the part of the defendants by denying to plaintiffs the relief to which they are entitled as disclosed by their petition.

It is contended by the defendants that the appointment of a receiver is an ancillary remedy in aid of the primary object of litigation between the parties, and that such relief must be germane to the principal suit, and that the action of the plaintiffs was primarily for the appointment of a receiver, and contend that the judgment of the trial court in sustaining the demurrer was correct.

We are of the opinion that the petition clearly discloses converse of this contention. The plaintiffs are asking that their rights first be ascertained by the court, and, in the event these rights as alleged in the petition are established by the evidence, then they ask that the court appoint a receiver in order that these rights might be secured to them. Under this view, the appointment of the receiver would be ancillary to the main action.

If in the opinion of the defendants the plaintiffs failed to state their cause with clearness and precision so that the precise nature of the claim made against the defendants was not apparent, the remedy of the defendants was not to demur, but they should have filed a motion to compel the plaintiffs to make their petition more definite and certain. When the petition states any fact upon which the pleader is entitled to any relief under the law, a general demurrer should not be sustained thereto.

[1] In *Jackson v. Moore*, 79 Okl. 59, 191 Pac. 590, the rule is stated as follows:

"A demurrer to a petition because not stating facts sufficient to constitute a cause of action can be sustained only where the petition contains defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action, and, if the facts stated therein entitled plaintiff to any relief, a demurrer for want of sufficient facts should be overruled."

In *Emmerson v. Botkin*, 26 Okl. 218, 109 Pac. 531 (29 L. R. A. [N. S.] 786, 138 Am. St. Rep. 953), the first paragraph of the syllabus is as follows:

"A general demurrer to a petition, which attempts to state several causes of action, should be overruled if any of the statements of causes of action contained in said petition are good."

The defendants contend that there is no allegation in the petition, that the corporation is insolvent or threatened with insolvency by the action of the majority of the stockholders, and that the court would be without authority to appoint a receiver in the absence of an allegation of insolvency.

In *Union State Bank of Shawnee v. Mueller et al.*, 172 Pac. 650, this court, speaking through Hardy, Justice, said:

"Where the property of a corporation is being mismanaged or is in danger of being lost to the stockholders through mismanagement, collusion, or fraud of its officers and directors, a

court of equity has the inherent power to appoint a receiver for the property of such corporation, and to require its officers to make an accounting upon petition of the minority stockholders therefor."

In *Hughes et al. v. Garrelts et al.*, 35 Okl. 321, 129 Pac. 43, the syllabus is as follows:

"Under section 5772, Comp. Laws 1909, where a party moving for a receiver shows that he has a probable cause of action, and that the rents, issues, and profits of the land in litigation are being removed, or there is danger of the same being lost, it is proper and right that the appointment should be made to hold them and prevent loss during the pendency of the litigation, and this without reference to the probable solvency or insolvency of the party against whom the proceedings are brought."

In 34 Cyc. 84, it is said as follows:

"But the rule that a receiver will not ordinarily be appointed at the instance of stockholders is not without limitation or exception. The authorities are sometimes to be reconciled upon the theory that the receivership is not for the purpose of working a dissolution of the corporation, but is merely to preserve the property intact, and to this extent, to say nothing here of statutory provisions under which the general rule is modified, it has been recognized that facts may arise which would justify the appointment of a temporary receiver, even when the court cannot liquidate the affairs of the corporation, and when the corporation is a going concern, and that if on the application of a stockholder for other equitable relief it should be made clearly to appear that the appointment of a receiver is necessary to effect the purpose of the action, the court would have power to make such appointment."

We conclude that the court committed error in sustaining the demurrer. The judgment of the lower court is therefore reversed, and cause remanded, with instructions to overrule the demurrer to the amended petition.

HARRISON, C. J., and McNEILL, MILLER, and NICHOLSON, JJ., concur.

(31 Okl. 288)

MIDLAND VALLEY R. CO. v. LAWHORN. (No. 10213.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

1. Railroads — 348(1) — Evidence supporting verdict for destruction of automobile.

The evidence examined, and held, that it was sufficient to take the case to the jury. There being evidence to support the verdict of the jury, it will not be disturbed on appeal.

2. Evidence — 474(19) — Owner of car held competent to testify as to its value.

Where a person testifies that he has been familiar with automobiles for several years,

that he purchased the car in controversy direct from the dealer when it was new, had driven it ever since he had so purchased it, held, that he is competent and qualified to testify as to its value. Further held, that it was not necessary to question such witness as to his technical knowledge of automobiles before he should be permitted to testify as to its value.

3. Railroads — 312(2, 3) — Running train without headlight or signals negligence.

When a railroad company, in operating a long and heavy freight train, runs it through a town at a speed of 25 to 30 miles an hour between 11 and 12 o'clock at night and without any headlight on the engine and without giving any warning of its approach by ringing the bell, or sounding the whistle, this constitutes negligence per se.

4. Trial — 261 — Instructions not stating law properly refused.

The requested instructions examined, and under the facts in this case they did not state the law, and it was therefore not error to refuse to give them.

Appeal from District Court, Tulsa County; N. E. McNeill, Judge.

Action by J. S. Lawhorn against the Midland Valley Railroad Company to recover for the destruction of an automobile. Judgment for plaintiff, and defendant appeals. Affirmed.

O. E. Swan, of Muskogee, and Blakeney & Maxey, of Oklahoma City, for plaintiff in error.

C. P. Chenault and J. P. Evers, both of Tulsa, for defendant in error.

MILLER, J. This action was commenced in the superior court of Tulsa county, and afterwards, by proper orders, transferred to the district court of Tulsa county. It was instituted by J. S. Lawhorn against the Midland Valley Railroad Company, a corporation, to recover \$800 damages for the destruction of his automobile, \$600 damages for personal injury, and \$500 punitive damages. There was a verdict in favor of the plaintiff for \$800 damages to the automobile. The jury did not allow anything for personal injury or punitive damages. Judgment was rendered on the verdict. The defendant filed its motion for a new trial, which was overruled, saved its exceptions, and perfected this appeal. For convenience the parties will be referred to as they appeared in the lower court.

The plaintiff alleged in his petition that the Midland Valley Railroad Company has a line of railroad or tracks running from north to south through the town of Jenks, Okl.; that it maintains a depot within a few feet of and close to the Main street in said town; that said Main street runs east and west and crosses said railroad tracks at approximately right angles; that between

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11 and 12 o'clock on the night of August 18, 1916, the plaintiff was on Main street and approaching said track in an automobile and was on the side where the depot was situated; that the depot obstructed his view until he was close to the tracks; that plaintiff was the owner of and was driving the car, but there were other persons riding with him; that he did not see the train until one of the passengers in the car with him holloed for him to stop; that he applied the brakes, slowed up, and stopped just before going onto the track; that a heavy freight train was approaching at a speed of 25 or 30 miles an hour, without any headlight on the engine; that the train was upon him by the time he got his car stopped, and the engine in passing struck the car, overturned and demolished it; that plaintiff attempted to jump, and received injuries about his knee in so doing.

Defendant sets out seven specifications of error and argues the first, sixth, and seventh under this heading: There is no evidence upon which to base the verdict or judgment.

[1] The testimony of some 10 or 12 witnesses was to the effect that the train was going at a speed of 25 to 30 miles per hour; that it did not have a headlight; that it did not whistle or ring the bell after coming into town. One witness testified about hearing a whistle a short time before the train approached and looked for the train, but could see no headlight, and that it did not whistle or ring a bell after it got into the town. The testimony of these witnesses was disputed by some members of the train crew, and the evidence of one or two other witnesses disputed some of the facts testified to by the witnesses for the plaintiff. We think the evidence was sufficient to take the case to the jury. There being evidence to support the verdict of the jury, and it having received the approval of the trial court, it will not be disturbed upon appeal. See *St. Louis-San Francisco Railway Co. v. Donahoo et al.* (No. 11058) 198 Pac. 81, and other cases therein cited.

Defendant next complains that the trial court erred in the admission of testimony as to the value of the car. The plaintiff testified that he bought the car new; that it was worth \$800 at the time of the accident; that he had known cars for several years and that the car was demolished; that the fore wheels were torn down, bent the front axle, knocked the bed clear out of line, and completely demolished the car so far as its value was concerned; that it would cost as much to fix it as the car would be worth.

The defendant argues the proposition as though the plaintiff had testified that he paid \$800 for the car when it was new, but the plaintiff did not so testify. He did not state what he paid for it when it was new.

The defendant further contends that the car was not totally destroyed. We think the evidence shows that the car was totally destroyed so far as any value was concerned, and the jury evidently so found.

[2] The plaintiff clearly qualified himself as a witness to testify as to the value of the car. Placing a value on an automobile that a person bought new and has been driving since he so purchased it does not require technical skill or technical knowledge of automobiles in order to qualify the person to testify as to its value. The automobile has become so common and so much a part of our everyday life that it would be absurd to say that a man who had been familiar with cars for several years, had bought a car new, and had been driving it since he so purchased it, that he could not testify as to its value without stating some special qualifications which he possessed. The approximate standard of value for cars is the price at which they sell on the market. We think the witness was qualified to testify as to its value. There being no other evidence of its value, except it was worth \$800, the jury was justified in finding by its verdict that it was worth \$800.

[3, 4] The other assignments of error are: Refusal of the court to give certain instructions requested by the defendant and the overruling of the motion for a new trial. We have examined the instructions asked for by the defendant, and they do not state the law under the facts in this case. The negligence of the defendant in running its train without a headlight at a high rate of speed between 11 and 12 o'clock at night, through a town where it might reasonably expect persons to be crossing its tracks on the public streets and without giving any warning of its approach, is negligence per se. Had there been a headlight on the engine, it would have sent its rays along the track, giving warning of its approach. The plaintiff had a right to expect the railroad company to use the ordinary means and care in warning the public.

We do not find that any reversible error has been committed.

The judgment of the trial court is therefore affirmed.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

(82 Okl. 117)

L. D. POWELL CO. v. CASTEEL
(No. 11516.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 564(4)—Supreme Court has no jurisdiction of appeal where case-made not served in time.

A case-made not served within the time allowed by law nor within the extension allowed by the court gives this court no jurisdiction of the appeal as a case-made.

2. Appeal and error \S 564(4)—Case-made filed too late will not be considered for any purpose unless it presents questions properly reviewable on a transcript.

Though a case-made may be filed too late to be considered as a case-made but within the time for filing a transcript, unless it presents questions properly reviewable on a transcript it will not be considered for any purpose.

Appeal from District Court, Murray County; F. B. Swank, Judge.

Action by the L. D. Powell Company against J. H. Casteel. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Yerker E. Taylor, of Pauls Valley, for plaintiff in error.

W. N. Lewis, of Davis, for defendant in error.

HARRISON, O. J. This record discloses that motion for new trial was overruled December 22, 1919, and plaintiff given 60 days, in addition to the 15 days provided by law, to serve case-made. March 5, 1920, an extension of 60 days additional was granted. May 4, 1920, an extension of 15 days in addition to the time already granted was made, making 150 days in all for serving case-made, which expired May 20, 1920. The case-made was not served until May 22, two days after the time had expired.

[1] Under the rule heretofore followed, a purported case-made, which has not been served within 15 days from the date of the judgment or order appealed from, or within an extension of time duly allowed, cannot be considered by this court for lack of jurisdiction. *Cook v. Cook*, 79 Okl. 222, 192 Pac. 215; *Cripple Creek Oil Co. v. King*, 76 Okl. 316, 185 Pac. 439; *Morgan v. Board of Co. Com.*, 59 Okl. 290, 159 Pac. 514; *Wills v. Buzbee*, 42 Okl. 206, 140 Pac. 1146; *Gilbert v. Divelbiss*, 47 Okl. 340, 148 Pac. 689.

[2] This case might be reviewed as upon a transcript, having been filed within six months from the date of final judgment; but as the petition in error presents no question reviewable upon transcript, there is nothing before this court. *Cook v. Cook*,

supra; *Thompson v. Stevens*, 175 Pac. 742; *Collins v. Garvey*, 171 Pac. 830.

For these reasons the appeal is dismissed.

JOHNSON, MCNEILL, KENNAMER, MILLER, and ELTING, JJ., concur.

(81 Okl. 266)

KEECHI OIL & GAS CO. et al. v. SMITH
et al. (No. 10698.)

(Supreme Court of Oklahoma. May 10, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1175(7), 1176(4)—If judgment is against weight of evidence, Supreme Court, in equitable cases, will render or cause to be rendered proper judgment.

In an equitable action, this court will weigh the evidence, and, if the judgment of the trial court is clearly against the weight thereof, will render, or cause to be rendered such judgment as said court should have rendered.

2. Mines and minerals \S 78(1)—Construction of phrase "oil or gas found in paying quantities."

The phrase, "oil or gas is found in paying quantities," means in sufficient quantities to pay a reasonable profit on the necessary sum required to be expended, including the cost of drilling, equipment, and operation of well.

3. Mines and minerals \S 78(2)—Forfeiture of oil and gas lease for want of diligence in operation held erroneous.

It is error to declare an oil and gas lease forfeited, which contained the following provision, to wit: "That second party agrees to commence operations of drilling within 90 days from the date hereof, somewhere within the vicinity of Cement, and drill to a depth of 3,000 feet unless oil or gas is found in paying quantities at a lesser depth, and continue drilling with due diligence to completion." When the evidence disclosed the lessee commenced the vicinity well and had continued to drill with due diligence to the date of filing suit to cancel the lease, although the parties had not found oil and gas in paying quantities, nor completed said well to a depth of 3,000 feet, the continued drilling with due diligence was a compliance with the express covenant contained in the lease.

4. Appeal and error \S 1012(1)—Judgment cancelling oil and gas lease set aside as against weight of evidence.

On an appeal from a judgment of the trial court canceling an oil and gas lease for violation of certain express covenants contained in the lease, where the court made a general finding in favor of the lessor, canceling said lease, and, from an examination of the entire record, the evidence is insufficient to support a finding that the lessees have failed to comply with any of the express covenants in the lease, the judgment of the court will be set aside, as clearly against the weight of the evidence.

Elting, J., dissenting.

Appeal from District Court, Caddo County; Will Linn, Judge.

Suit by J. D. Smith and Dora A. Smith against the Keechi Oil & Gas Company and others, to cancel an oil and gas lease. Decree for complainants, and defendants appeal. Reversed and remanded, with directions.

Bond, Melton & Melton, of Chickasha, for plaintiffs in error.

Morris & Jameson, of Anadarko, for defendants in error.

MCNEILL, J. This action was commenced in the district court of Caddo county by J. D. Smith and Dora A. Smith, against the Keechi Oil & Gas Company and others, to cancel a certain oil and gas lease, executed by J. D. Smith and Dora A. Smith to I. N. Duncan, which lease is now owned by the defendants.

The amended petition for grounds for cancellation alleged the land was the homestead of the Smiths, and the lease was executed on the 19th day of January, 1916, by J. D. Smith, without any consideration, and that, about the 15th day of December, 1916, Dora A. Smith executed said lease without any consideration whatever, except the lessee agreed to immediately resume drilling on what is known as the Kunzmilller well, and to continue actual drilling to a depth of 3,000 feet, unless oil and gas was found in paying quantities; that said representations were false and untrue, and made with the fraudulent intent to deceive Mrs. Smith, and with no intent to continue drilling, and made to obtain Mrs. Smith's signature to said lease; and she relied upon the said representations, and that said lease was obtained by fraud, and void.

The second ground for cancellation alleged that the lease contained the following provision:

"Second party agrees to commence operations of drilling within 90 days of date hereof, somewhere within the vicinity of Cement, Okl., and to drill to a depth of 3,000 feet, unless oil and gas are found in paying quantities at a lesser depth, and continue drilling until said well is completed."

It is contended that the defendants breached this provision of the lease, and had forfeited their rights in said lease.

The third ground for cancellation was that the lease provided, if no well was completed on the premises within one year from the date thereof, the lessee agreed to pay at the rate of \$1 per acre, payable in advance, until a well was completed. It is alleged that no well was completed, and no money paid according to the terms of the lease.

The fourth contention was that the lease was unilateral, and void.

The defendants answered, and upon the trial of the case the court found the issues

in favor of the plaintiffs and against the defendants, and canceled said lease.

[1] From said judgment the defendants have appealed. The grounds alleged for cancellation of the lease depend upon questions of fact, and, the court having made a general finding in favor of the plaintiffs, in order to reverse the judgment it will be necessary to find that the finding of the court is clearly against the weight of the evidence on each proposition.

The first allegation of the petition was that there was no consideration for said lease. The lease recites, one dollar consideration, and the further consideration that the well should be drilled within the vicinity of Cement, to a depth of 3,000 feet, unless oil or gas was found in paying quantities at a lesser depth. Mr. Smith, one of the plaintiffs, testified that he did not receive the dollar, nor did he contend that the lease should be canceled for that reason, but that the consideration for the lease was the drilling of a test well in the vicinity of Cement, and the lease should be canceled for failure to comply with that provision in the lease.

We think this is the material question in the case, and the judgment of the trial court depends upon whether the lessee had failed to comply with this express covenant in the lease at the time of the institution of the suit. The first requirement under this express covenant of the lease was the commencement of operations of drilling within 90 days from the 19th day of January, 1916. Whether there was a strict compliance with this 90-day provision we think is immaterial, for the lease in this case was not executed by Mrs. Smith, until the 15th day of December, 1916, and the lease was of no force and effect until that day, the land being the homestead of Mr. and Mrs. Smith, and the lessee or their assignees had drilled a well within the vicinity of Cement to a depth of about 1,500 feet at the time of signing the lease. This would be a waiver of the right to forfeiture for failure to strictly comply with this provision to commence operations of drilling within 90 days.

[2] The second requirement was to drill to a depth of 3,000 feet, unless oil or gas was found at a lesser depth in paying quantities. The term, "paying quantities," in an oil and gas lease has been defined by this court to mean:

"The phrase 'oil or gas is found in paying quantities,' means in sufficient quantities to pay a reasonable profit on the necessary sum required to be expended, including the cost of drilling, equipment, and operation of well." *Ardissonne v. Archer*, 178 Pac. 263; *Pelham Petroleum Co. v. North*, 78 Okl. 59, 188 Pac. 1069.

The evidence disclosed that oil was not found in paying quantities as measured by the above decisions, although it was believed

by all of the people familiar with the well that from the 1st of December, 1916, until long after the commencement of this suit, the Kunzmilller well was a paying well, but it later developed not to be a paying well. The next requirement was that a well was to be drilled to a depth of 3,000 feet. It is admitted that no well was drilled to a depth of 3,000 feet. The lease does not provide when said well shall be completed to a depth of 3,000 feet, but provides the lessee shall continue work with due diligence.

[3] The evidence is conclusive that the parties worked with due diligence, taking into consideration that this was a "wild-cat field," and in December, 1916, found oil and gas. They then worked diligently in their attempt to make the well produce oil and gas in paying quantities. They worked at the well for some eight or nine months trying to produce oil and gas in paying quantities. There is no contention that this work was not done in good faith.

This action was commenced on the 14th day of March, 1917, and, if the plaintiffs are entitled to have said lease canceled, it is by virtue of the violation of some express provision of the lease that existed on or prior to said date. No supplemental petition was filed asking for cancellation of the instrument for failure to comply with any of the express covenants of the lease that accrued after the filing of the petition. On the 14th day of March, the date of instituting this suit, the lessee had not found oil and gas in paying quantities in the vicinity well, nor had they drilled to depth of more than 3,000 feet, but they had commenced the work, and since the execution of this lease had worked continuously, diligently and in good faith and complying with this provision of the lease. The evidence is conclusive that there was no violation of this express covenant in the lease at the time of the commencement of this action.

[4] We will now consider the other grounds for cancellation of the lease as alleged in the petition. In regard to the allegation that at the time Mrs. Smith executed the lease certain false and fraudulent representations were made to her in regard to continuing drilling on the Kunzmilller well, it is sufficient to say that no evidence was introduced to support this allegation of the petition.

The third allegation for cancellation of the lease was that the lessee had not paid the dollar per acre for the second year's rental. This rental became due on January 19, 1917, and the evidence is conclusive the lessee had tendered the plaintiff said amount, which was refused, and on said date the rental was deposited in the bank designated in the lease as the depository, so there was a strict compliance with this provision of the lease.

The next contention is that the lease was

unilateral and void, by reason of the surrender clause. There is no merit in this contention. This question has been definitely settled by this court in the case of *Rich v. Doneghey*, 177 Pac. 86, 3 A. L. R. 352.

These are the only grounds on which the plaintiffs sought to have said lease canceled, and the evidence is insufficient to support a finding of the court that the lessee has violated any of the covenants contained in the lease; and the finding of the court in favor of the plaintiffs is clearly against the weight of the evidence.

The defendants in error have filed a motion to dismiss, for the reason said lease, by its own terms, terminated on January 19, 1921, and the questions herein are now moot. The plaintiffs in error have filed a response resisting said motion, contending they have certain rights and equities, and further contend they would have a right to have the lease extended by reason of this litigation if it was wrongful. The rights of the parties under the lease are to be determined as of the date upon which this action was brought in the district court. What has happened since that time we are not advised, nor can these questions be litigated here on a motion to dismiss. If the case should be affirmed, the rentals deposited in the bank before the commencement of the suit would belong to plaintiff in error, if reversed to defendants in error, so the question is not moot, if for no other reason than to determine the rights of the parties to the rentals already deposited by plaintiffs in error to the credit of defendant in error.

The judgment of the trial court is therefore reversed and remanded, with directions to dismiss plaintiff's petition.

HARRISON, C. J., and PITCHFORD, JOHNSON, and NICHOLSON, JJ., concur.

ELTING, J., concurs in the general conclusion that there was no forfeiture of the lease, and that cause should be reversed and remanded, with directions to dismiss the interveners' petition, but does not concur in all the conclusions stated in the opinion. I cannot concur in the conclusion that the Kuntzmilller well was not a paying well, and that, under the circumstances of its being a developing well, and that the lessors had only an indirect interest in the production, and that the main purpose was development, and not production, and being in a wild-cat field, and no market for oil, and there being no specific provision for forfeiture, the law, under such circumstances, will not raise one by implication. See *Poe v. Ulry*, 233 Ill. 56, 84 N. E. 49, for statement of the rule that is applicable.

The surrender clause should be held void, because no consideration is named to be paid for the surrender. In addition to the reasons given in *Rich v. Doneghey*, cited in the

opinion, the voidness of a surrender clause which fails to name the amount to be paid is held in the case of *Riddle v. Keechle Oil & Gas Co.*, 176 Pac. 737. The validity of a contract cannot be attacked for failure to pay a consideration the receipt of which is acknowledged in a written contract. See *Ulry v. Poe*, heretofore cited; *Finlayson v. Finlayson*, 17 Or. 347, 21 Pac. 57, 3 L. R. A. 801, 11 Am. St. Rep. 836; *Stannard v. Aurora*, etc., Ry. Co., 220 Ill. 469, 77 N. E. 254. The other reasons for dissent are expressed in the lengthy dissenting opinion.

ELTING, J. (dissenting). The writer of this dissenting opinion is not dissenting from the final conclusion of the opinion reversing the case and denying the forfeitures prayed for by the interveners below, defendants in error herein, and the manner of his concurrence is stated in the concurrence at the close of the case.

The writer concurs in the opinion overruling the motion to dismiss the appeal, but dissents for the reason that the opinion does not go far enough, in that it fails to find specifically that an equity has arisen in favor of the lessees, plaintiffs in error herein, by reason of the wrongful litigation, and that this court should hold that the lessees are entitled to a reasonable time, on and after the final determination of the litigation herein, in which to test for oil upon the premises leased, and that it is the duty of this court, under its undoubted equity powers, to either definitely decree the time and fix the terms of forfeiture when this lease shall end in the event the lessees fail to perform as directed by the decree of this court, or else this court should remand this case, with directions to the trial court to fix the time of extension, and to definitely determine the rights of the parties to said contract as to future forfeitures. This dissenting opinion is not what it ought to be, and we feel, at the outset, that it will fall far short in learning, and in the application of old rules to new conditions, or the application of any new rules that it may attempt to apply to the situation now existing between the parties to this contract. The writer, however, is sincere in the application of the general principle of equity that is sought to be applied herein, but admits some misgivings as to the application of some of the principles which may be enunciated herein, and that it is only by invoking the power of equity and by an appeal to conscience and right that the rule of strict forfeiture can be prevented from being applied to the ending of this contract and, as we view it, an injustice be prevented.

The effort of the writer herein will be to show that there is nothing more in the fixing of a term in this kind of a contract than any other forfeiture feature, either specifically provided in the contract, or which may arise

by implication of law; that it can be waived during the term of the lease, or that the lessor, may by his conduct, and by his inequitable actions, and by a breach of his implied warranty to the lessees to peaceable and quiet enjoyment of their contractual rights, which the opinion of the majority of this court, upon the merits of this appeal, has had the effect of preserving to them, provided some hard and rigid rule of law does not prevent their becoming effective. It has been suggested that, if this court undertook and did fix a definite arrangement as to the extension of this lease beyond its term, it would, in effect, be making a new contract for these parties. The writer is unable to see in what respect this court would thereby be doing anything but what courts of equity are doing every day, and that is relieving parties to contracts from the strict terms thereof by reason of rights that have arisen from the circumstances, conduct, and relation of the parties during the term of the contract. If this is such a contract that a court of equity will, during its term, specifically enforce at the behest of the lessees, or either party thereto, why has not a court of equity the power to enforce the remedy beyond the term in a proper case, and such as the writer contends this to be?

It is not the making of a new contract, but is decreeing that such and such a thing shall now be done which the contract said should have been done sooner, but the performance was prevented by the fault of one who now says it cannot be done. Equity says it can be done, that it has the power to so decree that it can be done, although out of time. The subject-matter still exists, and has not become nonexistent, such as the lapsing of a patent right or a license to do business, and is the subject-matter of a contract which can only be renewed or extended by a power that a court of equity cannot control. The relations of the parties it is practical for a court of equity to control by decreeing that something should now be done, though out of time, which, according to the contract, should have been done sooner.

The abstractions and distinctions between conditions precedent and conditions subsequent, and as to whether the production of oil in paying quantities before the end of the term is either one or the other, is not of much practical effect, as the writer views it. In one sense it might be held to be a precedent condition when we consider the full investiture of the rights of the lessees, but, when we consider it in the light of the fact, that the contract gave to the lessees certain contractual rights, specific and implied, such as the right to enter upon the premises during the term of the lease and test for oil, and being such rights as a court of equity will specifically enforce. The production of oil, as to such rights, is a condition subsequent, and a failure to perform

forfeits such precedent rights unless saved by any equities held sufficient to relieve against such forfeiture. The writer is not going to say that the equity maxim, "that courts of equity do not favor forfeitures based on breach of conditions subsequent" applies to a forfeiture arising under an oil lease like the one in the instant case. We think the trend of modern equity in passing upon such condition in an oil lease is to hold a forfeiture, unless the granting of a forfeiture would be against justice and good conscience. In other words, if equity has any leaning, either one way or the other, it is in favor of the forfeiture, and, in the opinion of the writer this is rightly so, and is more in consonance with the better policy of the law.

The following is a portion of section 379, *Pomeroy on Contracts (Specific Performance, second edition)*, found on page 464:

"The fundamental principle upon which the answer to the question turns is the following: Where a contract depends upon a condition precedent, or, in other words, where the intention of the parties is that no right shall vest until certain prescribed acts are done or omitted, or unless certain prescribed acts are done or omitted, at or before a specified time, then equity will not relieve against a breach of such precedent condition, for no court has the power to make a new contract for the parties which shall confer rights where no rights at all originally existed. But if a contract contains a condition subsequent, or, in other words, if the intention of the parties is that the rights under the agreement shall vest at once upon its conclusion—subject, however, to be defeated or ended upon the nonperformance of the provision which constitutes the subsequent condition—or its nonperformance at or before a specified day—then equity, by virtue of its general jurisdiction over penalties and forfeitures, has power to relieve the defaulting party from the loss or forfeiture caused by his breach of this subsequent condition. This power of relief would even more certainly exist when the breach was a failure, not to do the thing at all, but merely to do it at or within the time stipulated by the contract. It is therefore held, in a great number of cases, that the forfeiture provided for by such a clause as the one described above, on the failure of the party to fulfill at the proper time, unless such failure is intentional, or causes an injury to the other party which cannot be compensated, will be disregarded and set aside in equity; and the defaulting party performing, or being ready and willing to perform, at a subsequent time, will be allowed to enforce the contract notwithstanding his delay. In short, the general doctrine is applied in the face of such an express provision declaring the contract ended in case of a nonfulfillment of its terms at the appointed day, unless the agreement is so worded that a compliance with these terms at the prescribed time is made a condition precedent to the vesting of any rights."

On January 23, 1920, the plaintiffs in error filed in this court, a motion to have this case advanced, which, omitting the caption, was in words and figures as follows:

"Plaintiffs in error, Keechie Oil & Gas Company, Oklahoma Star Oil Company, O. W. Goolsby, J. M. Bailey, and Walter Jones, move the court to advance this case on the docket for hearing and determination for the following reasons:

"(1) March 14, 1917, defendants in error, J. D. Smith and Dora A. Smith, filed their petition in the district court of Caddo county, Okl., against plaintiffs in error, seeking to cancel an oil and gas lease on the north half of the southwest quarter of section 30, township 6 north, range 9 west, in Caddo county, Okl., which oil and gas lease is dated the 19th day of January, 1916, and provides that same shall be for a term of five years from such date and as much longer thereafter as oil or gas is found in paying quantities on the land. (Record, 6.)

"On the 10th day of February, 1919, the district court of Caddo county, Okl., rendered a judgment for the defendants in error and against the plaintiffs in error canceling such oil and gas lease, and from such judgment plaintiffs in error appealed to this court.

"(2) Plaintiffs in error say that under and pursuant to the terms of the said lease in controversy it is contended by the defendants in error that the same will expire on the 19th day of January, 1921, unless oil or gas is found on the land described therein in paying quantities prior to such date; that said oil and gas lease is valuable, and that the plaintiffs in error cannot drill a well thereon in order to determine whether or not the land described therein will produce oil and gas in paying quantities, and cannot induce others to drill a well thereon while such lease is in litigation and while this action is pending and undetermined, and therefore plaintiffs in error say that, unless said court advances said cause for hearing and determination, the plaintiffs in error may lose a valuable right and property by reason of the expiration of time within which the land described in the said lease may be prospected for oil and gas.

"Wherefore plaintiffs in error move the court to advance this cause.

"Bond, Melton & Melton,
Attorneys for Plaintiff in Error."

Shortly after the filing of said motion to advance, this court did advance said cause.

On January 22, 1921, the defendants in error filed herein a motion to dismiss this appeal, which was in words and figures as follows, omitting the caption:

"The defendants in error move the court to dismiss the petition in error herein for the following reasons, to wit:

"The oil and gas lease involved herein, and appearing on pages 6 and 7 of the record, by its own terms, expired on January 19, 1921, and there is, therefore, no controversy between the parties to be determined.

"Morris & Jamison,
Attorneys for Defendant in Error."

On February 9, 1921, plaintiffs in error filed a response to said motion to dismiss, in which they denied that the questions involved

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herein had become moot by reason of the expiration of the term of the lease involved in this suit, setting up their right to have this appeal passed upon by this court; and, in the event that the appeal is sustained, then the equity powers of this court are invoked to grant an extension of the term of said lease for the length of time this matter has been in litigation; attaching thereto their arguments and authorities in support of their contention.

On February 21, 1921, the defendants in error filed a reply to said response, setting up their arguments and authorities controverting the contentions of the plaintiffs in error in their response to the motion to dismiss. Thus a new issue is raised in this court, and this court, having full equity powers, should not, and, as we view it, cannot rightly shun the responsibility of fully and completely reviewing the rights and equities of the parties, as is hereby raised by this motion of dismissal.

The following law defines the power and scope of this court, since we are acting as a court of equity (quoting from 16 Cyc. pp. 106-110):

"A court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter. This doctrine seems to rest on the same principles which permit a court of equity to take jurisdiction in the first instance because the remedy is incomplete, or to avoid multiplicity of suits.

"By virtue of the rule the court, when its jurisdiction has been invoked for any equitable purpose, will proceed to determine any other equities existing between the parties, connected with the main subject of the suit, and grant all relief requisite to an entire adjustment of such subject, provided it be authorized by the pleadings. Relief of an equitable character may thus be incidentally obtained, when an original bill would not lie for such relief alone.

"When plaintiff has established a right to equitable relief, the court will not only grant that relief, but all other relief essential to a complete adjustment of the subject-matter among the parties, although it is thereby required to grant relief obtainable at law, and which, if the object of an independent action, could be obtained at law alone. Notwithstanding the refusal of equity generally to decree the delivery of the possession of land, such delivery will often be decreed for the purpose of affording complete relief, when a resort to equity has been necessary in order to establish plaintiff's title or right of possession. The same rule prevails with regard to chattels. Under a variety of circumstances the court, for the same reason, and as incidental to equitable relief, may order the payment of money, although a separate action at law would lie therefor. Thus, the jurisdiction of equity having been invoked to restrain the further commission of wrongful acts, damages already suffered will quite generally be awarded."

Of like effect are *Michigan Pipe Co. v. Fremont, etc., Co.*, 111 Fed. 284, 49 C. C. A. 324; *Deweese v. Reinhard*, 165 U. S. 386, 17 Sup. Ct. 840, 41 L. Ed. 757; *Eaton on Equity*, p. 74; *Pomeroy, Equity Jurisprudence*, § 398; *Angle v. Chicago, etc., Ry. Co.*, 198 P.—38

151 U. S. 23, 14 Sup. Ct. 240, 38 L. Ed. 55; *Depuy v. Selby*, 78 Okl. 307, 185 Pac. 107; *Cook v. Warner*, 41 Okl. 781, 140 Pac. 424.

To facilitate the determination as to whether or not the expiration of the term of the oil lease involved in the instant suit has had the effect of mooting the question involved herein, and as to whether the determination of the issues involved in the appeal can now constitute a decision on the substantial rights of the parties, we desire to state a few facts that are determined by this record and by the majority opinion of this court.

The lease in this case is one that has not been attacked for fraud, mistake, overreaching, or other thing that would in any manner impair it as a fair and honorable expression of the intention of the parties. We have held it amply supported by a legal consideration, and that its terms have been complied with in a legal and substantial way, that on March 14, 1917, a little over a year after the execution of said lease by one of the defendants in error and less than one-half a year after the execution by the other defendant in error, the defendants in error filed a suit in the district court of Caddo county, Okl., asking for a cancellation of said lease upon several grounds, of forfeiture alleged therein, and to clear cloud from the title to the land.

The holding of this court is such as to declare the allegations of the petition for the forfeiture of said lease to be without merit, and holding, in effect, that said suit was wrongfully brought and we have held the decision of the lower court not correct and the same is reversed and remanded with directions to enter judgment for appellants.

The habendum clause of this lease reads in part as follows:

"To have and to hold the same unto the said parties of the second part, his heirs, successors, and assigns, for the term of five years from the date hereof, and as much longer as oil or gas is found in paying quantities, excepting and reserving to first party the one-eighth part of all the oil produced and saved from the said premises, to be delivered into the pipe lines to the credit of the first party free of cost, and should any well produce gas in sufficient quantity to justify marketing the same, second party shall pay therefor at the rate of \$200 per annum, payable within 30 days from the time said gas is used therefrom, and yearly thereafter for such a time as gas therefrom is marketed"

—and then further provides for the mutual promises as to the use of the premises, and of oil, gas, and water on said premises.

The second clause of the lease demises and grants all oil and gas in and under the described tract of land, also grants the right of use of the surface of the land for the purpose of developing the oil and gas, and providing for the removal of the property of the second party, and waiving claim to any of the property placed thereon by the second party. A portion of the fifth clause of said lease provides as follows:

"Second party agrees to complete a well on the above-described tract of land within one year from this date or thereafter pay first party a rental of \$1 per acre per year per annum, payable annually in advance until such well is completed."

We are copying these provisions of the lease herein to show their connection and relation, and that they may be interpreted in the solution of this moot question. We hold that the effect of this lease is to grant to the lessee, if not a freehold interest in this land, at least not a tenancy at will, but a tenancy for a term of years. It has been held to be such an interest in the cases of *Rich v. Doneghey*, 177 Pac. 86, 3 A. L. R. 352, and *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; a decision by Van Devanter, Circuit Judge. See, also, the case of *Bruner v. Hicks*, 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332; *Poe v. Ulry*, heretofore cited; *Gillisple v. Fulton Oil & Gas Co.*, 236 Ill. 88, 86 N. E. 224.

The following are the third and fourth syllabi of the case of *Brennan et al. v. Hunter et al.*, 172 Pac. 49:

"3. The lease in question conferred upon the lessees the right to go on its premises and search for oil and gas within the initial period, and to commence operations within that time, and continue same with reasonable diligence until it was determined whether the premises were barren of oil and gas, or either of them were found thereon in paying quantities, and, while the lessees acquired no vested estate in the premises, yet they had the right to the possession of the land to the extent reasonably necessary to perform the obligations imposed upon them by the terms of the lease.

"4. After oil and gas, or either of them, are found upon the leased premises in paying quantities, the lessees thereby acquired a vested, though limited, estate in the leased premises for the purposes named in the lease, and are entitled to be protected in the exercise of their rights according to the terms and conditions of their contract, unless the lease has been forfeited for a violation of some of its terms, or has been abandoned by them."

The following is found in case of *Brewster v. Lanyon Zinc Co.*, 140 Fed. 807, 808, 72 C. C. A. 218, opinion by Van Devanter, Circuit Judge:

"The position is taken in the bill that, by reason of the clause which declares: 'Second party [the lessees] may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void'—the lease was wanting in mutuality, was determinable at the will of the lessee, and was therefore equally determinable at the will of the lessor. The position is not sound. Although the parties, with the sanction of a general practice, denominated the instrument of a 'lease,' strictly speaking it was not such, but was more in the nature of a grant in present of all the oil and gas in the lands described—these minerals being part of the realty—with the right to enter and search for them, and to mine and remove them when found. *Lanyon Zinc Co. v. Freeman* (Kan.) 75 Pac. 995; *Dickey v. Coffeyville Vitrified Brick & Tile Co.* (Kan.) 76 Pac. 398. Because, however, of the designation given to the instrument by the parties, it is here spoken of and treated as a lease. It runs to the lessee, its successors, and assigns, is without limitation as to time, and plainly shows that it is designed to be perpetual, if the oil or gas

shall continue, and the lessee and those claiming under it shall fulfill its stipulations. True, it was made and accepted upon certain conditions, one of which is that the premises may be reconveyed at any time at the option of the lessee; but that does not make the estate which it creates a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other. That rule is without application to a lease for a defined and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term. *Archbold's Landlord and Tenant*, 92; *Dann v. Spurrier*, 3 Bos. & Pul. 399; *Doe v. Dixon*, 9 East. 15. The present lease is of this type. It is essentially one in perpetuity. Such a term is permissible in the state of Kansas, where the creation of leaseholds in real property is almost entirely a matter of contract between the parties. *Dickey v. Coffeyville Vitrified Brick & Tile Co.*, supra; *Efinger v. Lewis*, 32 Pa. 367. The option reserved to the lessee was not designed to convert the estate, as otherwise defined, into a mere tenancy at will, or to make it determinable at any time at the option of the lessor. The lease expresses the intention of the parties, and, no rule of law forbidding, that intention is controlling. The consideration of \$1, the receipt of which was acknowledged, although small, was yet sufficient to make the lease effective and to support every stipulation in it favorable to the lessee, including the option to surrender it at any time. *Brown v. Fowler*, 65 Ohio St. 507, 525, 63 N. E. 76; *Gas Co. v. Eckert*, 70 Ohio St. 127, 135, 71 N. E. 281; *Davis v. Wells*, 104 U. S. 159, 168, 26 L. Ed. 686; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 604, 608, 106 Fed. 764, 767. Resting, therefore, upon an executed and valuable consideration, the lease was not wanting in mutuality merely because it reserved to one party an option which it withheld from the other. *Brown v. Fowler and Gas Co. v. Eckert*, supra; 9 Cyc. 334."

The lease provides that the plaintiffs in error could extend this lease without completing a well on the premises, by paying, at the end of the first year, \$1 per acre per annum, payable annually in advance until such well was completed. This provision has to be read in connection with the first part of the preceding clause, which reads as follows:

"To have and to hold the same unto the said party of the second part, his heirs, successors, and assigns, for the term of five years from the date hereof, and as much longer as oil or gas is found in paying quantities."

The effect of these two provisions was to grant to the lessee certain fixed rights which were enforceable, and under this covenant the lessors were denied the right to interfere therewith, and any substantial interference by them would be a breach of the contract. The lessees had at last the power under said lease to keep said lease in force for five years by two methods. One was to complete a well within one year, or, if they failed to do this, then pay rents at the rate of \$1 per annum in advance for five years, and, at the end of that time, if they were producing oil in paying quantities, then the lease would continue in force as long as they continued to develop and produce oil in paying quantities.

The lessees had, at least, these fixed and

indefeasible rights which could not be denied them by the lessor except at the cost of suffering the legal consequences for the breach. To repeat, the lessees were entitled to the uninterrupted contractual privileges of carrying out and executing the terms of said contract and without let or hindrance from the lessor. The facts in this record show that no well was completed on the said premises the first year, and does show a tender and payment in the bank to the credit of the lessors of the stipulated rents for second year. We have already held that that is sufficient compliance as to the payments of the rents as far as the second year is concerned.

We do not know, and the record does not show, that there have been tenders of the rents in advance for the other years that have expired since the suit was begun, nor that the same has been deposited in the depository bank provided for in the lease. By authority of *Gillespie et al. v. Fulton Oil Co.*, 236 Ill. 188, 86 N. E. 220, we do not think that the defendant, under the facts and circumstances in this case, is required to make tender. It must be borne in mind that the defendants in error filed suit on the 14th day of March, 1917, which was a notice to these lessees that the lessors were contending that this lease was void and that their contentions in said suit would be inconsistent with the acceptance of the rents. They could not accept the rents without waiving the grounds of their suit, and the filing and continuance of the suit waived necessity of tender of the rents. If the defendants in error had dismissed their suit, and had notified the plaintiffs in error that they would accept from them a resumption of the contract, then the lessees would be under the necessity of paying up the rents, and be required to comply with the contract, and any failure to comply would be at the risk of forfeiture of the contract. We will state that, under this contract, the defendants in error, by receipt of rents for the last year, probably would defer operations beyond that time, and by accepting rents for the sixth year, while that probably would not have the effect of starting a new term of five years, it would put the lessors in a position where they would have to serve notice upon the lessees that they would expect production the next year, and would refuse to receive further rentals; and after which notice, and within what the court would call a reasonable time after the paid period (we will venture to suggest, but not so deciding), in which to begin production or forfeit their lease. In this connection see section 153, p. 246, the Law of Oil and Gas (3d Ed.) vol. 1, by Thornton. See, also, *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439, 76 N. E. 1006; *Ind. Nat. Gas & Oil Co. v. Beales*, 166 Ind. 684, 76 N. E. 520, and cases cited therein.

The following is from *American Window Glass Co. v. Ind. Nat. Gas & Oil Co.*, 37 Ind. App. 443, 76 N. E. 1007, 1008:

"It will be noticed that the leases under which appellee is claiming gave to it certain expressed rights 'for a term of 12 years, and so long thereafter as petroleum, gas, or mineral substances can be produced in paying quantities, or the payments hereinafter provided for are made according to the terms and conditions attaching hereto.' This language is said to be ambiguous and uncertain as to meaning. This is true, but the ambiguity is caused by the use of the word 'or' instead of 'and,' thereby subjoining the stipulation, 'payments hereinafter,' etc., as an alternative. This was not the intention of the parties. It would be unreasonable to suppose that in one breath they would be so careful in fixing the time when the leases were to expire and in the next undo it all by stipulating for a nominal annual payment to run indefinitely. The 12-year clause was incorporated into the leases for a purpose, and it is the duty of the court to so construe the contracts as to give them effect, if it can be done consistent with the rules of law, to the end that the intention and purpose of the parties may be effectuated. To our minds the language of the leases last above quoted evidences an intention on the part of the lessor to grant to lessee the exclusive right for the term of 12 years to operate upon said land for petroleum, gas, etc., or the right to delay such operation for such term by paying a certain stipulated annual sum as compensation for such delay; but, in case lessee should in the meantime explore such land and procure the granted product in paying quantities, while this condition existed the lease would continue, although it may go beyond the limit of the 12-year period. The evident intention of the landowner was to have his land developed, and the lessee by the 12-year stipulation in the leases is given an agreed fixed time within which to develop the land and provide a way of utilizing the mineral substances thus obtained. Therefore, in our opinion, had the landowners, at the end of the 12-year term, notified appellee that they would not receive any further payments, and refused to accept the same, and before payment to the bank gave it notice not to receive any payments for their use and benefit on account of these leases, the rights of appellee under the leases would have terminated. *American Window Glass Co. v. Williams*, 30 Ind. App. 685, 66 N. E. 912; *Indiana Natural Gas & Oil Co. v. Grainger*, 33 Ind. App. 559, 70 N. E. 395; *Western Penn. Gas Co. v. George*, 161 Pa. 47, 28 Atl. 1004; *Cassell v. Crothers*, 193 Pa. 359, 44 Atl. 446; *Murdock-West Co. v. Logan*, 69 Ohio St. 514, 69 N. E. 984; *Brown v. Fowler*, 65 Ohio St. 507, 63 N. E. 76; *Northwestern, etc., Co. v. City of Tiffin*, 59 Ohio St. 420, 54 N. E. 77; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. The facts here show that the property owners accepted from appellee the thirteenth advance annual payment, in the same amount and for the same purpose as theretofore paid by appellee under its leases; that they acknowledged such payment by executing a receipt therefor, which receipt includes the statement, 'Which payment continues said lease in force for another term.' In our opinion this transaction alone would not be sufficient to extend such leases for an additional term of 12 years, but it is sufficient to constitute a waiver by the landowners of the definite time of termination therein fixed. It was therefore a waiver of their right to claim a forfeiture of the leases at the end of the 12-year period, and effective to require notice to the lessee and a reasonable time thereafter to comply with the terms of the lease before forfeiture. 'There is no claim of fraud or bad faith any-

where in this deal whereby the landowners were overreached or induced to grant such waiver. It must be presumed that they accepted the thirteenth payment with full knowledge of all the facts, as well as its legal effect. They were at liberty to insist upon a termination of the leases according to their terms or to waive such stipulations. For a valuable consideration they chose the latter. By their own voluntary choosing they must be content. Therefore, to give the transaction the force we have ascribed to it does not take away from the landowners the right to declare a forfeiture of such leases; but before they would be entitled to such forfeiture, under the decisions of our Supreme Court applicable to this special class of contracts, they must give appellee a reasonable time in which to develop the lands after notice of such intention. *Consumers', etc., Co. v. Littler*, 162 Ind. 320, 70 N. E. 363; *Consumers', etc., Co. v. Worth*, 163 Ind. 141, 71 N. E. 489; *Consumers', etc., Co. v. Ink*, 163 Ind. 174, 71 N. E. 477; *La Fayette Gas Co. v. Kelsey*, 164 Ind. 563, 74 N. E. 7; *Indiana, etc., Co. v. Beales* (Ind. Sup.) 76 N. E. 520."

Our purpose in this discussion is to show the nature of this five-year term of limitation. The effect of the covenant whereby the lessors granted and demised to the lessees, for them to have and to hold for the term of five years, or as long thereafter as oil was produced in paying quantities, would not have the legal effect of fixing a time when this contract should become null and void, and end ipso facto, and which could only be renewed and extended by a contract of equal force and dignity with the original lease; but that its only effect was to fix a time when the lessors could end the payment of rents and force production or a forfeiture of the lease. These were options and privileges granted the lessors which they could waive either by receiving of the rents or any other acquiescence or waiver, either verbal or in writing, and bear in mind all done during the term of the lease.

In the case of *Pyle et al. v. Henderson et al.*, 65 W. Va. 39, 63 S. E. 762, is a case where there is a strong analogy between the facts, and is absolutely in point in the matter of principles of equity elucidated, applied, and put in force. In the cited case the lessor leased to the lessee lands for oil production. The lease provided that a well must be completed within three months from the date of the contract, or in lieu thereof, the lessees agreed to pay the lessor \$15 for each three months' delay, payable in advance until such well was completed. No well was put down and the commutation money was not paid.

The lease was for five years, or as long thereafter as oil was found in paying quantities. The date of the lease was February 13, 1897, and on May 5, 1897, the lessor made another lease to C. E. Pyle, one of the plaintiffs in error in the case. Shortly after the first lease was taken the lessees found the title defective, as other parties owned some interest in the land. At the time they took the lease, they knew nothing of this defective title. The lessees in the first lease went to their lessor, who, at the time of the giving

of the lease, knew the title was defective, but did not notify the lessees, and demanded a perfecting of the title. He agreed to do so, and agreed for them to advance the money for the expense of perfecting title, and the expenditure to be applied upon the payments. The lessor procured one of the outstanding interests, but not the others. The parties that took the second lease had knowledge of the prior lease. The lessor further agreed, during the course of the trouble over the effort to perfect the title, that there should be an extension of time. It appears from the record also, that at the time of taking of the lease a certain amount of bonus was paid to the lessor by the lessees.

The lessees in the first lease did not enter upon the lease, nor make any offer to do so, and made no development. The second lessees did enter upon the lands, and developed oil. It was held in the suit that an equity had arisen in favor of the first lessees, under the implied warranty of title and by reason of the defective title, and by reason of the giving of the second lease during the life of the lease, and by reason of the specific and implied promises of the lessor for extension of time made during the lifetime of the lease, and had the effect of extending the life of the lease. The court held in favor of the first lessees, entered a decree canceling the second lease, and ordered an accounting for the production. They held, in this case, that the lessees in the first lease had a warranty for quiet enjoyment implied in an oil lease, in support thereof citing *Headley v. Hoopen-garner*, 60 W. Va. 626, 55 S. E. 744.

The legal contentions of the parties under the two conflicting leases are set out in the opinion as follows, to wit:

"The lessees under the first lease neither drilled a well within three months nor paid the money in place of it stipulated in that lease. For the second lease it is contended that such failure of itself caused the death of that lease; that it would work this result without any act on the part of the lessor declaring a forfeiture, even had the second lease not been made; that Bunfill could have remained quiet, done nothing to manifest an intent to insist upon the death of the lease, and it would have come to its end absolutely from such failure alone; that the 'paper is self-destructive.' It is said the document contains no words calling for an act declaring a forfeiture to end it. The contention for the first lease is that an oil lease implies a warranty of good title, and as Bunfill did not have the Sindledecker ninth, the title was not good, and work of development could not be safely done, and he could not insist on a forfeiture. Counsel for the second lease say that there is no place for forfeiture, as the first lease was at an end. So much is this so that the end of the lease, its death from want of compliance with its terms, could not be waived, and that the second lease could have no effect as a declaration or act of forfeiture. That the land had been already freed from the first lease, without the second lease. That nothing but a new lease to the first lessees would do. Those claiming under the first lease say that, as Bunfill's title was defective, and as he agreed to an extension of time for boring a well or paying money in its place, as below stated, he could

not enforce a forfeiture; that Bunfill was in no condition to enforce a forfeiture. The other side says that it cannot be held that Bunfill was in no condition to declare a forfeiture as there was no forfeiture to be declared, because the lease was dead. This distinction is quite refined and unpractical. What if the instrument does not in terms provide for a forfeiture and contain the word? What the plain meaning of the clause that for failure to drill or pay money the lease "shall become null and void and all rights thereunder shall cease and determine?" The clause was put there for the benefit of the lessor. Another clause, one giving right to the lessee to surrender and be discharged from liability, covered his case. Surely the lessor could waive this clause made for his protection. It cannot be asserted that there is anything in this clause as written preventing Bunfill from dispensing with it. That a forfeiture may be waived by the landlord in favor of a tenant is reasonable and clear from cases cited in *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. 151; *Roberts v. Bittman*, 45 W. Va. 143, 30 S. E. 95."

Both the court below and the appellate court held the contentions in favor of the holder of the first lease. We are unable to see why the principles thus enunciated do not apply in the instant case. They held, in the cited case, that the holder of the first lease was not required to take the risks necessary in development because of the defective title. We can ask, with equal force, why should the lessees in the instant case be required to take their risks of production in the face of a suit threatening to forfeit and cancel their lease? The lease in the instant case contains no specific provision of forfeiture, while the lease in the cited case did have a provision of forfeiture, which they held, however, was nullified by the payment and acceptance of the bonus at the time of the taking of the lease. The cited case bears out our contention, furthermore, that the fixing of a term in a lease does not have the effect of making the lease null at the end of the term, and which term could be extended only by a contract of equal dignity with the original lease, but that, during the life of the term, the lessor may act in such a way as to estop himself from claiming a forfeiture of the lease, and that equity will not follow the rule of strict legal forfeiture, but will declare against a forfeiture if good conscience and right under the facts, circumstances, and conduct of the parties of the lease warrant their so doing.

The case of *Halla et al. v. Rogers et al.* is a case from the Circuit Court of Appeals, Ninth Circuit, dated February 7, 1910, and is rendered by Hunt, District Judge, and found in 176 Fed. 709, 100 C. C. A. 263, 34 L. R. A. (N. S.) 120. It is an appeal by the defendants from an order of injunction pendente lite granted by the United States District Court for the Second Division of Alaska, restraining defendants from interfering with the peaceable possession of the Golden Bull placer mining claim; situated in Cape Nome recording district.

In the cited case, the court specifically held that the lessee was entitled to a reasonable time on and after the expiration of the term of the lease to develop the lease and extract the ore, and for the reason that the lessee had been prevented from developing and extracting the ore by the wrongful acts of the lessor. We quote the following from the last portion of said decision, and which sets forth the reasons upon which the court based the decree:

"The equitable doctrines which are applied every day to other contracts for the sales of lands seem to be those which should here govern. Where a vendor wrongfully prevents a vendee from performing a condition precedent on his part to be performed, under a valid executory contract, courts will not suffer the vendor to escape on the ground of such default occasioned by his own wrong, but will order that if the vendee perform within a time certain, the vendor must convey. So if the lessor unlawfully prevents the lessee from removing from the demised property a house which the latter had the right to remove during the term, by virtue of an agreement in the lease, and the legal remedy be inadequate, the chancellor will, we think, after the expiration of the term, enjoin the lessor from interfering with its removal by the lessee, even though the house belong to the lessor. Were the plaintiffs now working the claim and extracting the minerals, could defendants, in a suit brought by them to oust plaintiffs, or to enjoin them from working and extracting the deposits, prevail against the facts in this suit, if pleaded by the plaintiffs? Would the court declare that plaintiffs were without right within a reasonable time to become the owners of the property which defendants agreed might become theirs? We believe that both questions would be answered in the negative. It is apparent to us that, if the plaintiff be not granted the remedy of injunction, they will be irreparably injured. The awarding of this remedy is not discordant, but is in harmony, with the principles which must guide a court of equity. The lack of case precedent for the application of the principles which we invoke is no obstacle to the granting of the remedy, which is clearly indicated, and, indeed, required, by the undisputed facts."

Equity knows no favorites as between parties—to-day it may grant relief to a lessee under an oil and gas lease; to-morrow a lessor may be asking it for relief from the rigid and specific terms of an oil lease, and, if he is entitled thereto under the general rules laid down for the control of equity why hesitate to give it to him, even though it require a novel application?

The following is from the case of *Kansas Natural Gas Co. v. Harris* (Kan.) quoting from 100 Pac. 73, 74:

"The facts found by the court indicate that the lessees under the Evans lease violated the provisions thereof to such an extent that the lessors had a right to declare a forfeiture and terminate the lease. The language of the instrument itself, however, does not appear to be such as would work a termination thereof absolutely merely because of a breach of its provisions. In such a case it seems to be the rule that some affirmative action on the part of the lessor is necessary to accomplish a forfeiture. In 24 Cyc. 1359, it is said: 'The occurrence of a ground of forfeiture does not of itself work a forfeiture. A condition subsequent in a

lease that upon neglect of the lessee to perform his covenants the lease shall determine and be void does not render the lease absolutely void upon a default of the lessee, but merely voidable at the election of the lessor, so that, if he elects to waive the forfeiture, the lessee is bound as though there had been no breach of condition. So, where the statute declares that the lease is forfeited on the occurrence of certain events, it merely means that it may be forfeited by the lessor on such occurrence.' See, also, *Alexander v. Touhy*, 13 Kan. 64. While a lessor may terminate a lease when facts exist which give him that right, the law does not require him to do so. If he prefers to have the lease continue, he may waive the right of forfeiture. The waiver may be in writing or it may be evidenced by conduct which indicates such a purpose. When Dow and Dow made the written request upon the gas company to lay pipe to and furnish gas at the leased premises, neither party had declared to the other that the lease was at an end, and neither party at that time seemed to regard it as terminated. It was competent, then, for them to renew it, and competent for the lessors to waive all past delinquencies on the part of the lessees, and we think the written request and the compliance therewith had that effect. Whatever the prior conditions may have been, the parties by this act renewed the lease and infused it with its original vigor. Nothing occurred after this waiver of the lessors to impair the vitality of this instrument, and at the time of the trial the rights of the lessees thereunder were the same as when they first began furnishing gas in compliance with its provisions. The district court erred, therefore, in declaring it at an end, and ordering that it be canceled on account of delinquencies which had been waived."

As to whether the acceptance by the lessors of the rentals for the fifth year at the beginning of the fifth year would or would not raise such a condition as to place the duty upon the lessors to serve notice upon the lessees that they would not receive further rents after the expiration of the term, and that they would expect immediate operations for production, and, upon the service of said notice, that the lessees would then have a reasonable time, after the expiration of the term, they having paid the rents of the last year, is a question we do not find to be decided directly, but it is our opinion that such acceptance would have such effect.

We have decided, however, that the fixing of the term in the lease does not have the effect of making the relations of the lessors and the lessees such, that the lessors cannot waive the requirement that the lessees have paying production at the end of the term, since it has been held that the acceptance of the rentals for the sixth year would constitute a waiver by the lessors, and, while it probably would not have the effect of extending the lease for another five-year term, it at least would extend it for another year, and, as the authorities herein cited hold, would require notice and demand of performance by the lessors upon the lessees; and, under the

authorities cited, if the lessors, within the period that such notice of performance was required, should declare a forfeiture of the lease and commence suit, this would have the effect of relieving the lessees of performance during the pendency of the suit.

There are cases wherein contracts have been interpreted, and which contracts provide that a well be completed within a certain time, or that rents be paid either quarterly or yearly and that no term was fixed in such contracts as is provided in the one in the instant case; and the courts have held that, after the lessors have accepted one of those payments under such contracts, and then served notice on lessees that they would not receive further rents, and that they would expect the lessees to carry out their contract for the production of oil, then, if the lessees fail, within a reasonable time, to begin such production, that would constitute a forfeiture. But if the lessors served notice on the lessees that they would not receive further rents, and declared the lease forfeited, and began suit of forfeiture that had the effect of deferring necessity of performance until the assertion of forfeiture was withdrawn, and within a reasonable time thereafter.

We cannot see that the fixing of a term in a contract can be of any greater force and gives the lessor any greater right than the one that arises by operation of law in the leases just discussed. We are unable to see why the commencement of a lawsuit within the term, and its prosecution continued, as in the instant case, beyond the term, would not have the effect of raising an equity in favor of the lessees that would at least give them a reasonable time to perform their contract after the ending of said litigation. The fact is, the cited cases hold that even a notification of intention to forfeit, without the bringing of a suit, during the period requiring notice, is sufficient to prevent forfeiture.

It may be suggested that, by the holding in this case, we are setting a precedent that may hereafter be invoked in causes where this court would not be disposed to make an application of it. We find, however, that, in the application of equitable principles, courts, while seeking to make a uniform and consistent application of the principles of equity, always reserve the right to judge the equities that arise from the facts of each particular case, and, hence we admit that courts should, at all times, be careful in extending equitable application to new and novel situations. When, however, the court is convinced that equity, good conscience, and right requires such application, they should not hesitate to make the application. We are dealing with a subject-matter, when interpreting oil and gas leases, that is recognized as peculiar and different in its very nature from the usual transactions in human affairs. The denial of

a lessee of his right to develop oil production under a contract providing for the same raises a question of what are his practicable and reasonable remedies. No one can definitely foretell the result of any effect of development. It may result in a total loss or great expenditure of time and money, or it may result in gains both to the lessee and lessor beyond the dreams of avarice. Why, therefore, should courts deny to one who has a valid and subsisting contract, for the delay in the performance of which he, in no sense, is responsible, the right to pursue and carry out the complete purpose of his contract. A breach of most of the ordinary transactions of men probably can be satisfied by an action in damages, but, even in those cases where it is shown that such would not be adequate, courts of equity will specifically enforce the same if found practicable, and in the instant case we find the remedy quite practicable, and within the power of this or the trial court to grant.

Notwithstanding the great length to which this case has gone, yet we find ourselves unable to resist the temptation to quote the following from *Genet v. Delaware & Hudson Canal Co.*, 136 N. Y. at page 593, 32 N. E. at page 1081, 19 L. R. A. at page 132:

"I know very well that implied promises are to be cautiously and not hastily raised. What they are was very well stated in *Scranton v. Booth*, 29 Barb. 174, in *Allamon v. Albany*, 43 Barb. 38, and in *Booth v. Cleveland Roll. Mills Co.*, 6 Hun, 597. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (*Dermott v. State*, 99 N. Y. 101), and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect (*King v. Leighton*, 100 N. Y. 386)."

What is the position of the defendants in error in this case at this time, and since filing the motion to dismiss this appeal? They are saying by this motion that they do not want this case tried upon its merits. They, in effect, say:

"We do not know if our suit that we filed so long ago was rightly brought or not, and, what is more, we do not care. The suit that we are responsible for is not over; it still is pending, but the contract is now dead. It has expired by the time limit, and now we ask that this appeal be dismissed, without regard to whether or not our suit was rightfully or wrongfully brought."

This is the position the defendants in error are now taking in this law suit. The question is, Will equity permit them to have what they are now asking for? We say No; that good conscience and right denies them any such relief as this they now are asking for by this motion to dismiss this appeal. The law says to them, while they had the legal right, if they saw fit, to file this suit, yet that they took on themselves a risk, if it should be found upon this appeal that their suit was not well grounded in law, and, upon appeal, that the grounds of forfeiture upon which they ask that this contract be canceled are not well taken, then that they be denied the right now to plead lack of performance of this contract, and delay in its performance beyond the time of said contract, which delay can be reasonably attributed to the action of the defendants in error in bringing a suit, which this court now finds was wrongfully brought, and not based on equity. In other words, the court says to them:

"You are not now in a position to ask equity because you have not done equity. You are not now in this court with clean hands. You cannot now plead this delay that has in effect been caused by your own fault, your own wrong."

The following is from *Eastern Oil Co. v. Coulehan*, quoting from 65 W. Va. 541, 64 S. E. 840:

"But suppose we are wrong in our conclusion on the first question, what rights, if any, did the plaintiff acquire by the slightly belated discovery of gas in the Indian sand? It is conceded the Indian sand was not penetrated and the gas gotten there until about 1 o'clock of August 4th, some 12 hours after the 5 years had expired. What is the proper construction of the lease as to time? It is for five years from date and as much longer as oil or gas was produced or the rental paid thereon. If oil or gas was produced within the five years given for exploration, the full term thereof was as surely for as much longer as oil or gas should be produced as it was for the term of five years in which to explore. Failure to produce oil or gas within that time, therefore, while not strictly or technically working a forfeiture of any further right to explore or produce oil or gas, resulted in the same thing to plaintiff, and we perceive no reason why, in a proper case, equitable principles applicable in cases of technical forfeiture should not be applied. The same necessity therefor, in order to prevent a gross injustice, may arise in the one case as in the other. It is said, however, that in contracts of this kind time is of the essence thereof, and this proposition, for which authorities are cited by counsel, is not controverted; but the case we have in hand is one where the plaintiff was legally entitled to the full term of five years given for exploration, without let or hindrances of the lessor. Indeed, the lessee, by the implied covenants of his deed was entitled to the protection of the lessor therein. The evidence satisfies us that, though defendant may not have been guilty of serious breach of the implied covenants of his deed, yet that he was anxious the lessee should fail to get to the In-

dian sand in time, did nothing to aid him, and actually succeeded, by his suggestions, in preventing work on Sunday, and caused a loss of about 12 hours' time after midnight of August 2d, when he had no right of interference, but owed a positive duty to plaintiff to protect it in its rights. The drillers Kenny and Gaffney give it as their opinion that, had they not been thus interrupted, the well could have been drilled into the Indian sand and gas produced from it before the time expired."

The following is from Pomeroy's *Equity Jurisprudence*, Students' Edition, quoting from pages 182-184:

"On the other hand, the maxim now under consideration, 'He who comes into equity must come with clean hands,' is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that, whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf to acknowledge his right, or to award him any remedy.

"The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence. We have seen that in the origin of the jurisdiction the theory was adopted that a court of equity interposes only to enforce the requirements of conscience and good faith with respect to matters lying outside of, or sometimes, perhaps, opposed to, the law. The action of the court was, in pursuance of this theory, in a certain sense, discretionary; and the terms 'discretionary' and 'discretion,' are still occasionally used by modern equity judges while speaking of their jurisdictional and remedial functions. Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that, while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act upon the conscience of a defendant, and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the

maxim, 'He who comes into a court of equity must come with clean hands;' and, although not the source of any distinctive doctrines, it furnishes a most important, and even universal, rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights.

"Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act of inequitable conduct on the part of plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or, at all events, connected with, the matter in litigation, so that it has, in some measure, affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however, gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

We hold in this case that the lessors, the defendants in error, by instituting and continuing the prosecution of the instant case, have raised an equity in favor of the lessees, the plaintiffs in error, whereby the latter are entitled to such reasonable extension of the term of this lease on and after final determination of this suit as is reasonable, and as is right and just. In support of this rule, we cite the following authorities: *Blodgett et al. v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79; *Sitman & Burton v. Lindsay*, 123 La. 53, 48 South. 646; *Elkhart Car Works Co. et al. v. Ellis et al.*, 113 Ind. 215, 15 N. E. 249; *Ind. Nat. Gas & Oil Co. v. Beales*, 166 Ind. 684, 76 N. E. 520; *American Window Glass Co. v. Ind. Nat. Gas & Oil Co.*, 37 Ind. App. 439, 76 N. E. 1006; *Zeigler v. Dailey*, 37 Ind. App. 240, 76 N. E. 819; and *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971 (in this last-cited case a forfeiture was held allowable on grounds of abandonment, and holding that the contract was nil by reason thereof. Herein the facts differ from other cited cases); *New American Oil & Mining Co. et al. v. Troyer et al.*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *La Fayette Gas Co. v. Kelsey*, 164 Ind. 563, 74 N. E. 7; *Consumers' Gas & Trust Co. v. Worth*, 163 Ind. 141, 71 N. E. 489; *Consumers' Gas & Trust Co. v. Ink*, 163 Ind. 174, 71 N. E. 477; *Eastern Oil Co. v. Coulehan et al.*, 65 W. Va. 531, 64 S. E. 836; *Weaver Mining Co. v. Guthrie et al.*, 189 Mo. App. 108, 175 S. W. 118; *Saunders v. Busch-Everett*, 138 La. 1049, 71 South. 153; *Leonard v. Busch-Everett*, 139 La. 1099, 72 South. 749; *Stahl v. Van Vleck*, 53 Ohio St. 136, 41 N. E. 35; *Consumers' Gas & Trust Co. v. Littler*, 162 Ind. 820, 70 N. E. 363; *Bearman v. Dux Oil Co.*, 64 Okl. 147, 166 Pac. 199.

The following is from the last-cited case, quoting from page 152 of 64 Okl., 203 of 166 Pac.:

"Defendants entered into a supplemental agreement with intervenor, that the time during which he should be kept out of possession and prevented from developing the premises under his lease by the plaintiff should be deducted from the period within which, by the terms of his lease, he would have to develop. *Downey v. Gooch*, 240 Fed. 527. This would be so in the absence of such an agreement. *Stahl v. Van Vleck*, 53 Ohio St. 136, 41 N. E. 35."

The following are quotations from cases heretofore cited: Fourth syllabus of case of *Stahl v. Van Vleck*, supra:

"It being agreed that such lease should 'continue and be in force for five years from the date thereof,' and the second party, having commenced operations in good faith to drill for oil in ample time to complete a well within said term of five years, was wrongfully enjoined by the lessor, and the injunction kept alive until after the expiration of the term of five years, held, that the second party is entitled at the close of the litigation to as much time in which to perform his contract as still remained of his term when he was first enjoined."

Second syllabus, *Leonard v. Busch-Everett Co.*, supra:

"A lessor who refused to receive quarterly payments under such a grant, and brought suit to annul the lease on the ground that it was a nudum pactum, put himself in default, and cannot be heard to urge that the lessee had not, *pendente lite*, performed his part of the contract."

Portion of case of *Weaver Mining Co. v. Guthrie*, supra:

"The doctrine we apply in this case is much the same in principle as that applied by the trial court in the injunction suit of this defendant against this plaintiff, from which this plaintiff appealed, to wit, that one person cannot take advantage of the failure of another to do some act required of him when the complaining party has materially hindered or obstructed him in so doing. He cannot profit by his own wrong or what may turn out to be his own wrong. It is a species of estoppel in that the complaining party has induced or compelled the other to do or refrain from doing what he otherwise would or could have done. The appealing of the former suit is merely the means employed by this plaintiff in obstructing and preventing defendant from complying with the terms of her lease. We do not say that every appeal in similar cases would have such obstructing effect as to prevent a forfeiture for a subsequent breach. We so hold under the facts of this case, and affirm the judgment."

Portion of case of *Eastern Oil Co. v. Coulahan*, supra:

"A lessor should not be heard to complain of a default caused by himself, or permitted to take advantage of his own wrong; *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634;

Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *Stahl v. Van Vleck*, 53 Ohio St. 136, 41 N. E. 35; *Hukill v. Guffey*, 37 W. Va. 426, 16 S. E. 544. * * *

"Now on the subject of substantial performance of the contract: There can certainly be no question as to the fact that the plaintiff substantially performed its contract. It had discovered gas in one sand, and was about to find it in a lower sand in still greater quantities, and we cannot say from the evidence that, but for the improper interference by the defendant with its operation, it would not have discovered the gas in the lower sand within the term of five years. Where there has been such substantial performance of a contract, equity may set aside or disregard a forfeiture occasioned by a failure to comply with the very letter of an agreement. 1 *Pomeroy*, § 451, p. 756, citing *Hagar v. Buck*, 44 Vt. 285, 5 Am. Rep. 368, and *Bliley v. Wheeler*, 5 Colo. App. 287, 38 Pac. 603. And this court, in *Railroad Co. v. Triadelphia*, page 517 of 58 W. Va., page 511 of 52 S. E., recognizes the doctrine announced in *Henry v. Tupper*, 29 Vt. 358, opinion by Chief Justice Redfield, that relief may be granted in equity even where the condition is for the performance of collateral acts."

Syllabus of *Consumers' Gas & Trust Co. v. Ink*, supra:

"1. Where, under a lease of oil lands, the owner had an option to require the lessee to drill for gas or oil within a reasonable time by claiming a forfeiture, or to accept a certain sum annually for delay, the acceptance of such sum annually in advance for several years precluded the lessor from claiming a forfeiture before the year in which the last payment made for a postponement of operations had expired."

"2. Where a lessor of oil lands demanded a forfeiture of the lease for the lessee's failure to drill for oil at a time when she was not entitled to such a forfeiture, such demand was ineffectual, as a notice to the lessee to start operations, the claim of forfeiture being equivalent to a denial of the lessee's right thereafter to enter the premises for the purpose of conducting such operations."

Same case, portion of opinion:

"It is very clear that appellee was not entitled to a forfeiture before the agreed term of postponement had expired, and a demand of forfeiture at a time when she was not entitled to it was without legal significance. It could not operate as a notice to start the drill, for the claim of forfeiture was equivalent to a denial of appellant's right thereafter to enter the premises for that purpose. Its only effect was to create a state of uncertainty as to appellant's right to proceed under the contract. And appellee, having produced this uncertainty by her own conduct, will be denied a forfeiture for the delay which she probably induced."

Case of *Consumers' Gas & Trust Co. v. Worth*, supra, last syllabus:

"Where a gas lease is for such period as the lessee shall pay the lessor a specified sum annually in advance or until gas shall be found in paying quantities, and the lessor refuses to

accept the annual payment and declares the lease forfeited, the failure of the lessee to thereafter commence development proceedings cannot be regarded as a lack of diligence, entitling the lessor to a forfeiture."

From body of same opinion:

"As to whether appellant should have commenced operations between March 3, 1902, and the day on which this action was commenced, is, under the circumstances, not a question in the case, for certainly appellee, after notifying appellant company that the contract was at an end, was not in a position to insist or expect that appellant should expend money in drilling wells and developing the lands under a contract which she had declared to be forfeited."

The following is from *New American Oil & Mining Co. v. Troyer*, supra:

"Under a contract of this sort parties must act fairly with each other. The landowner must be given a fair opportunity to compel such timely operations as will preserve the underlying oil and gas, and prevent its being mined through wells, on other premises; while, on the other hand, he will not be permitted to take advantage of delays that have been reasonably induced by his own conduct and force a forfeiture for nonperformance. The operator must have a fair chance to perform his contract, *Lafayette Gas Co. v. Kelsey*, 164 Ind. 583, 74 N. E. 7; *Consumers' Gas Co. v. Ink*, 163 Ind. 174, 71 N. E. 477; *Consumers' Gas Co. v. Worth*, 163 Ind. 141, 71 N. E. 489; *Consumers' Gas Co. v. Littler*, 162 Ind. 320, 70 N. E. 863. He has not had a fair chance in this case. If appellees, when they accepted the advanced payment on March 10th, or at some other reasonable time, had given appellants notice that they must drill a well within that quarter, and that no further extension of time would be granted, then we should have quite a different question. This action, however, is brought and prosecuted upon the theory that the failure of appellants to drill a well within the period put an end to their right to drill one at all. This view is erroneous. The peculiar character of the contract, and the conduct of the parties while acting under it, are such, we have seen, as make an action without notice and reasonable time to perform inequitable and unsustainable."

Portion of case of *Lafayette Gas Co. v. Kelsey*, supra:

"Appellee apparently construed the lease or contract as awarding him the right to refuse to accept payments of the well rentals, and thereafter to arbitrarily terminate the rights of appellant under said contract, and proceed to quiet his title to the premises in controversy, without allowing appellant a reasonable time to explore or develop after it had been notified of his purpose to decline in the future all payments of well rentals. This is evident from the facts alleged by him in the second paragraph of his complaint, and further by his acts and declarations as shown by the evidence. Such a construction of the lease we cannot sanction. Had he in June, 1902, when he first decided to terminate the lease, notified or warned appellant that in the future he would de-

cline to accept payments of the stipulated rentals, and had appellant thereafter, under the circumstances, failed to explore the premises within a reasonable time, in order to discover the existence or nonexistence of gas or oil thereunder, then, within the rule asserted in *Consumers', etc., Co. v. Littler*, 162 Ind. 320, 70 N. E. 363, *Same Company v. Crystal, etc., Co.* (Ind. Sup.) 70 N. E. 366, and *Same Company v. Worth* (Ind. Sup.) 71 N. E. 789, a different question would be presented. By the provisions of the contract the rentals were to be due on the 1st of January and July of each year, and it was stipulated that payment thereof might be made within 10 days after maturity, either direct to appellee, or by depositing the same in the Fairmount Bank, at Fairmount, subject to his order. The payment of the July installment of rent appears to have been made within the time prescribed, by appellant depositing the amount thereof in the bank designated, to the credit and order of appellee; hence it was not material whether the deposit was made in lawful money, or in checks or drafts, as it was accepted by the bank, and the amount thereof placed in the credit of appellee, subject to his order, thereby enabling him to draw the money from the bank when he desired. *Yoke v. Shay*, 47 W. Va. 40, 34 S. E. 748; *Friend v. Mallory*, 52 W. Va. 53, 43 S. E. 114."

We quote from *Ross v. Sheldon* (Ky.) 119 S. W. 228:

"Whether or not these misfortunes would be sufficient to legally excuse the lessees from a performance of the contract we express no opinion, but we think they furnish reasons why they were not as diligent as they should have been, and, in an action to cancel the contract, are entitled to weight. And we can readily understand why the institution of this action seriously interfered with and retarded the progress of the work that the lessees had commenced before the suit was brought. We do not think that the lessees should be held accountable for failing or refusing to do anything under the contract after the lessor had brought his suit to have it canceled. The lessees, of course, did not know how this suit would terminate, or whether they would be successful in defeating it or not. So that, if they did any work, expended any money, or lost any time in carrying out the contract, they would do it at the risk of losing the time and money so invested, or with the prospect staring them in the face of having to bring suit to recover the value of the money invested."

The above suit was brought to cancel a lease, and for damages. No injunction was procured. The lessees were in possession, and had operations going for production, and the court held that the commencement of a suit justified the lessees in not pursuing development; then, for a still greater reason, why should not a court grant an extension of a term of a lease where lessor, in possession, brings suit to cancel same, against lessees out of possession.

The above cases cover different facts and different forms of leases. In some of them

there were injunctions, possibly one or two for specific performances, some of them were brought by the lessees, who were in possession under their leases, and in the act of performing same, and injunctions were brought to prevent interference, others were actions for cancellation of the leases, same as in the case at bar, and, in some instances, injunctions were asked in those cases to prevent interference and to preserve rights. In all of them the question of cancellation of the leases was raised upon grounds of forfeiture.

In the case of Elkhart Car Works Co. v. Ellis, heretofore cited, and found in 113 Ind. 215, 15 N. E. beginning on page 249, it was held, in suit to quiet title, the same as in the instant case, that a re-entry by the grantor, and ouster before the breach of the contract or before the expiration of the time of performance, will defeat the right of the grantor to insist upon the forfeiture of the estate. Quoting briefly from said case, it states as follows:

"It would be a flagrant violation of right to permit the grantor of an estate, upon a condition subsequent, to defeat the action by wrongfully preventing the performance of the condition, and the law is not subject to the reproach of permitting such a thing to be done."

Quoting further:

"The breach did not occur until the 1st day of July, 1882, and the re-entry was made on the 1st day of June, 1882. These dates are averred as material, traversable facts, and we cannot disregard them, but must yield them their just force. This requires us to hold that the re-entry took place before there was any breach of condition, for the breach did not occur until after the 1st day of July, 1882, and the re-entry was made on the first day of the preceding month. It is indispensably essential, in order to defeat an estate upon condition subsequent, that there shall be a re-entry, or its equivalent, and there cannot be a re-entry until there has been a breach of the condition. An entry before the time is wrongful, and no rights can result from a wrong. An estate upon a condition subsequent does not fail until there has been a breach of the condition and a demand or re-entry. Both these things must concur to re-vest the title in the grantor."
* * *

"As is well known, conditions subsequent are not favored, and he who undertakes to forfeit an estate held upon such a condition cannot successfully ask that intendments shall be made in his favor."

This suit from which the above quotations are taken was based upon a claim of forfeiture and a deed which provided the following conditions:

"That if the grantees, or its grantees or assigns, shall, at any time within three years from this date, fail, neglect, or refuse to use said real estate in the manufacture of cars for a term of six consecutive months at a time, said real estate shall revert to said grantors."

The same principles laid down and made applicable in the above case are applicable in the instant case. In the cited case, the party bringing the suit made demand and made re-entry on the premises before the time for performance of the conditions subsequent had elapsed. In the instant case, the lessees were out of possession, the lessors were in possession, therefore, re-entry and ouster were not necessary as a preliminary to filing a suit to quiet title, but the wrongful act of the parties was sufficient to defeat the right to maintain the suit upon the grounds of forfeiture, based upon delay in performance, which can be reasonably attributed to the wrongful act of the defendants in error. The authorities that we have heretofore cited hold that the lessees are entitled to free and untrammelled action, without let or hindrance from the lessors, and have a right to demand of the lessor good faith in their relations with them in the execution of the contract.

The lessors are held to be in legal wrong; are held to have infringed the rights of the lessees when they disavowed the contract and began legal action to forfeit the same. In addition to the uncertainty in the developing of oil, and the burdens incident thereto, the lessors, by filing suit, and thereby adding to the difficulties the added uncertainties of litigation, thereby, in right and equity, waived their right to ask performance of conditions subsequent from their lessees, and they thereby relieve their lessees, by such conduct from the necessity of performing the condition or proffering performance during the time said litigation is pending.

To be sure, the fixing of a term in the contract gives the lessor the power to stop payment of rentals, and force explorations by the lessee to develop and test for production. It must also be borne in mind that the lessor, under the covenants, both specific and implied, of his contract, owes certain duties to the lessee before he is in a position to demand his pound of flesh, and one of these duties is that he will not act in such a way as to cast doubt upon the rights of the lessee, by filing lawsuits, and persist in the prosecution thereof, or act in any other manner than in the best of good faith in his relations to said contract and the rights of lessee thereunder, or do that which might amount to an interference with the rights of the lessee to perform, or that the lessee might, from his point of view, reasonably hold to amount to an interference, and which he might deem to effect and destroy his freedom of action in the matter of carrying out the contract according to its strict terms.

For the purpose of getting the reasons for the ruling herein stated another way, we will suppose that, shortly before the suit was filed by the lessors in the instant case, the lessees had decided to begin operations for

production, and had gotten the material and equipment ready and started to go upon the lands covered by this lease, and they had been met at the boundary by the lessors and notified that they would not be allowed to enter the premises; that the lessors held the lease void, and the lessees concluded that they could not go further without the use of force, and, they being out of possession and the lessors in possession, that it would be futile for them to press their efforts further, whereupon the lessees ceased their efforts to enter the land, and commenced a suit for a mandatory injunction or other action amounting to specific performance. To this suit the lessors answered, we will say, setting up grounds for forfeiture, the same as in the instant case. And the trial court had held upon such issues the same as held in the instant case, and had denied the lessees the remedy prayed for, whereupon the lessees appealed. Before a decision was rendered in the supposed case by this court, the term of the lease had expired, and this court had held the same as in the instant case, that the appeal was well taken, and that the grounds of forfeiture contended for to defeat the remedy asked for by the lessees was groundless, in which event would it not be unreasonable for this court to hold that, because the term had expired, the lessees were not entitled to their remedy.

We cannot grasp the reasoning whereby it can be held that the situation would be any different, in the supposed case, than it is in the instant case. The only difference that could exist would be the fact that the lessors commenced suit in the instant case; in other words, were the aggressors in the litigation. The commencement of the suit in the instant case was notice to the lessees that their efforts to perform the contract were not wanted by the lessors. It was notice, furthermore, that they intended to press said litigation to final determination, and that their intention had continued to the present time. We have a right to so conclude, since they have served no notice of intention to withdraw their suit, or ceased demands for forfeiture of the contract. It was notice, furthermore, to the lessees that, in the event they went upon the lands and spent their time, labor, skill, and money in an effort to bring production, and in the event the suit was decided against them, they would lose what they would expend therein.

The following has been held to be the law in regard to lessees making improvements upon leases that are afterwards forfeited. In the case of *Probst v. Bearman*, 76 Okl. 71, 183 Pac. 886, they held the following to be the law in such case:

"The cost of improvements and operations incurred by the holder of an oil and gas lease, purchased pendente lite and with actual knowledge of the adverse claim, and of the purpose of such party to insist upon his rights, and to

obtain redress for the invasion of such rights, will not be deducted, when requiring such holder to account to the successful adverse party for oil and gas produced and sold from the premises."

The law does not require the lessees in an oil and gas lease, where their lease has been attacked in a suit on grounds of forfeiture, that they assume such risks in order to preserve their rights under the contract. It does not matter what the lessees and their attorneys thought about their rights under the contract and their honest and faithful efforts to comply with the same; they had a right to consider the uncertainties of litigation and discount the possibilities of defeat, and that the courts are not always unerring in their judgments, and might hold different from what the lessees and their attorneys might think were their rights.

At the risk of a charge of reiteration, we will state that they were not required to take this risk to preserve their rights, but they had a right to contend in the lawsuit, and let the litigation take its course, and, in the event that they were held right in their appeal they can justly claim upon high grounds of equity, and that they be given an efficient remedy in an effort to protect and preserve their rights, which might otherwise be lost to them.

The plaintiffs in error herein have prosecuted their appeal with reasonable diligence, as we view it, and as shown in the record in this case. They filed their motion to advance this cause, and the same was set down for April 16, 1920. They were required to file their briefs on March 9, 1920, and the defendants in error were given 20 days thereafter. The plaintiffs in error filed their brief February 16, 1920, and on March 2d the defendants in error filed their brief. On June 15th the defendants in error asked for permission to file a supplemental brief, which was granted to the defendants in error, and on July 6, 1920, the defendants in error filed their supplemental brief; so, as we see it, there is no neglect on the part of the plaintiffs in error whereby they have delayed the determination of this lawsuit and caused the decision to be rendered after the life of the lease.

We cannot conceive of many wrongs that modern equity will not relieve against. The breadth and scope of equity powers and the variety and multiplicity of their exercise is well stated by Pomeroy. In the early days of equity jurisprudence, equity acted in personam, and not in rem. But it has broadened its remedies in these later days. See Pomeroy's *Equity Jurisprudence*, Students' Edition, pp. 206-10:

"This ancient quality in the operation of equitable remedies has been greatly modified by various statutes in the United States, which, in some instances, provide that a decree estab-

lishing an estate, interest or right of property in the plaintiff shall execute itself, shall be of itself a muniment of title, by divesting the defendant of the interest and vesting the same in the plaintiff, without any conveyance or other instrument of transfer. The decree alone, being on record, operates as a sufficient security of the plaintiff's right as adjudged. In other instances, an officer of the court, commissioner, master, or referee is authorized to carry out the provisions of the decree by executing the necessary instruments, which are thereupon the plaintiff's muniments of title, with the same effect as though they had been executed by the defendant himself.

"When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and, so to speak, internal, nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinctive and central principles of the equity remedial system that it deals with property rights—estates, interests, liens—rather than with the mere personal rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of property, in their various grades, from complete estates to liens or charges, is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence—things to be acquired in future—the remedial right is worked out by conceiving of a present ownership, interest, lien or charge, as arising from the executory provisions, or a present possibility which will ripen into such an interest, and by establishing this proprietary right, protecting and enforcing it. The decree, with a few exceptional cases, passes over the personal rights of the plaintiff and the personal obligations of the defendant, deals with rights or interests in property, and shapes its relief by conferring rights, or imposing duties growing out of or connected with some grade of property. Even when the executory contract creates what at law would be a debt, and when the recovery at law would be a general pecuniary judgment, the equitable remedy views this debt as an existing fund and awards its relief in the form of an ownership or of lien upon that fund. A general pecuniary judgment to be recovered from the debtor's assets at large—as an award of damages—is only granted by a court of equity under very exceptional circumstances.

"Another quality of the distinctively equitable remedies, connected with and perhaps growing out of the one last mentioned, is their specific character, both with respect to substance and form. Except in actions to recover possession of land or of chattels ('action of right,' 'ejectment,' or 'replevin,') the legal remedies by actions are all general recoveries of specified sums of money, which may be collected by execution out of any property of the debtor not exempted. The equitable remedies, with a few exceptions, are specific; deal with specific things, land, chattels, choses in action, funds; establish specific rights, estates, interests, liens, and charges in or over these things; and di-

rect specific acts to be done or omitted with respect to these things, for the purpose of enforcing the rights and duties thus declared. Even when the controversy is concerning pecuniary claims and obligations, and the final relief is wholly pecuniary, the equitable remedies are administered by regarding the subject-matter as a specific fund, and by adjudging such fund to its single owner, or by apportioning it among the several claimants. It is the distinctive feature of the system, which gives it a superior efficacy over the legal methods, that it ascertains a rightful claimant's interest in or over a specific thing, land, chattels, choses in action, debts, and even money in the form of a fund, and follows it through the hands of successive possessors as long as it can be identified. The two qualities which I have thus described, that equitable remedies deal with property rights rather than with personal rights and obligations, and that they are specific in their nature, are the peculiar and important features of the system, and give it the power of expansion and of application to an unlimited variety of circumstances, which enables equity to keep abreast with the progress and changing wants of society."

It is therefore the view of the writer of this dissenting opinion that an equity has arisen in favor of the plaintiffs in error by reason of this litigation, and that they are entitled to a reasonable time on and after the final determination of said litigation to enter upon the lands, covered by this lease, for the purpose of exploring and making a test for oil production, if they elect so to do.

(82 Okl. 114)

BLAKESLEE v. YOUNG et al. (No. 12029.)
(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1160—Supreme Court will not, upon stipulation, disregard record and reverse judgment, with directions to find facts.

This court will not, upon a mere stipulation of parties, disregard the record and reverse the judgment, with directions to the trial court to find certain facts.

2. Appeal and error \S 776, 1161 — Supreme Court will, upon motion or stipulation, dismiss appeal or reverse and remand.

Ordinarily this court, upon motion of plaintiff in error, or upon stipulation of the parties, will dismiss an appeal, or, upon confession of error, will reverse and remand a cause.

3. Appeal and error \S 1175(7), 1176(4)—In equity cases, Supreme Court will render or cause to be rendered proper judgment, but will not direct trial court in finding of facts.

But, in an equity case, this court will determine from the record what the facts are itself, and, if satisfied that the judgment of the trial court is clearly against the weight of evi-

dence, will direct it to render judgment in conformity to the findings made by this court; but in no event will this court assume to control the conscience of the trial court, or direct it to say what the facts are.

Error from District Court, Rogers County.

Action between H. W. Blakeslee and Mary L. Young and another. Judgment for the latter, and the former appeals. On motion on stipulation for reversal, with directions to find facts set forth therein. Stipulation denied.

J. Wood Glass, of Nowata, for plaintiff in error.

Holtzendorff & Holtzendorff, of Claremore, for defendants in error.

HARRISON, C. J. This cause comes on upon stipulation of the parties hereto, through their respective attorneys of record, J. Wood Glass, attorney for plaintiff in error, and Holtzendorff & Holtzendorff, attorneys for defendants in error, that the judgment of the trial court shall be reversed with directions to render judgment upon the facts as agreed upon in the stipulation.

Certain things are agreed to be the facts in said stipulation, and the parties, in effect, ask that this court reverse the judgment of the trial court and direct it to find the matters agreed upon in the stipulation to be a fact, or to be the facts, and to render judgment accordingly.

[1] This court will not act upon a stipulation of parties, disregard the record, and assume to direct the trial court to find certain matters to be a fact when this court does not know whether such is a fact. If the parties have agreed upon a settlement, and have settled pursuant to such agreement, then, upon such settlement, this court, upon motion or upon stipulation, will dismiss the appeal, but will not direct a trial court to render a judgment when this court does not know whether it is such judgment as should be rendered or not.

This particular case was an action to cancel a conveyance on the ground of fraud. It was an action which invoked the equity powers of the trial court, and appeals to the equity powers of this court. In such case this court will weigh the evidence as disclosed by the record, and determine from the record here presented whether or not there was fraud, but will not, upon a mere stipulation, assume to direct the trial court to find whether there was or was not fraud, and to render judgment accordingly, until we have first ascertained from the record whether in truth, there was or was not fraud.

[2, 3] Upon specific confession of errors agreed to by the parties this court will reverse the judgment, and remand it for such further proceedings as the parties may elect

to take; or, as above stated, upon either a motion of plaintiff in error to dismiss, or a stipulation agreed to by both parties, the appeal will be dismissed. Or this court, in an equity case, will determine from the record what the evidence shows the facts to be, and, if satisfied that the judgment of the trial court is clearly against the weight of the evidence, will direct the trial court to render judgment in conformity to the findings made by this court, but in no event will this court assume to control the conscience of the trial court, or direct it to say what the facts are.

Stipulation denied.

JOHNSON, McNEILL, MILLER, KENNAMER, and ELTING, JJ., concur.

(82 Okl. 97)

Protest of BENDELARI, GROSS PRODUCTION TAX, 1919. (No. 11190.)

(Supreme Court of Oklahoma. Jan. 8, 1921. Dissenting Opinion Feb. 23, 1921. Rehearing Denied May 31, 1921.)

(Syllabus by the Court.)

1. Statutory provisions.

Section 7302, Revised Laws 1910, provides "all property in this state, whether real or personal, including the property of corporations, banks, and bankers, except such as is exempt, shall be subject to taxation."

2. Taxation §6—State tax may be imposed upon property of agent of government.

No constitutional implications prohibit a state tax upon the property of an agent of the government, merely because it is the property of such agent.

3. Taxation §6—In absence of action by Congress, state may levy property tax on property of a corporation which is the agent of the United States.

Although a corporation may be an agent of the United States, the state may levy a property tax upon its property, and, when Congress has not interposed to protect said property from state taxation, said taxation is not obnoxious to that objection.

4. Taxation §188—Property with situs within state not exempt from state taxation, though exclusively used in government contract work.

Property which has acquired a situs within the jurisdiction of the state is not exempt from taxation by the state simply because it is exclusively used by the owner in carrying out a contract with the government.

5. Taxation §121—Gross production tax not a tax on earnings of producers of mining ore, but upon property within state.

The gross production tax provided for by chapter 39, Session Laws 1916, which provides that said tax shall be in lieu of all other

taxes upon said property, and further provides that, if the tax assessed is greater than the amount said property would be subject to upon ad valorem basis in the tax district where it is situated, the state may lower the rate in accordance therewith, is not a tax upon the earnings of the producer of mining ore, nor upon its right to engage in business, but is a tax upon the producer's property within the state.

Kane and Miller, JJ., dissenting.

Appeal from State Board of Equalization.

Proceeding before the State Board of Equalization on the protest of A. E. Bendelari, agent, concerning the gross production tax for the year 1919. The protest was overruled, and the agent appeals. Affirmed.

Ray McNaughton and A. C. Wallace, both of Miami, for appellant.

S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for the State.

MCNEILL, J. This controversy arose by A. E. Bendelari, Agent, making returns to the State Auditor of the amount of gross production of lead and zinc mining ore produced from certain mines for the quarter ending the 1st of April, 1919. The returns embraced 18 separate and distinct leases, and a separate return was made for each lease and included the payment to the State Auditor of the tax as required by section 1, chapter 39, Session Laws 1916, in sums ranging from \$12 to \$450 upon each lease. At the time of making the return and paying said amounts to the State Auditor notices were filed with the Auditor that the payment on each lease was paid under protest. Thereafter, as provided in chapter 39, the protest was submitted to the State Board of Equalization upon an agreed statement of facts to determine the following questions, to wit:

First. Whether or not the ore produced from said lease is subject to a gross production tax.

Second. If the gross production tax is illegal, are the concentrating plants and the tangible property of the lessee which is placed upon said lease subject to be taxed on an ad valorem basis?

Upon said agreed statement of facts, the State Board of Equalization overruled the protest filed by said company, and disallowed the same. From said order, the agent has appealed, and the same is now before this court for consideration.

We will consider the second question first: Whether the concentrating plant and all tangible property of the appellant which would include the ore at the pit's mouth is subject to an ad valorem tax. The plaintiff in error is not the owner of the land from which the ore is produced, but is producing the same under the terms of separate mining leases upon each tract of land. The lands were patented by different members of the Quapaw Indians under the Act of Congress ap-

proved March 2, 1895 (28 Stat. 907), and the patents contained restrictions against alienation for a period of 25 years.

It is further agreed that the lease was executed upon authority of the Act of Congress June 7, 1897, which provided, in substance, as follows:

"The allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes."

The act further provides:

"That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or disability, any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased, in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him." 30 Stat. 72.

It is admitted that, as to the lands upon which the leases or a part of the same are executed, the Indians have been considered incompetent, and the royalty is paid to the Secretary of Interior and disbursed by him; that other Indians who executed their leases were competent under the Leasing Act of June 7, 1897, and said leases were not approved by the Secretary, nor has the Indian ever been declared incompetent under said act, nor were the royalties paid to the Secretary for the Indian.

It is further agreed that the agent owned concentrating plants and other tangible property upon each lease, and the same was used exclusively for producing ore from each lease. It was further agreed that the agent had made no return of its property for the purpose of taxation upon an ad valorem basis, and had paid no tax to the state upon any of the property situated upon said lease upon an ad valorem basis for the year 1919.

It will therefore be seen that there is no controversy in this proceeding between the state and the allottee or the Indian, and there is no attempt to tax any of the Indian's property, nor the royalty that he has received, or is to receive, from the mining lease.

[1] The plaintiff in error, however, contends that the concentrating plant, the machinery or ore at the pit mouth, and all tangible property owned by the plaintiff in error is not subject to taxation for the reason it is an attempt to impose a tax upon a federal agency or upon the means and instrumentality by which the government was performing its duty, right, and obligation to its Indian wards in the operation of restricted lands for mining purposes. With this contention, we are unable to agree. Section 7302, R. L. 1910, is as follows:

"All property in this state, whether real or personal, including the property of corpora-

tions, banks and bankers, except such as is exempt, shall be subject to taxation."

This property, being tangible property, is, by virtue of this provision of the statute and of the decisions of this state, subject to taxation, unless it is exempt by reason and by virtue of the same being used in operating a mining lease upon the land of restricted Indians over which the government has superintending control. We have been unable to find any case where such exemption has ever been sustained by any state court or the Supreme Court of the United States. The question has been before the Supreme Court of the United States on many occasions, and their uniform holding has been that an exemption from taxation of a federal agency does not extend to property of the agent.

[2] One of the numerous cases decided by the Supreme Court of the United States is the case of *Union Pacific Railroad v. Wm. S. Peniston* (18 Wall. 5-50) 21 L. Ed. 787, the third and fourth syllabus is as follows:

"3. The property of the Union Pacific Railroad, although the corporation was created by Congress, and the company is an agent of the general government, designed to be employed and actually employed in the legitimate service of the government, both military and postal, is not exempt from state taxation.

"4. No constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such agent."

The court in the opinion used the following language:

"It is therefore manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform."

The Supreme Court of the United States in the case of *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740, in the body of the opinion, stated as follows:

"As to that portion of the argument which claims that, even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & Northern Railway v. Fisher*, 116 U. S. 28, and *Mariacopa & Phoenix Railroad v. Arizona*, 156 U. S. 347, in which it was held that the property of railway companies traversing Indian reservations are subject to taxation by the states and territories in which such reservations are located.

"But it is urged that the Indians are directly

and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed, by the Legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.

"But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *Erie Railroad v. Pennsylvania*, 158 U. S. 431. There the state of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that state, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a reference to the amount of the tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company, and thus, in effect, become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burthen on interstate commerce. A similar view was taken in the case of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, where a tax imposed by the state of Kentucky on the intangible property of a company which owned and maintained a bridge over a river between two states was contended to be objectionable as constituting a burthen upon interstate commerce, but it was held that the fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, and thus be a burthen on interstate commerce, was too remote and incidental to make it a tax on the business transacted. *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185.

"The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians, and not on the cattle belonging to third parties. * * *

"The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that, as such a tax is too remote and indirect to be deemed a tax or burthen on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress."

[3, 4] The Supreme Court of U. S. in the case of *Central Pacific Railroad v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 908, stated as follows:

"Although a corporation may be an agent of the United States a state may tax its property, subject to the limitation pointed out in *Railroad Co. v. Peniston*, 18 Wall. 5."

In the body of the opinion, they announced the following rule:

"No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection."

In the case of *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801, it was stated:

"Property which has acquired a situs within the jurisdiction of the territory of Porto Rico is not exempt from taxation by the territory simply because it is exclusively used by the owner for carrying out a contract with the government."

In the case of *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234, the court stated:

"But it is insisted that the statute, rightly understood, prescribed only an ad valorem imposition on the personal property owned by appellant—the coal at the pit's mouth, which is permissible, according to many opinions of this court."

In the case of *Indian Territory Illuminating Co. v. State*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779, upon the question of tangible property being taxable stated as follows:

"It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid."

It is contended, however, that the Supreme Court of the United States held such property was not subject to taxation in the case of *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234, but such a contention is not supported by the syllabus in the case nor from a reading of the opinion in the case. The syllabus indicated the only question involved in the case and is as follows:

"The gross revenue tax imposed by Act Okl. May 28, 1908, § 6, upon coal miners or producers equal to a specified percentage of the gross receipts from the total coal produced, which shall be in addition to the taxes levied and collected upon an ad valorem basis upon such mining * * * property and the appurtenances thereunto belonging, is an occupation or privilege tax."

It can be readily seen that the only question involved in that case was the gross production tax provided by the act of May 28, 1908 (Laws 1907-08, c. 71), which was a tax in addition to the ad valorem tax; and in referring to whether the coal at the pit's mouth was subject to taxation, the court stated as follows:

"But it is insisted that the statute, rightly understood, prescribed only an ad valorem imposition on the personal property owned by appellant—the coal at the pit's mouth—which is permissible, according to many opinions of this court. *Thomson v. Union P. R. Co.*, 9 Wall. 579, 19 L. Ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 908, 16 Sup. Ct. Rep. 766; *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740, 18 Sup. Ct. Rep. 340."

This is conclusive that the question of taxing the tangible property of the defendant upon ad valorem basis was recognized in that case. It is further contended that the *Indian Territory Illuminating Oil Co. v. State*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779, supports the contention that the tangible property of lessee owning a mining lease upon the tribal lands of Osage Indians was not subject to taxation. In that case there was no issue except the question of whether the lease itself was taxable, and the Supreme Court of the United States held that the lease itself was not subject to taxation. The opinion recites that the lessee had returned for taxation its tangible property in the sum of \$50,000, and there was no contention that said property was not taxable. It was not even contended by the lessee that the tangible property, which consisted of derricks, casing, pipe line, etc., used in operating said Osage lease, was exempt from taxation. The quotation copied above discloses that the only question was whether the lease itself was taxable.

It is further contended that this question was settled by the Supreme Court of the United States in the case of *Large Oil Co. v. Howard*, 248 U. S. 549, 39 Sup. Ct. 183, 63 L. Ed. 416. No such construction can be placed upon that case as the court simply in a per curiam opinion followed the holding of the court in the case of *Choctaw, O. & G. R. Co. v. Harrison*, and *Indian Territory Illuminating Co. v. State*, supra, and in those cases it was conceded that the tangible property was subject to an ad valorem tax. We think that no such construction can be placed upon any of the cases as plaintiff in error attempts to place upon the same, and that no case can be found wherein the Supreme Court of the United States, or any other court, has held that the tangible property of a party who has a contract with the United States government is by reason of said fact exempt from taxation.

We will now direct our attention to the other question, whether the gross production

tax provided in chapter 39, Session Laws of 1916, is illegal. In doing this, it can best be determined by ascertaining whether the same is a property tax, or a tax upon the earnings of the company, or a license or occupation tax. In determining whether the same is a property tax or a license or occupation tax, we must look to the entire law upon the subject of taxation and the whole method provided for taxation.

Section 7302, R. L. 1910, provides that all property within the state, except such as is exempt, shall be subject to taxation. The Legislature thereafter passed what is known as a gross production tax concerning mining property, and provided that this tax shall be in lieu of all other taxes. The fifth paragraph of section 1, chapter 39, Session Laws, provides as follows:

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals * * * upon the machinery, appliances and equipment used in and around any well."

This tax is made in lieu of taxes upon all of the property except the real estate which is covered by the lease, and except the ore on hand on the date the property is assessed for general ad valorem taxes, and provides these two classes of property shall be taxed as other property within the taxing district in which said property is situated at the time. Paragraph 6 then provides that:

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated."

The paragraph further provides that the State Board of Equalization may lower or raise the rate to conform thereto. The force and effect of this provision of the law is to tax the property upon an ad valorem basis, and if the producer considers that the amount he pays in the way of a gross production tax at the rate provided for in said section is greater than his property would be if taxed to him upon an ad valorem basis, he may submit proof of this question to the State Board of Equalization, and the State Board of Equalization may reduce the rate, and thereby prevent him from being discriminated against. In other words, there shall be no discrimination in the taxation of this class of property from other classes of property that is taxed upon an ad valorem basis. It is conclusive that the intent of the Legislature was to make this tax a property tax, and based upon the valuation of the property at

the same rate as other property, and the same must be considered a property tax. It is simply a method to arrive at a property tax, and in its final analysis it is nothing more nor less than a property tax.

The identical question was presented to the Supreme Court of Minnesota in the case of *State v. U. S. Express Co.*, 114 Minn. 346, 131 N. W. 489, 37 L. R. A. (N. S.) 1127, the court there stated as follows:

"The gross earnings tax provided by R. L. 1905, §§ 1013-1019, is not a tax upon the earnings of express companies, or upon the companies, or their right to engage in business, but is a tax upon their property within the state."

An appeal was taken from a decision of the state court to the United States Supreme Court, being entitled *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, and the court there stated as follows:

"A state may not burden interstate commerce by taxing its commerce, but it may measure the value of property of a corporation engaged in interstate commerce within the state by the gross receipts, and impose a tax thereon if the same is in lieu of all taxes upon the property of such corporation."

In the body of the opinion, the court stated as follows:

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property of a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697. See *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is now without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. * * *

"The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. In this connection, the language of Mr. Justice Peckham in *McHenry v. Alford*, 168 U. S. 651, 671, while it was not necessary to the decision of the case, is nevertheless apposite: 'When it is said, as it is in this act, that the tax collect-

ed by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings. * * * Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitability of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent thereof, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.

"We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo v. Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made. The statute embraces receipts from all the business done within the state, including much which is purely local.

"Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state."

[5] If we apply the same reason to the facts in the case at bar, it would seem that the state in good faith has attempted to place a tax upon the property of those engaged in mining, and has adopted this method and means in lieu of the ad valorem tax, and that the same should be a property tax, based upon the value of the property, and be a property tax. There is no contention in this case that the tax imposed is larger in any respect to the value of the tangible property of the company upon the lease, subject to taxation, than if it was assessed upon an ad valorem basis at the same rate other property in the same taxing district is assessed at. We must therefore conclude that the same is not a tax upon the earnings of the company, but simply a tax upon the property of the producer that is subject to taxation.

When the state has provided this method of taxation, and provided that the tax shall be in lieu of all other taxes, and has placed around the taxpayer, the safeguard that if the rate of taxation is greater than if paid upon an ad valorem basis, the State Board of

Equalization may reduce the rate, certainly with this provision in the law there can be no contention that the producer is being discriminated against, nor that the state is attempting to exact an exorbitant tax from him.

It is contended, however, that the Supreme Court of the United States passed upon a similar statute in the case of *Choctaw, O. & G. Ry. Co. v. Harrison*, supra, and held the same invalid, but in this we cannot agree. The only question before the Supreme Court of the United States in that case was the construction of the gross production tax under the act of May 26, 1908, which act provided that the gross production tax should be in addition to the ad valorem tax. Since the rendition of that opinion the Legislature of this state has not only revised the gross production tax, but also the method of taxing the property of the producer. The Legislature has not only provided that the gross production tax under section 1, chapter 39, Session Laws 1916, shall not only be in lieu of all other taxes, but has placed a further safeguard around the taxpayer that will prevent him from being discriminated against in the payment of his tax, and has also provided that, if the tax amounts to more than it would upon an ad valorem basis, the tax shall be reduced in accordance therewith, thereby not only changing the statute in the manner of taxation, but the result is different. The only way that case could apply to the facts in the case at bar would be to hold, after the Supreme Court of the United States has declared one tax law illegal, thereafter the state would be forever foreclosed from amending its law in the future, and be prevented from passing future laws to assess property in accordance with the opinions that they have rendered.

It may be contended that the state in this instance is attempting to tax the lease because the statute provides that the tax shall be in lieu of all other property, including the lease, but in this we cannot agree. The statute is very broad, and provides that the tax shall be in lieu of taxes on all property subject to taxation. Now if the lease is not taxable, the taxpayer has a right to submit to the State Board of Equalization a list of his property that is or would be subject to taxation upon an ad valorem basis, and the value thereof, and if the tax paid is greater than the taxpayer would pay if taxed as other property, the state has a right to reduce the rate.

It is unnecessary to decide whether any of the leases owned by plaintiff in error would be taxable, for that question is not essential in determining this appeal. The plaintiff in error did not file his complaint with the State Board of Equalization, asking that the rate be reduced. He did not ask that the State Board of Equalization ascertain what property he had upon said leases that would

be subject to an ad valorem tax, and request, if the gross production tax amounted to more than the plaintiff in error's tax would be if his property was assessed upon an ad valorem basis, that the same be reduced. If he did so, and the State Board refused to reduce the rate for the reason they considered the value of the lease in determining the value of his property, then that question would be material. Until that is done it is unnecessary to pass upon that question.

We are unable to tell from the record in the instant case the amount of property, including the concentrating plant, and other tangible property upon each lease, or the value of the same; therefore we must presume that, if plaintiff was paying a tax upon an ad valorem basis, his tax would be as great as the gross production tax he is now paying, for the reason he does not complain or contend that his tax is higher than it would be if his property was taxed as other property. Under those circumstances he has no complaint to make, except to escape all taxes within that district. The statute has provided plaintiff in error with a plain and speedy remedy, and afforded him adequate relief, and he has failed to take advantage of the same, but in the instant case he has simply tried to defeat all of his taxes. His complaint is very similar to the complaint of the Central Pacific Railroad Company, and in passing upon their complaint the Supreme Court of the United States, in the case of *Central Pac. R. R. Co. v. State of California*, 162 U. S. 91 (16 Sup. Ct. 766, 40 L. Ed. 903), the court in the last syllabus stated as follows:

"When it is considered that the Central Pacific Company returned its franchise for assessment, declined to resort to the remedy afforded by the state laws for the correction of the assessment as made if dissatisfied therewith, or to pay its tax and bring suit to recover back the whole or any part of the tax which it claimed to be illegal, its position is not one entitled to favorable consideration; but without regard to that, the court holds, for reasons given, that the state courts rightly decided that the company had no valid defense to the causes of action proceeded on."

We therefore conclude: First, that all the tangible property owned by plaintiff in error which was used in operating the Indian lease is subject to an ad valorem tax; second, that the gross production tax provided by chapter 39, Session Laws 1916, is not a tax upon the earnings of the producer of mining ore, or upon his right to engage in business, but is a property tax, based upon the property and the value thereof within the state, and is not an illegal tax.

After reaching this conclusion, under the facts in this case, the plaintiff is not entitled to any relief, and the State Board of Equalization did not err in overruling the protest of said plaintiff in error, and the judgment

of the State Board of Equalization is therefore affirmed.

RAINEY, C. J., HARRISON, V. C. J., and PITCHFORD, JOHNSON, HIGGINS, BAILLEY, and COLLIER, JJ., concur.

KANE and MILLER, JJ., dissenting.

KANE, J. I dissented from my Brothers when the opinion in this case was handed down without formally stating the grounds of my dissent. A petition for rehearing having since been filed, which is still (February 23, 1921) pending, I have decided upon reflection to file a dissenting opinion for the following reasons:

1. The question involved herein has been correctly decided contrary to views expressed in the majority opinion in the case of the Protest of the Skelton Lead & Zinc Company's Gross Production Tax, 1919, recently handed down, 197 Pac. 495, and in which a petition for rehearing has since been granted.

2. In the former case the Attorney General confessed the illegality of a gross production tax levied under the precise circumstances as the tax assailed herein, to wit: Where the leases were made by Quapaw Indians not declared incompetent at the time the leases were made, but who were later declared incompetent by the Secretary of the Interior.

3. The precise federal question herein involved has been definitely decided by the Supreme Court of the United States contrary to the views expressed in the majority opinion in several well-considered cases.

4. As in my judgment it would be inimical to the business involved, as well as to the interest of the state, again to open for discussion a federal question which seems to me to be definitely put at rest by repeated decisions of the highest court in the land having jurisdiction thereof, I deem it to be my duty to the members of the court who have come onto the bench since the majority opinion was handed down to file a dissenting opinion, in order that they, as well as the members who participated in the majority opinion, may be advised of my views in a definite way, before passing upon the pending petition for rehearing.

In the Matter of the Protest of the Skelton Lead & Zinc Company's Gross Production Tax, 1919, the protest of the company questioned the validity of the gross production tax as applied to leases made by the Quapaw Indians under three different circumstances as follows:

First. Leases made by Indians who have never been declared incompetent by the Secretary of the Interior under the authority to do so conferred by that part of the provisions of the act of Congress allotting the lands of the Quapaw Indians in severalty.

Second. Leases made by Indians not declared incompetent at the time the leases

were made, but who were later declared incompetent by the Secretary of the Interior.

Third. Indians whose leases were made after they were declared incompetent, such leases being at all times subject to the supervision and control of the Department of the Interior.

In the case at bar the taxes, as we have seen, were levied under the second set of circumstances. In the original opinion in the Skelton Lead & Zinc Company Case, supra, which upon petition for rehearing was withdrawn and replaced by another opinion reaching a contrary conclusion (In re Skelton Lead & Zinc Company's Gross Production Tax, 1919, 197 Pac. 496), the court discussed the question presented for review as follows:

"As the Attorney General in his brief concedes that he is unable to draw any substantial distinction between leases made under the second and third circumstances stated above and the leases made under the circumstances existing in the cases wherein the Supreme Court has heretofore held that the lessees were federal agencies and not subject to taxation pursuant to the laws of the state, it will not be necessary to notice the questions presented under those two subheads. The cases referred to by the Attorney General, which we agree are in point to the effect stated, are as follows: Choctaw & Gulf R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 770; Large Oil Co. v. E. B. Howard, State Auditor of Oklahoma, 248 U. S. 549."

In the case at bar the Attorney General has not filed a brief, for the reason, no doubt, that the cause was tried upon the same agreed statement of facts as the Protest of the Skelton Lead & Zinc Co. Case, supra, and he is still satisfied with his view as to the controlling effect of the Supreme Court cases just cited, and considers them decisive of the case at bar. This, it seems to me, ought to set at rest forever the question involved herein. But in the face of this the court upon its own initiative has undertaken to set forth reasons why the cases just cited are erroneous, and therefore not controlling, and I wish briefly to notice some of the points of distinction pointed out by the court in the majority opinion.

In the first place, without overruling the construction placed upon the present gross production law by this court in Large Oil Co. v. Howard, 63 Okl. 143, 163 Pac. 537, the court holds that, inasmuch as the taxes levied under this act are in lieu of all other taxes, and the act further provides that, if the tax assessed is greater or less than the tax on the property of said producer would be if taxed upon an ad valorem basis, the State Board of Equalization may lower or raise the rate to make the tax conform to the prescribed standard, the law does not impose a tax upon the business of the producer, nor upon his mineral leases, nor upon his mineral

rights, but does, when rightly understood, in effect impose a tax upon the producer's tangible property within the state, which is permissible.

While these are the precise grounds unavailingly urged by the state authorities for upholding the gross production law of 1908 in Railroad Co. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234, supra, and the present law in Large Oil Co. v. Howard, supra, and the other cases cited, the right of the state to tax these federal agencies or their property, it seems to me, does not turn so much on the question, what is the nature of the tax? as upon whether the tax does in truth deprive the federal agency of the power to serve the government as it was intended to serve it; does it hinder the efficient exercise of its power? Union Pacific Ry. Co. v. Peniston, 18 Wall. 5-50, 21 L. Ed. 787.

No matter what the state courts may hold as to the nature of the tax, this still is the federal question, which can be answered only by taking the whole scheme of taxation into account. And the application of this settled principle to particular cases so as not to hedge on the taxing power of the state on one hand or the power of the federal government to protect its own agencies on the other is not without some difficulty. As was said by Mr. Justice Day, in discussing a similar question in United States Express Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459:

"The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a Legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can."

Assuming that these cases, in so far as applicable, state the rule correctly, let us inquire what items of property or elements of value must be taken into consideration by the taxing officers in making the levy under the present act. Section 1 of chapter 39, Sess. Laws 1916, provides that every person engaged in the mining or production of ores bearing lead, zinc, jack, etc., shall pay to the State Auditor a tax equal to one-half of 1 per cent of the gross value of such ores less the royalty interest. Another part of the same section provides that the payment of the taxes thus imposed shall be in full and in lieu of all taxes by the state, counties, cities, townships, school districts, and other municipalities upon any property rights attach-

ed or inherent in the rights to said mineral leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver, or copper, etc., and upon mining rights and privileges for the minerals aforesaid belonging or appertaining to land.

This part of the section unquestionably provides for a straight gross production tax based on the gross value of all the ores, less the royalty, produced by the taxpayer by the use of all the instrumentalities pertaining to his business.

Another part of the same section provides that the State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate herein shall, take testimony to determine whether the taxes herein imposed are greater or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation for the district or districts where the same is situated, including the value of oil, gas, or mineral lease or of the mining or mineral rights, the machinery, equipment, or appliances, used in the actual operation of, in, and around any such well or mine, the value of the oil, gas, asphalt, or any of the said mineral ores produced, and any other element of taxable value in lieu of which this tax herein is levied. The said board shall have power, and it shall be its duty, to raise or lower the rates herein imposed to conform thereto.

Now an analysis of the applicable parts of the act discloses that the first part of section 1 provides for a straight gross production tax equal to one-half of one per centum of the gross value of ores bearing lead, zinc, jack, etc., produced, less the royalty; and that the second part of the act merely makes it the duty of the State Board of Equalization, either upon its own initiative or upon complaint of the taxpayer, to see that the taxes thus imposed are not greater or less than the general ad valorem taxes for all purposes would be upon the property of such producer, subject to taxation, including the value of oil, gas, or mineral lease or of the mining or mineral rights, the machinery, equipment, appliances used in the actual operation of, in, and around such well or mine, the value of the oil, gas, asphalt, or any of the said mineral ores produced, and any other element of taxable value in lieu of which the tax is levied.

Under this act, as I understand it, and as it was construed by this court in *Exchange Oil Co. v. State*, 193 Pac. 999, recently handed down, the State Board of Equalization, in determining whether the gross production tax is greater or less than the general ad valorem tax for all purposes would be on the property of any particular producer or taxpayer, must consider, not only the value of the tangible property of the producer, but

also the value of the mineral leases or mining or mineral rights, if it follows the mandate of the statute. Therefore, assuming that the tax imposed amounts to no more than an ad valorem tax on the property would be, it is fairly obvious that the ruling of the court is in direct conflict with the ruling of the Supreme Court of the United States in *Indian Territory Illuminating Oil Co. v. Oklahoma*, supra, wherein it was held that such leases cannot be taxed either directly or indirectly. The *Illuminating Oil Company Case* did not turn upon the question whether the leases involved were tangible or intangible personal property, or whether the taxes assailed were based upon a gross production or an ad valorem basis. It was conceded that the leases were personal property, but the court held that they were not taxable by the state either as entities or vicariously by taxing the stock of the corporation owning them, because they were the franchise by which the company was authorized to do business with the Indians and to permit the state to tax them would necessarily interfere with an instrumentality through which the United States was performing its duty to the Indians.

"A tax upon the leases," says the learned Justice who delivered the opinion of the court, "is a tax upon the power to make them, and could be used to destroy the power to make them."

In the case at bar, after all is said that profitably can be said in relation to the nature of the tax sought to be imposed by the present act, it still remains fairly obvious that the state Legislature was aiming directly at the receipts of the producer by providing a gross production tax based upon the gross value of all ores bearing lead, zinc, or jack produced, and that the State Board of Equalization has no power to change this basis of taxation; that is, it has no power to change the valuation placed upon the gross production by the State Auditor. If, upon investigation, the State Board of Equalization finds the tax to be too high or too low, measured by the prescribed standard, it adjusts the matter, not by changing the valuation of the gross production, but by changing the rate of taxation. *Exchange Oil Co. v. State*, supra. The result of this is that, whatever the State Board of Equalization finds the rate shall be, the resulting taxation still is based upon the total value of the gross production as found by the State Auditor, and necessarily must be a burden upon the entire business and property of the producer, including, as the statute prescribes, any licenses, leases, or mineral rights operated as a federal agency. A system of this kind cannot be enforced against this federal agency without interfering with an instrumentality through which the United States

(198 P.)

(82 Okl. 106)

is performing its duty to the Indians. *California v. Pacific Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150.

This is the principal vice of the present law as applied to federal agencies. That was the vice of the gross production law of 1908, which it was held could not be enforced against a federal agency in *Railroad Co. v. Harrison*, *supra*. In the present act the Legislature sought to remedy what it conceived to be the defect in the former law by declaring the tax imposed to be in lieu of all other taxation. This, however, in my opinion, was not the defect which made the law invalid, but it was invalid, as I have heretofore pointed out, because by it the state sought to cast an unauthorized burden of taxation upon the entire business franchises and property of a federal agency. And for this reason alone the Supreme Court of the United States in the *Large Oil Company Case* held the present act invalid upon the authority of *Railroad Co. v. Harrison*, and the other cases cited holding previous acts invalid, without noticing the distinction between the different acts so ably and strenuously pointed out by the Attorney General and so stressed in the opinion of the Supreme Court of the state in the *Large Oil Co. Case* and the dissenting opinion prepared by the Chief Justice in the *Protest of the Skelton Lead & Zinc Company*, *supra*, and in the opinion of the majority of the court in the present case.

The Chief Justice in the dissenting opinion in the *Skelton Case* just referred to, and the court in the majority opinion in the case at bar, concede that the question involved in the *Large Oil Co. Case*, *supra*, grew out of the present act, and was precisely the same as the question involved in the case at bar. They seem, however, to be of the opinion that that case is erroneous and not controlling, apparently assuming that the Supreme Court did not notice the real question involved because it did not discuss at length the distinctions pointed out by the state authorities, hereinbefore referred to, between the act of 1908 and the act of 1916. The Attorney General, as we have seen, confesses his inability to distinguish this case and the *Skelton Lead & Zinc Company Case*, *supra*, from the various cases decided by the Supreme Court of the United States. In these circumstances I deem it to be the duty of this court to abide by the decisions of the Supreme Court of the United States on federal questions, trusting that high court to correct on appeal its own rulings many times repeated, if perchance it finds that error has crept into its former opinions.

For the reasons stated, I respectfully dissent from the majority opinion.

I am authorized to say Mr. Justice MILLER concurs in this dissenting opinion.

IN RE UNITED STATES SMELTING, REFINING & MINING CO., GROSS PRODUCTION TAX 1919. (No. 11192.)

(Supreme Court of Oklahoma. March 1, 1921.)

(Syllabus by the Court.)

Case followed.

Affirmed upon authority of *In re Protest of Bendelari, Gross Production Tax 1919*, 198 Pac. 606, decided January 8, 1921 (not officially reported).

Appeal from State Board of Equalization.

Proceeding before the State Board of Equalization on the protest of the United States Smelting, Refining & Mining Company concerning its gross production tax for the year 1919. The protest was overruled, and the Company appeals. Affirmed.

Ray McNaughton and A. C. Wallace, both of Miami, for appellant.

S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for the State.

MCNEILL, J. This is an appeal from the action of the State Board of Equalization in overruling protest filed by the United States Smelting, Refining & Mining Company regarding its gross production tax for the year 1919.

The agreed statement of facts in this case is identical with the agreed statement of facts in the case of *In re Protest of Bendelari, Agent for Gross Production Tax* (decided January 8, 1921, not officially reported) 198 Pac. 606, and the questions for review are precisely the same in both cases.

In these circumstances, the judgment of the Board of Equalization must be affirmed upon authority of *In re Protest of Bendelari Gross Production Tax 1919* (decided January 8, 1921, not officially reported).

HARRISON, C. J., and PITCHFORD, NICHOLSON, and ELTING, JJ., concur.

(82 Okl. 128)

IN RE ST. LOUIS SMELTING & REFINING CO., GROSS PRODUCTION TAX 1919. (No. 11191.)

(Supreme Court of Oklahoma. March 1, 1921.)

(Syllabus by the Court.)

Validity of Tax.

Affirmed upon authority of *In re Protest of Bendelari, Gross Production Tax 1919*, decided January 8, 1921, 198 Pac. 606 (not officially reported).

Appeal from State Board of Equalization.

Proceedings before the State Board of Equalization on the protest of the St. Louis Smelting & Refining Company regarding its

gross production tax for the year 1919. Protest overruled, and the Company appeals. Affirmed.

Ray McNaughton and A. C. Wallace, both of Miami, for appellant.

S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for the State.

MCNEILL, J. This is an appeal from the action of the State Board of Equalization in overruling protest filed by the St. Louis Smelting & Refining Company regarding its gross production tax for the year 1919.

The agreed statement of facts in this case is identical with the agreed statement of facts in the case of *In re Protest of Bendelari*, Agent for Gross Production Tax, decided January 8, 1921, 198 Pac. 606 (not officially reported), and the questions for review are precisely the same in both cases.

Under these circumstances, the judgment of the Board of Equalization must be affirmed upon authority of *In re Protest of Bendelari*, Gross Production Tax 1919 (not officially reported).

HARRISON, C. J., and PITCHFORD, NICHOLSON, and ELTING, JJ., concur.

(82 Okl. 13)

PETITT et al. v. DOUBLE-O OIL CO. et al.
(No. 10101.)

(Supreme Court of Oklahoma. May 17, 1921.)

(Syllabus by the Court.)

Mines and minerals §§58, 59, 77—Abandonment held to automatically terminate oil and gas lease; oil and gas lease held valid; holder of oil and gas lease and lessor held entitled to cancellation of prior lease and accounting.

Where a contract extending an oil and gas lease expressly provides that the grantee shall commence drilling a well for oil and gas upon the premises in 30 days and shall complete the same within 60 days from the date thereof, and, failing to find oil or gas in paying quantities, shall within 6 months thereafter surrender said lease, and deliver to the grantor a good and sufficient release, and the well was commenced and completed within the time specified but the same was a dry hole, and the grantees abandoned the lease, but did not release the same within 6 months or at any time thereafter, but within 6 months attempted to assign the lease to another, and 2 years and 4 months thereafter the grantor executed an oil and gas lease to A., who filed his lease for record immediately, and 6 months after A.'s lease was recorded, the assignee of the grantee in the extension agreement assigned the lease to S., who was attempting to enter upon the premises and begin drilling operations thereon, when this action was commenced by the grantor in the extension agreement and A., the holder of the

oil and gas lease last mentioned, held: (a) The rights of the grantee in the extension agreement and its assigns automatically terminated with the completion of the dry hole and the abandonment of the lease; (b) that the lease to A. is valid and subsisting; (c) that the grantor in the extension agreement and A., the holder of the valid lease, are entitled to have the lease mentioned in the extension agreement canceled and held for naught, and are entitled to an accounting between them and the defendants of the proceeds of all oil and gas produced from the leased premises.

Appeal from District Court, Creek County; Mark L. Bozarth, Judge.

Action by Millie Petitt and others against the Double-O Oil Company and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

F. A. Rittenhouse, of Chandler, and J. H. Stephens, of Okmulgee, and H. T. Walker, Bruce & Brewer, and R. E. Stewart, all of Muskogee, for plaintiffs in error.

T. J. Farrar, of Okmulgee, and Geo. S. Ramsey, Edgar de Meules, Malcolm E. Rosser, and Villard Martin, all of Muskogee, for defendants in error.

JOHNSON, J. This is an appeal from the district court of Creek county; Hon. Mark L. Bozarth, Judge.

This action was commenced on February 27, 1917, by Millie Petitt and J. C. Petitt, as owners, and Spencer Adams, as the holder, of an oil and gas lease, on the following described real estate situated in Okmulgee county, Okl., to wit: The northeast quarter of section 9, in township 14 north, range 14 east of the Indian base and meridian, to set aside a certain oil and gas lease to Double-O Oil Company, dated October 17, 1912.

The cause was tried to the court, and the court made no separate findings of fact, but made a general finding in favor of the defendants, rendering a judgment in their favor, from which judgment the plaintiffs have appealed to this court.

The plaintiff in error Millie Petitt, as a Creek freedwoman, was allotted the above-described real estate. Immediately upon becoming of age, Millie Petitt, then Millie Stephens, deeded this land to her mother, Ella Hadley, September 28, 1912. On October 17, 1912, Ella Hadley executed to Double-O Oil Company an oil and gas lease covering the Millie Petitt allotment, above described, and also the north half of the northeast quarter of section 16, township 14 north, range 14 east, being a part of the Ella Hadley allotment. On December 10, 1912, Ella Hadley, and Wm. Hadley, her husband, re-conveyed to Millie Petitt, née Stephens, the Millie Petitt allotment.

The land herein involved as hereinbefore stated, the N. E. $\frac{1}{4}$ of section 9, township

14 north, range 14 east, was allotted to Millie Pettitt, nee Stephens, and the S. E. $\frac{1}{4}$ of the same section was allotted to her brother, Willie Stephens, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 16, which joined the Willie Stephens' allotment on the south, was allotted to the mother of the parties, Mrs. Ella Hadley.

On October 17, 1912, Ella Hadley, joined by her husband, Wm. Hadley, executed an oil and gas lease to the defendant Double-O Oil Company covering the Millie Pettitt tract, and the Ella Hadley tract, but did not cover the Willie Stephens' tract. The lease recited the consideration of \$1 and other good and valuable considerations, and of the covenants and agreements hereinafter contained, and contained a further provision as follows:

"It is further agreed and understood that the party of the second part is to commence operations in connection with the drilling of a well for oil and gas upon the southeast quarter of section 9, in township 14 north, range 14 east, within 30 days from the date of this lease, and to pursue said operation to completion without unnecessary delay, unavoidable accidents and water conditions to be at all times considered; that if oil or gas be found in paying quantities in the well hereinabove provided for, then the party of the second part agrees to prospect and develop the premises herein leased as soon as practicable, and to protect all lands from waste by other drilling operations. A failure to commence and complete said first or test well on said southeast quarter of section nine, shall render this lease absolutely null and void, but the drilling of such well and the finding of oil or gas therein in paying quantities, and the development of the premises herein leased shall operate as a full payment of all rentals under this lease, saving to the lessor, as herein provided, the one-eighth part of all the oil production, and the \$250.00 per year for each gas well."

It will be observed that a test well was to be drilled upon the Willie Stephens land which lay between the two tracts included in the lease.

No well was commenced on the Willie Stephens allotment until in January, 1913, and a small amount of gas being found on this land, no further development was made, and the premises were abandoned.

The record discloses without dispute that one H. E. P. Stanford was the organizer and president of the Double-O Oil Company, and that he was the party who prepared the Millie Pettitt deed to her mother, and he was the party who prepared and managed the execution of the gas lease from Ella Hadley to the Double-O Oil Company, and also in December prepared and attended to the execution of the deed from Ella Hadley to Millie Pettitt, and he is the sole manager of the Double-O Oil Company, and that company drilled the well on the Willie Stephens allotment. That well was not commenced until some 30 days after the time specified in

the lease. He testified that he secured from Ella Hadley an acknowledgment that the well was commenced within the time, but that the written acknowledgment could not be found at the time of the trial.

After the execution thereof, assignments were made by the Double-O Oil Company to numerous parties of interest in said lease. Stanford testified that the Double-O Oil Company and its several assignees were partners in the lease, and that thereafter the Double-O Oil Company entered into a written extension agreement with Millie Pettitt on December 30, 1913, which agreement was as follows:

"Whereas, on the 17th day of October, 1912, Ella Hadley joined by her husband, William Hadley, made and executed to the Double-O Oil & Gas Company a certain oil and gas lease, covering the following described lands, to wit: The northeast quarter of section 9, township 14 north, range 14 east (amongst other lands) in Okmulgee county, Oklahoma.

"Whereas, since the execution of said lease the above-described tract of land has been by the said Ella Hadley and William Hadley deeded in fee to the undersigned:

"Now therefore, know all men by these presents, that we, Millie Pettitt and T. J. Pettitt, her husband, for and in consideration of the sum of one dollar, and other valuable considerations, the receipt of all of which is hereby acknowledged, hereby ratify and confirm said oil and gas lease, and agree that same may be extended for a period of sixty days from this date upon the following condition; that the said Double-O Oil & Gas Company, its successors or assigns, shall within thirty days from this date commence the drilling of a well for oil and gas upon the land and premises herein described and shall complete the same within sixty days from this date, and failing to find oil or gas in paying quantities shall within six months thereafter surrender said lease and shall deliver to the said Millie Pettitt and T. J. Pettitt a good and sufficient release of said oil and gas lease.

"The Double-O Oil Company further agrees to furnish releases to the said Millie Pettitt and T. J. Pettitt from any parties to whom they may have assigned any interest in and to the above mentioned lease, should they fail to develop oil and gas in the time mentioned above.

"Witness our hands and seals this 30th day of December, 1913. Millie Pettitt. C. J. Pettitt. Double-O Oil & Gas Company, by H. E. Stanford, President. [Corporate Seal.]

"Attest: Harry C. Devinna, Secretary."

The Double-O Oil & Gas Company, as a partner of its several assignees, after procuring the above agreement, entered upon said premises, in pursuance thereof in January or February, 1914, and drilled a dry hole upon the Millie Pettitt allotment, and thereafter moved off all their casing, machinery, property, and effects, and no further efforts were made to develop this allotment for oil or gas from that time until after the commencement of this action (February 27,

1917), and no release was furnished as was therein agreed.

In August, 1916, Millie Pettitt, and her husband, C. J. Pettitt, executed and delivered to Spencer Adams, one of the plaintiffs in error, an oil and gas lease, which lease is still in force and effect.

After H. E. P. Stanford and his partners in this lease had drilled a dry hole on the Millie Pettitt allotment and had wholly abandoned the lease, Mr. Stanford secured from the several partners assignments of their interests, and organized the Hadley Oil Company, of which he was secretary, and afterwards Hadley Oil Company through W. Lusk as president, and H. E. P. Stanford as secretary, on February 3, 1917, assigned the Ella Hadley lease to the defendant in error W. E. Sunday, which was long after the Spencer Adams lease was recorded, and of which lease they had full notice and knowledge.

That said Double-O Oil Company, and its partners, in said Ella Hadley lease, wholly abandoned said lease and said allotment in 1914, and said abandonment continued during 1914, 1915, and 1916, and until the commencement of this action in 1917, and during all of said time no efforts were made by any of them to develop this property for oil or gas.

No oil or gas was produced in paying quantities or at all, by them, and no delay money was paid by them or provided for in the lease; the sole and only consideration for this lease being the diligent and prompt development of this land for oil and gas or either of them.

Some time in the summer of 1914 a gas well was drilled in on the Ella Hadley allotment, and H. E. P. Stanford paid the first gas royalty to William Hadley, who controlled the Ella Hadley lease, Millie's allotment then standing in the name of Millie Pettitt by reconveyance. Millie receiving no part of said first gas royalty, she accepted \$142.85 sent her for 1915 by mistake believing, as she testified, that it was from her mother's estate. Later W. E. Sunday, in 1917, mailed Millie Pettitt, who was still in Texas, a check for gas royalty, and she having learned that no gas was being produced from her land, returned this check, and at the trial counsel for Sunday contended that acceptance of the first check constituted an estoppel to declare a forfeiture of the lease by Millie Pettitt.

Millie Pettitt demanded a surrender and release of said oil and gas lease on August 17, 1916, but no release was made, and on February 3, 1917, the lease was assigned by the Hadley Oil Company to the defendant W. E. Sunday, who took the same with full knowledge of the Spencer Adams lease, and he so testified.

A brief summary of the record discloses that Millie Pettitt, née Stephens, attained her majority on September 4, 1912, and on September 28, 1912, conveyed her allotment

to her mother, Ella Hadley, to be held by her mother in trust, as she and her mother testified, to be relieved from annoyance from parties seeking to cheat her out of her land.

On October 17, 1912, Ella Hadley, joined by her husband, Wm. Hadley, executed the oil and gas lease involved to the Double-O Oil & Gas Company, and on December 10, 1912, Ella Hadley, joined by her husband, Wm. Hadley, reconveyed to Millie Pettitt her allotment; the same being the land involved in this litigation.

The test well on the Willie Stephens tract was commenced in February, 1913, and completed March 25, 1913, the same being plugged and the premises abandoned, and no further development was had on the same.

The ratification agreement made by Millie Pettitt, joined by her husband, to the Double-O Oil & Gas Company, was made on December 30, 1913, the sole consideration being that a well upon her allotment was to be begun in 30 days and to be completed in 60 days from that date, and failing to find oil or gas in paying quantities shall within 6 months thereafter surrender said lease, and shall deliver to the said Millie Pettitt and T. J. Pettitt a good and sufficient release of said oil and gas lease from the Double-O Oil Company, and from any parties to whom they may have assigned any interest in said lease, should they fail to develop oil and gas in the time mentioned.

In January or February, 1914, the well was drilled upon Millie Pettitt's land, and the same was a dry hole, whereupon the premises were abandoned by the Double-O Oil Company, and no further development of any kind or character was made by it or its assigns thereafter.

On August 2, 1916, Millie Pettitt, joined by her husband, executed an oil and gas lease upon her allotment to the plaintiff Spencer Adams, which was filed and recorded on the said date, and on August 18, 1916, Millie Pettitt and T. J. Pettitt made a written demand upon the Double-O Oil Company for a release of its lease upon the premises, which demand was never complied with.

Millie Pettitt testified that she first learned that her mother had leased her allotment to the Double-O Oil Company about 2 or 3 months after her mother had reconveyed to her, her allotment. This testimony was not disputed. On February 3, 1917, the Hadley Oil Company assigned the lease in controversy to the defendant W. E. Sunday. Mr. Sunday testified that he inspected the premises and that the dry hole was all the development that was upon the same, and was all the development that had been made upon the premises prior to the institution of this suit; that he knew of the Spencer Adams lease at the time he took his assignment; that the same was shown in the abstract; that he had never at any time seen or talked with Millie Pettitt, and that he relied up-

on his inspection of the premises and what the assignors of the lease had told him, that it was a good lease, and that he understood that Millie Pettitt had been paid one year's rental upon the same; that he took the lease and deposited it in the depository bank to the credit of Millie Pettitt, \$166.67 which he estimated to be the amount due her of the \$250 provided in the lease that was to be paid for a producing gas well; that he knew the gas well was not upon the Millie Pettitt land, but was upon the Ella Hadley tract.

The assignment of the lease to the Hadley Oil Company by the Double-O Oil Company was on April 9, 1914, and as to its assigns, in July 1915, which was subsequent to the drilling of the dry hole on the land of Millie Pettitt.

Mr. Stanford testified that he secured these assignments to the Hadley Oil Company, and that he was secretary of the company, and all this was done subsequent to the extension agreement contract between Millie Pettitt and Double-O Oil Company, which was also procured by Stanford, which agreement was on date of December 30, 1913, and which shows conclusively that the Hadley Oil Company took the lease with the knowledge of the extension agreement, and that under the same the dry hole on the Millie Pettitt allotment had been drilled, and that therefore under the terms of the agreement all rights accruing thereunder in favor of the Double-O Oil Company and the Hadley Oil Company had expired by the express limitation contained in the contract.

The Hadley Oil Company had abandoned this lease, was not in the possession of the same, and had no rights therein on August 2, 1916, when Millie Pettitt executed the lease to Spencer Adams, which lease was filed and recorded August 2, 1916, and that the Hadley Company had no right to assign said lease on February 2, 1917, to the defendant W. E. Sunday, all of which was known or could have been known by the said W. E. Sunday by the exercise of proper diligence on his part.

Under the facts disclosed by the record, the contract of December 30, 1913, terminates the rights of the parties to this litigation, and the contract is such a contract as the contracting parties had the right to make under the law, and the same is plain and unambiguous. The object of this contract was clearly expressed in the instrument; that is to say, it was a ratification of the lease of November 17, 1912, in its entirety as to this tract of land, including the provisions that—

"A failure to commence and complete said first or test well on said southeast quarter of section nine shall render this lease absolutely null and void."

The terms of its duration is expressly fixed therein, which was "that same may be ex-

tended for a period of sixty days from this date upon the following conditions, that the said Double-O Oil Company, its successors or assigns, shall within thirty days from this date commence the drilling of a well for oil and gas upon the land and premises herein described in thirty days, and shall complete the same within sixty days from this date," which was done, but nothing more, and "failing to find oil or gas in paying quantities," which actually happened, "shall within six months thereafter surrender said lease and shall deliver to the said Millie Pettitt and T. J. Pettitt a good and sufficient release of said oil and gas lease."

We think this case comes clearly within the rule announced by the court in the case of Garfield Oil Co. v. Champlin et al., 78 Okl. 92, 189 Pac. 515, where, in the fourth and seventh syllabi thereof, the court said:

"Where an oil and gas lease expressly provides that rights of parties shall terminate if no well be drilled within a fixed period, unless the lessee on or before that date, shall pay or tender to the lessor a fixed sum, time is of the essence of the contract."

"Mere ignorance of the contents of a lease by one who becomes a party thereto is not sufficient to excuse noncompliance therewith. The lessee is bound by its terms, and where, under the terms of and 'unless' lease, the lease terminated if a well was not completed in six months from the date thereof, or rentals paid as therein provided, the failure to complete a well, or pay the rentals within the time stipulated, automatically terminated the lease."

Such was the holding of this court in the case of Northwestern Oil & Gas Co. v. Brantine, 175 Pac. 533, 3 A. L. R. 344; Curtis v. Harris et al., 76 Okl. 226, 184 Pac. 574; New State Oil & Gas Co. v. Dunn et al., 75 Okl. 141, 182 Pac. 514.

The leases in the cases cited provided for the extension thereof by the payment of the rentals as stipulated therein, but this contract has no such provision, but provided for the development and production of oil and gas in paying quantities within a fixed period, which provision was not complied with by the lessee or its assigns; hence for that reason the lease automatically terminated with the expiration of the time fixed to wit, six months from the date thereof.

The Double-O Oil Company further agrees to furnish releases to the said Millie Pettitt and T. J. Pettitt from any parties to whom they may have assigned any interest in and to the above-mentioned lease, should they fail to develop oil and gas in the time mentioned above."

These provisions must be read into the extension agreement and, when done, the evidence shows that the lease as to this tract of land automatically terminated at the end of six months from the date of the extension agreement.

From an examination of the entire record

we find that the findings and conclusions of the trial court "that the development in this territory was pursued with diligence, and more so than would be expected in districts of this kind as shown by the testimony as to the development of the surrounding country that existed at that time. The court further finds that Millie Pettit, by reason of the accepted gas rentals, is estopped to claim anything under and by virtue of this lease"—are clearly against the weight of the evidence, because the evidence discloses that the defendants failed to continue development after drilling a dry hole on the Millie Pettit allotment in March, 1914, while the surrounding country was being actively developed by others.

Mr. W. E. Vincent testified that he lived in section 10 in 1912, 1913, 1914, 1915, and 1916, and that there was production in section 12 in 1914, and quite a lot of production in section 10 in 1915 and 1916, and that a number of wells were brought in, in section 13 and 20.

His testimony was corroborated by the record of the Corporation Commission, which showed in 1915 and 1916 there were 19 or 20 wells production in section 10 alone, and in sections 4, 15, 20, and 20 there were a number of wells producing in 1915 and 1916, but during all of this time the defendants made no attempt to further develop the Millie Pettit allotment. Hence we say that the court's finding that development was pursued with diligence is not supported by the evidence, and as hereinbefore stated the Spencer Adams lease was dated August 2, 1916, and that the defendant W. E. Sunday, with notice of the same, acquired his assignment from the Hadley Company February 3, 1917. Under the terms of this contract, development was immaterial so long as oil and gas was not found within six months.

The evidence further discloses that the plaintiff Millie Pettit ignored the Ella Hadley lease, the facts being that she executed the ratification agreement December 30, 1913, and that on the drilling and completion of the dry hole on her allotment in this agreement within 60 days, and the abandonment of the leased premises by the defendants, and the failure of the defendants to execute a release within six months, on, to wit, August 2, 1916, she executed a lease to Spencer Adams, and thereafter in the same month served a written notice and demand upon the Double-O Oil Company to execute such release and the return thereafter to the defendant W. E. Sunday, of the \$166.67 when she ascertained that the same was intended for rental upon the gas well drilled upon her allotment, and she testified that she accepted the \$142.85 sent her for rentals upon the gas well upon her mother's allotment the year 1915 through a mistaken belief that the same was from her mother's estate, which testi-

mony was not disputed. In this situation we think she was not estopped from maintaining this action, and that the finding of the court that she was estopped from maintaining this action is not supported by the evidence and is clearly against the weight thereof.

The plaintiff in error's first assignment of error is as follows:

"That the court erred in rendering judgment in favor of the defendant in error and against the plaintiff in error, for the reason that the same is not sustained by sufficient evidence and is contrary to law, and is in direct conflict with the evidence in the case, to all of which the plaintiff in error excepted at the time."

For the reasons stated and in view of the authorities cited, we are of the opinion that this assignment of error should be sustained. It is therefore ordered that the judgment of the trial court be reversed, and that judgment be herein entered in favor of the plaintiffs for the cancellation of the lease of October 17, 1912, as to her allotment, and that an accounting be had between the parties, and the cause remanded, with directions to the trial court to take further proceedings herein in accordance with the views herein expressed.

(82 Okl. 114)

CHICAGO, R. I. & P. RY. CO. v. BURKE.
(No. 10064.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Railroads \S 17 — Claim agent may settle claims for damages.

The claim agent of a railway company has authority to make settlement on claims for damages against his company.

2. Railroads \S 17—Claim agent's promise to pay damages to consignee binding.

Such claim agent may bind his company by a promise to a consignee of freight that if the consignee will accept the goods and put in his claim for damages, such damage as has been actually sustained by reason of the bad condition of the goods so shipped will be allowed by him as against his company.

3. Compromise and settlement \S 6(2) — Carrier accepts liability where it delivers damaged goods under claim agent's promise to consignee to settle.

When a shipment of freight arrives at its destination in bad condition, and the railway company by authority from its claim agent induces the consignee to accept the goods in their damaged condition on the promise that his claim for actual damages will be settled on its merits, the railway company thereby accepts the liability, and is bound to the consignee to pay whatever actual loss he may sustain by reason of the damaged condition of the goods.

4. Carriers ~~to~~—Evidence as to condition of goods at time of shipment held properly excluded, where railway has promised to pay actual damages.

When a person purchases from other parties a consignment of goods which are by the Railway Company designated as perishable freight, and such goods arrive at their destination in bad condition, and the only issues presented by the bill of particulars are the defendant's promise to pay whatever damage was actually sustained by reason of the damaged condition of the goods and the amount of such damage, it is not error to exclude evidence offered by the defendant tending to prove the condition of the goods at the time of shipment, or at the time the goods were received on its carrying lines.

Appeal from Superior Court, Pottawatomie County; Leander G. Pitman, Judge.

Action by R. J. Burke against the Chicago, Rock Island & Pacific Railway Company for damages to a shipment of freight. Judgment for plaintiff, and defendant appeals. Affirmed.

C. O. Blake, of El Reno, Abernathy & Howell, of Shawnee, W. R. Bleakmore, of Oklahoma City, and R. A. Tolbert, and Roy St. Lewis, both of El Reno, for plaintiff in error.

Goode & Dierker, of Shawnee, for defendant in error.

MILLER, J. This action was commenced in the justice court of D. P. Sparks, a justice of the peace of Shawnee township in Pottawatomie county by R. J. Burke against the Chicago, Rock Island & Pacific Railway Company, a corporation, to recover damages sustained by reason of two cars of potatoes that were shipped to the plaintiff, and which arrived in bad condition. The defendant railway company was a connecting carrier, and delivered the potatoes at their destination. Judgment was taken by default in the justice court, and the defendant appealed to the superior court of Pottawatomie county. The case was tried to a jury, which resulted in a verdict in favor of the plaintiff for \$50, and judgment was rendered against the defendant on the verdict. The defendant filed its motion for a new trial, which was overruled, and perfected this appeal. For convenience the parties will be referred to as they appeared in the court below.

The railway company complains that the trial court erred in overruling its motions for a new trial, and then sets up three specifications of error as follows:

(1) Its demurrer to the evidence should have been sustained.

(2) It should have been permitted to prove, as it attempted, that any injury to the shipments in question occurred before same were received by it, and to present its theory in other respects.

(3) The jury should have been instructed to return a verdict for defendant, as requested by it.

There is very little dispute about the facts in this case. The potatoes were purchased by the plaintiff of D. E. Ryan & Co., jobbers, Minneapolis, Minn., and shipped on or about December 4, 1914. The bill of particulars alleges that when the cars of potatoes arrived at Shawnee, he examined their condition, and found some of them were frozen. That the potatoes in the sacks would have to be sorted, and he refused to receive the potatoes, and wired D. E. Ryan & Co. to this effect, offering, however, that if they would stand \$100 damage he would accept the potatoes. While these negotiations were in progress, T. J. Amos, agent of the defendant at Shawnee, called the plaintiff over the telephone, and told him he had a wire from the railway company's claim agent, asking him to accept the two cars of potatoes, put in his claim, and the company would allow whatever the damage amounted to. Relying upon this statement of the agent, the plaintiff accepted the potatoes, had them sorted, kept a strict account of the damaged potatoes and the expenses of sorting them. That these items of damage amounted to \$118.40.

[4] The defendant did not file a bill of particulars either in the justice court or in the superior court. It therefore claims that on the trial of the case it had a right to set up any defense it might have. It offered to prove that the potatoes were in no worse condition when delivered to the plaintiff than when it received the potatoes from the other carrying line, or when the potatoes were loaded in Minnesota. This evidence was objected to, and the objection sustained. This was neither an issue nor a defense in the case. The only issues presented by the petition was whether or not the agent had promised that the railway company would be responsible for the actual damages sustained, and whether or not this promise was binding on the company, and the amount of the damages. The trial court did not commit error in excluding the proffered testimony.

The remaining specifications of error Nos. 1 and 3, that defendant's demurrer to the evidence should have been sustained, and the jury should have been instructed to return a verdict for defendant as requested by it, will be considered together. This goes to the question of liability under the alleged promise.

The defendant placed its agent, Mr. Amos, on the stand. He testified that he did not have authority to make settlement where the amount of damage exceeded \$50, and in no case did he have authority to make settlement on claims for damage to live stock or perishable freight; that all such claims for damages had to be presented to the claim agent. Defendant then cites a large list of

authorities to the effect that the local station agents cannot bind their companies by any promise such agent may make to settle damage claims against the company. These authorities have no application here, and we are not expressing any opinion as to the extent the company might be liable for the promises of its local agent.

The plaintiff testified that he ceased the negotiations with Ryan & Co. after being assured by the agent that the claim agent of the defendant company would allow his claim for damages. He testified that the agent Amos told him he had a wire from the claim agent, asking him to receive the potatoes, and that the claim agent would allow his claim for damages. He afterwards went to Amos, and was given a copy of the wire, and this was offered in evidence as plaintiff's Exhibit D, and reads as follows:

"Plaintiff's Exhibit D.

"Chicago, Ill., Dec. 17, 1914.

"Agent, Shawnee, Okla. Wire 16th, MKT 8229 spuds advise date car arrived Consignees should accept and file claim for actual damages which will be settled on its merits advise. R. C. 48820.

W. C. Bunger.
"225 PM"

While this wire only refers to one car of potatoes, plaintiff's conversation with the agent referred to each of the cars and from his testimony it is clear he understood both cars were to be adjusted on the same basis. However, there is evidence tending to prove the damage sustained on the car specified in the wire amounted to \$62.40, which was in excess of the amount of damage allowed by the jury.

[1, 2] There is no question but what the claim agent had authority to bind his company in the settlement of this claim. The plaintiff was not relying upon the authority of Amos as local agent, but upon the statement made by the local agent that he had a wire from the claim agent that the claim agent would allow it. This was corroborated by the telegram. Under this state of facts, the company was bound by the promise of its claim agent, and the only other question for the jury to determine was the amount of damage the plaintiff had sustained. Under the evidence we cannot understand why the jury limited the amount of recovery to \$50, unless it proceeded under the erroneous theory that as only one car was specified in the telegram, the defendant company would not be liable for damages sustained to the other car of potatoes. However, plaintiff did not file a cross-petition in error, or cross-appeal. There was evidence tending to support the verdict of the jury on all the issues presented.

[3] It is suggested by the defendant company that there is no consideration for this promise, but this is not seriously contended

for, and, if it was, there would be no merit in such a contention. The plaintiff under this promise accepted the potatoes, and relieved the railway company from any further duty to care for them or liability that might occur by freezing or otherwise, and this was sufficient consideration to support the promise.

The judgment of the trial court is affirmed.

HARRISON, C. J., and JOHNSON, McNEILL, ELTING, and KENNAMER, JJ., concur.

HODGES v. STATE. (No. A-3555.)

(Criminal Court of Appeals of Oklahoma. June 16, 1921.)

(Syllabus by the Court.)

Criminal law §1131(4)—Where convict has accepted parole pending appeal, appeal will be dismissed as abandoned.

When an appeal from a judgment of conviction is pending in this court, and the appellant is granted a parole and accepts the same, and the fact that a parole has been granted and accepted is brought to the attention of this court, the appeal will be dismissed as having been abandoned.

Appeal from District Court, Oklahoma County; Geo. W. Clark, Judge.

Joe Collins Hodges was convicted of larceny of an automobile, and he appeals. Appeal dismissed, and cause remanded.

Pruett, Sniggs & Patterson, of Oklahoma City, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. On May 22, 1918, an information was filed in the district court of Oklahoma county, charging appellant, Joe Collins Hodges, alias Joe Collins, and Alford Lester A'Day, alias Alford Walters, with the larceny of one 1918 model, five-passenger Ford automobile, of the value of \$501, the personal property of the Oklahoma Farm Mortgage Company, a private corporation.

Upon their trial appellant, Joe Collins Hodges, was found guilty and his punishment fixed at imprisonment in the penitentiary for the term of two years and six months. From the judgment rendered November 30, 1918, upon such conviction, an appeal was taken by filing in this court on May 28, 1919, a petition in error, to which was attached a transcript of the record proper.

The appellant is not represented by counsel in this court, and no brief in support of the assignments of error has been filed. When the case was called for final submis-

sion, it was suggested that pending the determination of the appeal, on December 24, 1920, the Governor had granted a pardon or parole to appellant, which was by him accepted, and that the appeal had been abandoned.

It has been uniformly held by this court that when an appeal from a judgment of conviction is pending, and the appellant applies for a pardon or parole, and the same is granted and accepted by the appellant, and the fact that the same has been granted and accepted is brought to the attention of this court, the appeal will be dismissed as having been abandoned.

The appeal herein is therefore dismissed, and the cause remanded to the trial court.

MATSON and BESSEY, JJ., concur.

COPPEDGE v. STATE. (No. A-3597.)

(Criminal Court of Appeals of Oklahoma.
June 18, 1921.)

(Syllabus by the Court.)

Homicide §255(3)—Evidence sustaining conviction of manslaughter in first degree.

In a prosecution for murder, evidence held to sustain a conviction of manslaughter in the first degree, and that no material error was committed on the trial.

Appeal from District Court, Hughes County; Geo. C. Crump, Judge.

John Coppedge was convicted of manslaughter in the first degree, and he appeals. Affirmed.

J. L. Skinner and Anglin & Hall, all of Holdenville, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. On November 18, 1919, an information was filed in the district court of Hughes county, charging appellant, John Coppedge, and his brother, Will Coppedge, jointly, with the crime of murder for having killed one Carl Morris in said county on or about the 4th day of October, 1918. Appellant asked and was given a separate trial, which resulted in his conviction of manslaughter in the first degree, leaving the punishment to be fixed by the court. The motion for a new trial was overruled, and on April 19, 1919, the court rendered judgment and sentenced appellant to imprisonment in the penitentiary for the term of 15 years. From the judgment he appeals. The errors assigned are:

(1) That the court erred in overruling the motion for new trial.

(2) That the verdict of the jury was contrary to law and the evidence.

(3) That the court admitted incompetent testimony against the defendant and rejected competent and material testimony offered by the defendant.

(4) That the court erroneously instructed the jury.

No brief has been filed on behalf of appellant, and we have not been favored with an oral argument in his behalf; however, we have carefully examined the record for the alleged errors upon which this appeal is based. It appears that the parties were all farmers and lived neighbors; that appellant and his codefendant married sisters of Carl Morris, the deceased; that appellant and the wife of the deceased had been criminally intimate, and a short time before the homicide they each admitted this fact to the deceased in the presence of each other; that just before sundown on the date alleged appellant and his brother drove into a wagon yard in Holdenville; that Carl Morris, the deceased, walked through the gate, and appellant, standing in the wagon, fired the fatal shot. Briefly stated, the testimony with reference to the killing was as follows:

W. G. Blankenship, a farmer, who it appears was not acquainted with any of the parties, testified:

"I saw the defendants drive in with a bale of cotton standing on end in their wagon. One jumped off the wagon and the other was standing by the cotton bale facing the gate; as I walked away I passed the man that was shot. He was walking along eating an apple. Within a minute I heard the shot and returned to the yard. The man was lying four or five steps within the gate. He had a gunshot wound in the forehead. He never spoke. He was lying 15 or 20 steps from the wagon."

Will Dial testified:

"I was there when the defendants drove into the yard. I heard Will Coppedge say to John Coppedge, 'You do what I told you to do.' There was a bale of cotton in the wagon. I was standing at the head of the team unhitching when John Coppedge, standing behind the cotton bale, shot Carl Morris. He was about 50 feet from the wagon when he fell. John Coppedge jumped out of the wagon and ran up to where he was lying and cocked the gun, and then I went under the shed."

R. O. Brown testified:

"I am a farmer, living seven miles southwest of here. I was in the wagon yard, but my back was turned when the shot was fired. I was about halfway between this wagon and where the man fell. I saw the defendant with a gun after the shot was fired. He was on the ground pulling the hammer back on his gun and walked toward the man that was down; it was about 18 or 20 steps from the wagon to where the man was lying; I did not know any of the parties at that time."

Toney Ashland testified:

"I live in Seminole county; I was standing near the camp house in the wagon yard when John Coppedge shot Carl Morris. I heard Will Coppedge say to John Coppedge, 'Go and see if the son of a bitch is dead.' John got out of the wagon, and I went into the barn. Carl Morris was in his shirt sleeves."

E. W. Morris testified:

"I was on my way to the wagon yard when I heard the shot fired. I walked in and saw a man nearly dead with a gunshot wound over the right eye. I picked up a piece of apple that was lying near his left hand. It had been freshly cut."

Price Ashland testified:

"I was something like six steps from the Coppedge wagon when Carl Morris was shot. I saw the Coppedge boys drive in the yard with a bale of cotton standing on end in the wagon. Will got out. John stayed in the wagon. I saw Carl Morris when he had taken a step or two into the yard. He was walking along like anybody would walk. The shot fired, and I saw him fall. John Coppedge was standing up in the wagon with a bale of cotton between him and Carl Morris. John Coppedge jumped off of the wagon, and Will Coppedge says, 'Go and see if the damn son of a bitch is dead.' Carl Morris was 15 or 18 steps from the wagon when John shot him."

For the defense Will Coppedge testified:

"The day of the killing I brought a bale of cotton to town. Late in the evening I was sitting on the curb. My brother was standing on his wagon in front of the American National Bank selling a bale of cotton. He called me, and I went over and got in his wagon. Mr. Loftis said it was too late to weigh the cotton, and we decided to go to the wagon yard and wait until morning to weigh the cotton. He handed me the lines, and we started to the McDonald wagon yard. Near Dennis' corner Carl Morris stepped towards us and shook his fist at us. I drove into the wagon yard and got out of the wagon. John started to get out, and I said, 'You do what I told you to do.' Bill Dial, a brother-in-law to Carl Morris was there, and said, 'Will, what is the matter?' and I says, 'Carl is trying to kill John,' he said, 'Can't it be stopped?' We were unhitching the mules. John was standing next to the bale of cotton. The gun fired, and I looked around and saw Carl fall."

As a witness in his own behalf the defendant testified:

"I am 33 years old; brother-in-law to Carl Morris, the deceased. I brought a bale of cotton to town that day and stopped in front of the American National Bank. I saw my brother, Will, and called him and asked him to go to the compress with me. The bale of cotton was in the back end of the wagon. Mr. Loftis wrote me a ticket and said, 'You can't get that cotton weighed now; it is too late.' The sun was not down. We drove on down to the wagon yard, and just before we got there I saw Carl Morris standing on the corner. As we went by he stepped out six or seven

steps, shook his fist and said, 'Damn you,' or something like that. I said, 'Will, drive up and let's get away from here, Carl is here to kill me.' Will says, 'I will drive down to the yard; you stay in the wagon and I will stop it.' Carl took out after us. Will drove into the yard and jumped off the wagon and says, 'You do as I told you; now stay in the wagon.' About that time Will Dial walked up and said, 'What is the matter here?' I stepped back by the side of the bale of cotton where I could watch the gate; Carl Morris came in the gate and reached back like he was going after a gun or something in his pocket. He always carried a pistol. He had something in his hand. I thought he had a pistol. My gun was wrapped up in my coat. I looked the other way and saw Leland Morris, Carl's brother, coming out from under the shed. It just come to my mind that they were framing up there. I reached down to my coat, got my gun up and shot. Carl was about 10 or 12 steps from me. He was mad and muttering something. I shot because I was scared and I thought he was going to shoot me. I jumped out of the wagon and cocked my gun again and looked towards the shed where the other boy had come out, and he was going back; then I went out on the street and surrendered."

In rebuttal Wyle Evett testified:

"I was in the yard when John Coppedge shot Carl Morris. I heard a gun and saw the defendant standing in the wagon behind the bale of cotton. His arm and the gun were directly over the cotton bale."

Leland Morris testified:

"I was in the barn when the shot was fired. Some fellow said, 'A man has been killed out here.' I was tying the team in the barn. My brother did not own a gun at the time he was killed. I do not remember of him ever owning any gun, but a 22 target."

Willie Morris testified:

"I am the widow of Carl Morris. I have three children living and two dead. The oldest is six, the next one three, and one nine months old. My husband did not own a pistol of any kind."

We deem it unnecessary to detail further the facts disclosed by the record. No one can review the testimony in the case without being impressed with the belief that appellant should have been found guilty of murder. The only basis for the verdict of a lower degree of homicide is the testimony of appellant "swearing his own neck out of the halter." As we view the evidence, the only debatable question in the case for the jury to consider was whether the punishment to be assessed should be death or imprisonment for life. The record shows that no objection was made or exceptions saved to the evidence on behalf of the state, and that the testimony offered in behalf of appellant and rejected was either hearsay or self-serving declarations.

The court by its instruction authorized the jury to convict appellant of murder or man-

slaughter in the first degree, or acquit him on the ground of self-defense. No objections were made or exceptions taken to the instructions, which fully and fairly covered the law of the case. After considering all the errors assigned, we are of opinion that there was no error which could have been prejudicial to appellant, and the judgment is affirmed.

MATSON and BESSEY, JJ., concur.

KILLION v. STATE. (No. A-3664).*

(Criminal Court of Appeals of Oklahoma.
June 18, 1921.)

(Syllabus by the Court.)

1. Robbery §17(1) — Information held sufficient.

For information held to state a sufficient charge of robbery, see body of opinion.

2. Criminal law §586, 1151—Applications for continuance addressed to discretion of trial court.

Applications for a continuance are addressed to the discretion of the trial court, and the trial court's action in overruling a motion for a continuance on account of absent witnesses will not be disturbed unless a manifest abuse of discretion appears.

Appeal from District Court, Washington County; Preston A. Shinn, Judge.

Charles Killion was convicted of robbery, and he appeals. Affirmed.

J. R. Charlton, of Bartlesville, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Washington county, wherein on the 29th day of May, 1919, plaintiff in error, Charles Killion, hereinafter, designated defendant, was convicted of the crime of robbery, and sentenced to serve a term of 10 years' imprisonment in the state penitentiary.

From the judgment rendered against him he has appealed to this court, and relies for reversal on the following assignments of error: (1) That the court erred in not sustaining the demurrer to the information; and (2) that the court erred in overruling the motion for a continuance.

The case-made as originally filed contained an incomplete copy of the amended information. The Attorney General, on May 24, 1921, filed a motion in this court to correct the case made by insertion of a correct copy of the amended information. In reply to said motion, counsel for defendant has ad-

mitted that the copy of the amended information contained in the original case-made was defective, and joins in the request of the Attorney General that the same be corrected. Upon said motion and agreement of counsel for defendant, this court made an order correcting the case-made by the insertion therein of a correct copy of the amended information.

[1] The amended information, upon which the cause was tried, reads as follows:

"Now comes W. B. Allen, the duly qualified and acting county attorney, in and for Washington county, state of Oklahoma, and gives the district court of Washington county, state of Oklahoma, to know and be informed that Charlie Killion did, in Washington county, and in the state of Oklahoma, on or about the 30th day of March, in the year of our Lord one thousand nine hundred and nineteen, and anterior to the presentment hereof, commit the crime of robbery in the first degree in the manner and form as follows: That in the county and state aforesaid, the said Charlie Killion, on the day and year aforesaid, did knowingly, willfully, unlawfully, wrongfully and feloniously, make an assault in and upon Fred Stepp, J. M. Ernest, Warnie Catlin, Bud Stepp and R. E. Henson and others, with a certain weapon, to wit, a revolver, then and there had in the hands of him, the said Charlie Killion, and did then and there and thereby putting the said Fred Stepp, J. M. Ernest, Warnie Catlin, Bud Stepp and R. E. Henson and others in fear of an immediate injury to their lives and persons by threatening to shoot them, the said Fred Stepp, J. M. Ernest, Warnie Catlin, Bud Stepp and R. E. Henson and others, and did then and there by the use of said force and putting in fear unlawfully, willfully, wrongfully and feloniously and against the will of them the said Fred Stepp, J. M. Ernest, Warnie Catlin, Bud Stepp and R. E. Henson and others, take, steal and carry away from the possession and persons of them the said Fred Stepp, J. M. Ernest, Warnie Catlin, Bud Stepp and R. E. Henson and others, certain personal property, to wit, \$97.00 good and lawful money of the United States, with the unlawful, wrongful and felonious intent then and there on the part of him the said Charlie Killion to rob and deprive the said Fred Stepp, J. M. Ernest, Warnie Catlin, Bud Stepp and R. E. Henson and others of the said property and convert the same to the use and benefit of him the said Charlie Killion, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

"Robbery" is defined by section 2364, Revised Laws 1910, as follows:

"Robbery is a wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear."

In the opinion of this court the amended information contains a sufficient charge of robbery as defined by said section.

[2] The motion for a continuance was based

on the ground of the absence of certain alleged material witnesses for defendant. After an examination of the motion, this court is convinced that the trial court properly overruled the same. There is no sufficient showing of diligence used to obtain these witnesses, nor is there a showing of facts indicating that there is any reasonable likelihood of obtaining the attendance of these witnesses or their testimony in behalf of defendant at any future date to which the cause might have been continued. We find no abuse of discretion on the part of the trial court in overruling the motion.

Upon the whole record, the conclusion is reached that defendant was fairly tried and properly convicted.

The judgment is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

(185 Cal. 731)

WELCH v. ALCOTT et al. (L. A. 4897.)

(Supreme Court of California. May 27, 1921.
Rehearing Denied June 23, 1921.)

1. Partnership §53—Evidence held to establish partnership between parties.

In an action for dissolution of partnership and an accounting, evidence held sufficient to establish partnership between plaintiff and defendant as to real estate business and other operations.

2. Appeal and error §1011(1)—Finding by the trial court on conflicting evidence will be deferred to on appeal.

Finding by the trial court on conflicting evidence will be deferred to on appeal.

3. Partnership §53 — Admissions sufficient to establish.

Repeated admissions by defendant that he and plaintiff were partners, together with conduct as to purchases for firm account, etc., held, in view of Code Civ. Proc. § 1832, to warrant a finding that a partnership existed between them.

4. Partnership §44 — Party asserting existence of partnership has burden of proof.

The party asserting the existence of partnership has the burden of proving the same.

5. Evidence §588—It is for the trial court to reconcile inconsistencies or contradictions.

It is for the trial court in an action tried without a jury to reconcile inconsistencies or contradictions in the evidence.

6. Partnership §328(1) — Presumption that transactions within scope of firm business were for benefit thereof.

A partnership engaged in the real estate business having been formed, there is a pre-

sumption that all transactions within the scope of the agreement between the parties were for the benefit of such partnership.

7. Pleading §129(1) — Allegations not controverted must be taken as true.

Every material allegation of the complaint not controverted by the answer must under Code Civ. Proc. § 462, for the purposes of the action, be taken as true.

8. Trial §396(7) — Findings should be confined to the facts in issue.

Findings should be confined to the facts in issue, and it is improper for the court to make finding on allegations in the complaint admitted by failure to deny.

9. Partnership §10 — Agreement to divide gross earnings will not constitute partnership.

An agreement to divide gross earnings will not of itself constitute a partnership.

10. Partnership §5 — Agreement to divide profits prima facie establishes "partnership."

In view of Civ. Code, §§ 2395, 2404, defining partnership as the association of two or more persons for the purpose of dividing profits, and that an agreement to divide the profits implies an agreement to divide the losses, an agreement between the parties to divide the profits of a business prima facie establishes the existence of a partnership between them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

11. Partnership §329—Findings on an issue of partnership may be made before or after an accounting in the court's discretion.

In a suit for dissolution and accounting wherein existence of the partnership was in issue, failure of the court to make findings prior to taking the account within the meaning of Code Civ. Proc. § 632, requiring the court to file its decision on the trial of a question of fact within 30 days after the cause is submitted, was not error; findings on the issue of partnership before or after the accounting being clearly within its discretion.

12. Appeal and error §1033(10)—Party not heard to complain of modification of judgment when in his favor.

A party will not be heard to complain of modification of a judgment after its entry while motion for new trial was pending when the modification was in his favor.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Edmund Welch for dissolution of partnership and for an accounting against Edward H. Alcott and others. From a judgment for plaintiff, the named defendant appeals. Reversed and remanded for trial of particular issue; otherwise affirmed.

See, also, 173 Cal. 530, 174 Pac. 34.

James P. Clark, of Los Angeles, and F. W. Gail, of Covina, for appellant.

Frank C. Prescott and Prescott & Prescott, all of Los Angeles, for respondent Welch.

James P. Clark, of Los Angeles, for respondent California Land & Water Co.

L. C. Gates, Chas. H. Brock, and W. S. Allen, all of Los Angeles, for respondent Title Insurance & Trust Co.

Luther Brown, of Los Angeles, for respondent Imperial Valley Farm Lands Ass'n.

LAWLOR, J. This is an action brought by plaintiff, Edmund Welch, against the defendant Edward H. Alcott for the dissolution and accounting of an alleged partnership between them. The connection of the corporation defendants—Imperial Valley Farm Lands Association, California Land & Water Company, Title Insurance & Trust Company, and the First National Bank of Los Angeles, which we shall refer to as the "agent," "sales agent," "trustee," and the "bank," respectively—will hereafter appear.

It is alleged in the complaint that on or about October 1, 1912, the parties entered into a parol agreement of partnership to engage in a general real estate business in the city of Los Angeles and in the Imperial Valley; that the expenses "of the Los Angeles office of partnership" for stenographer, telephone, rent, advertising, and fixtures, and the expenses of the partnership at Brawley for telephone, automobile hire, advertising, improving or purchasing lands, were to be borne, and the losses and profits shared, equally between them; the defendant to attend to the Los Angeles office, keep proper books of account, and render monthly statements of expenses and profits of the partnership; plaintiff to attend to the duties thereof in the Imperial Valley in finding lands to list for sale or improvement, and to show intending purchasers lands held for sale by the partnership; that the partnership has been conducted from the formation thereof until March 1, 1914, except for the failure of the defendant to perform his duties thereunder; and that in certain specific instances he was "guilty of serious misconduct."

It is further alleged that certain real estate deals were had by the partnership, in some of which the commissions were divided equally, and in others were retained by the partner collecting them; that in the Libby Yokum to Chauncey W., Lillian E., and Mabel F. Owen deal, and in the Hans A. Johnson and Mrs. Gena O. Ringer to Chauncey W., Lillian E., and Mabel F. Owen deal, in which the commission was \$3,200, defendant received two promissory notes made to his individual order for \$1,600 and \$1,700, respectively (\$100 of the latter note representing a personal loan to Libby Yokum by defendant), which notes were delivered to and are held

by the bank, and that the defendant and the bank refused to recognize plaintiff's interest therein, and that "defendant has been guilty of serious misconduct."

It is further alleged that after the partnership established a town site on the southeast one-quarter of section 4, township 11 south, range 14 east, San Bernardino meridian, at Imperial Junction (subsequently named "Niland"), defendant was guilty of serious misconduct in that he began advertising the property as his own and held out to the public falsely that he was its sole proprietor; that, after a consultation with plaintiff, it was agreed a contract of agency or sale should be entered into between the partnership and the agent whereby the partners should get 50 per cent. of the proceeds of the sales, but that defendant on his personal account entered into a contract with the agent by the terms of which it was given for seven years the exclusive right to handle, sell, and dispose of the town site upon the conditions that the agent receive 25 per cent. of the first proceeds of all sales for commissions, advertising, and the general expenses of handling and selling the property; that an additional 10 per cent. be then allowed to be expended on improvements; that of the balance the agent receive 60 per cent. and defendant 40 per cent.; that the agent thereupon appointed the sales agent its exclusive selling agent for the same period, agreeing to divide equally the net proceeds to which the agent became entitled under its agreement with defendant; that the defendant deeded the town site property to the trustee and it made a declaration of trust setting forth the respective rights in the town site, and acknowledging the receipt from defendant of the deed of conveyance of the town site property; that the trustee would hold it in trust for defendant, the agent, and the sales agent for the purposes indicated in the contracts between the respective parties; that it would sell lots, convey all titles, receive and disburse all moneys in connection with the town-site property, and pay the parties their proper portions after the expenses of making the sales and its commissions had been deducted.

Plaintiff prayed for a dissolution of the partnership; that an accounting of the affairs thereof be had; that a receiver be appointed pendente lite; for an order that the agent, the sales agent, the trustee, and the bank be enjoined and restrained from in any way disposing of or paying out and yielding up possession of any of the moneys or property of the partnership until the further order of the court, and for a decree enjoining defendants or their agents or representatives from interfering with the plaintiff in participating in the management of the partnership business and affairs.

The defendant and the four corporation de-

fendants' interposed separate demurrers to the complaint, which were overruled.

The defendant's answer is a specific denial of the allegations of the complaint, and while admitting that the deals set forth in the complaint were made, and that commissions were divided in certain of them, denies that he and plaintiff ever entered into an agreement of partnership, or that any of the transactions between them were based upon a partnership.

The defendant also alleges that the deal in which he was given the two promissory notes of \$1,600 and \$1,700, respectively, was one in which plaintiff had no interest whatever, admits the execution of the town-site contracts heretofore described, and alleges that he was not to receive less than \$36,000, that he should retain all moneys which he had collected upon sales of 34 town-site lots which he had disposed of up to January 1, 1914, and that those contracts should be assigned to the agent. The answer denies that plaintiff ever at any time had any interest in the town site.

The answer also contains certain affirmative allegations, which are negated by the findings.

The case was tried by the court, a jury having been waived by the parties. The trial commenced on December 3, 1914, and on February 26, 1915, when the evidence was closed, the court orally announced that the evidence introduced established a partnership between plaintiff and defendant. The court thereupon proceeded to take an accounting. The testimony, oral and documentary, having been introduced, the accounting continued until March 25, 1915, when the court stated the account, which was filed on July 29, 1915, the action having been dismissed as to the parties sued under fictitious names. On October 13, 1915, the court made its findings of fact and conclusions of law. Judgment was entered on October 28, 1915, decreeing that the partnership be dissolved; that plaintiff and defendant are the owners of the town site, "subject to the trust agreement and declaration of trust," and of the sum of \$5,158.19, cash proceeds of said trust now in the possession of the trustee, and of certain personal property and the two promissory notes for \$1,600 and \$1,700, respectively, which are in the possession of the bank and are to be collected by demand, if possible, and, if not, then by suit. It is further decreed that the personal property of the partnership be sold; that the proceeds of the two promissory notes and the above sum of \$5,158.19, belonging to the partnership, be divided as follows: That after the above adjustment the notes, interest, property rights, and equity heretofore standing in the name of the defendant as owner, beneficiary, or otherwise shall belong to and be the property of plain-

tiff and defendant in equal parts, and that the trustee render and account to plaintiff for an equal one-half of all rights heretofore vested in the defendant; that the bank hold the two notes less payments received for account of the partnership, and pay \$230 to the account of plaintiff alone; and that the trustee thereafter fulfill the duties of the trust, rendering to the creditors of plaintiff and of the partnership, respectively, their respective demands, and thereafter to plaintiff one-half of the share provided therein for defendant.

On November 8, 1915, the defendant interposed a motion for a new trial, which was denied on January 17, 1916. The appeal is from the judgment and is taken by the defendant alone.

[1] 1. Appellant's principal contention is that the evidence is insufficient to support the findings of a partnership between the parties. The findings in the main follow the allegations of the complaint. Appellant's position is thus stated:

"None of the indicia of a partnership are to be found in the surroundings of the parties, either at the time of the alleged formation of the partnership, or afterwards. * * * The evidence clearly shows that each of these parties did business in his own name, and not jointly, and that business was several, and not joint."

In support of his claim that he and appellant entered into an oral agreement of partnership on or about October 1, 1912, and conducted it as such until March 1, 1914, respondent offered a great variety of evidence, including correspondence, telegrams, advertisements, printed sales forms for the alleged partnership, documents, exhibits, and conversations with, the conduct of, and admissions by, the appellant.

It appears in the evidence that for some years prior to meeting appellant respondent was engaged in the grading business with a partner named Sexsmith in the Imperial Valley; that he met appellant in the early part of 1912, having been introduced to him by one Frank C. Prescott, Jr., an attorney, who suggested they ought to be able to do some business together. On June 26, 1912, an agreement in writing was entered into between appellant and respondent whereby respondent appointed appellant his agent to secure "contracts for all kinds of reclamation work" on a 15 per cent. commission basis, the parties to employ Prescott to assist in the preparation of all papers necessary in securing such contracts and filing of yearly proofs therein. For his compensation Prescott was to receive 25 per cent. of the profits. Just before October 1, 1912, appellant suggested to respondent "that we ought to make some other arrangement besides paying Frank C. Prescott part of the profits"; that the three met on October 1st and appellant

advised Prescott that for the amount of work they did not think they ought to pay him so much. Prescott agreed to withdraw and retired from the arrangement the following morning. It is not claimed this written agreement has any connection with the issues herein, and we only refer to it as indicating the sequence of events after the parties first met.

Respondent testified that the business in Los Angeles was to be in charge of appellant, and in the Imperial Valley of himself; that he was to attend to the duties of the partnership in the Imperial Valley in finding lots to list for sale or improvement, and to show intending purchasers lands held for sale by the partnership; that appellant secured for the use of respondent room 440 in the Chamber of Commerce Building, Los Angeles, adjoining room 441, where appellant had conducted his real estate business during the preceding three or four years, and it was arranged respondent might dictate his correspondence to the stenographer and pay one-half of her salary and of the general office expenses, including rent and telephone service; that advertisements appeared in the newspapers in Los Angeles and in the Imperial Valley in the joint names of "Alcott and Welch"; that the cost of this advertising was one of the partnership expenses, one-half thereof being charged to respondent; that the appellant had printed and furnished respondent blank forms authorizing "Alcott and Welch" to make sales for the owners of real estate; that respondent in January, 1913, took out a real estate license in the Imperial Valley in the name of "Alcott and Welch," the amount of the license—\$36—being charged to his account; that appellant took no exception to respondent's action in taking the license out in their joint names; that, when respondent saw cards in the Los Angeles office in which his name did not appear with appellant's, he spoke to the latter about it, and appellant said "he would attend to that later"; that a great many letters were written to respondent by appellant and many conversations took place between them concerning the real estate business; that, when respondent spoke to appellant about the advertisements which appeared in the Los Angeles papers in appellant's name alone, the latter explained that he advertised the partnership business in that way because he was well known in that part of the country, and it was to the advantage of the partnership.

Miss Kate Gatzman, a stenographer in the Los Angeles office, testified she was employed from November, 1912, to May, 1913; that appellant directed her to keep a book account of the expenses of the Los Angeles office and to charge respondent with one-half of the expenses entered therein; that abstracts of the account book were made in triplicate—one to be furnished respondent,

another to appellant, and the third to be retained as an office copy; that in the latter part of 1912 and during 1913 certain sums of money passed between the parties aside from the commissions derived from the proceeds of sales of real estate negotiated by them. Herman Layer testified that appellant told him, "Welch and I are partners." H. E. Williams, one of the respondent's creditors, said appellant assured him "we needn't worry, that as soon as the town site was closed out he [respondent] would have plenty of money to settle his debts; that the town site was in the appellant's name, but that respondent had an interest in it." Richard H. Hobgood testified that early in 1913 appellant told him respondent claimed a partnership, and that he spoke of "Ed and I," "me and Ed," and "us". Miss Louise Barker, another stenographer, testified she started to work for respondent and appellant in October, 1912; that when she asked appellant for a raise of salary he told her he would have to submit the matter to respondent, and that after respondent had been consulted she was given the advance; that appellant said, "There is a gentleman in business with me who is out of town practically all the time." He said that Mr. Welch took care of the business in the Imperial Valley and he took care of this end of the business."

Miss Cressie Mitchell, a stenographer for Frank C. Prescott, Jr., whose telephone was on the same extension as appellant's, testified that, when she told the latter there were calls for respondent, he replied, "Welch and I are partners, and when he is called, you can buzz me. * * * Mr. Welch is in the Valley, but I am his partner. Mr. Welch is in the Valley, and we are opening a town site." John Garvey and John Welch (respondent's brother), both foremen for respondent on the high-line ditch, testified that on one occasion when respondent's teams were idle appellant came along and said he did not want the teams loafing because he was standing half the expense. Clarence R. Conover testified that, when appellant became dissatisfied with respondent, he told the witness "he would have to cease his partnership business with him." Alexander M. Williams testified that in the latter part of 1912 appellant said in plaintiff's presence "they had just formed a partnership, * * * and Welch said the same. * * * Alcott then said that Welch was the best partner he ever had. He says, 'You know we are partners.' * * * As to an automobile Alcott told me they were going to buy one for the business." This refers to a Cadillac machine which respondent bought, as he claims and appellant denies, for the partnership. Mrs. Bonnybelle Welch, wife of respondent, testified at considerable length about conversations she had with appellant in which he stated he and respondent had gone in the real estate business together as partners.

Calvin A. and Gertrude Terwilliger testified to conversations with appellant in which the latter spoke of respondent as his partner.

The testimony for appellant as to the character of the relationship is to the effect that he never entered into a parol or any other sort of agreement of partnership with respondent; that for a long time prior to October 1, 1912, he had been engaged in the real estate business with an office in room 441, Chamber of Commerce Building, Los Angeles; that "about October, 1912, I talked with Welch about changing his office to my place; * * *" that respondent said there were many people coming to him in connection with grading contracts "and there was a chance to do real estate, but that he had no time. He said it will be a good idea to make some arrangement with me to show the lands when I could not come down, and that the other man where he had his office was to move, and he wanted another office, and I told him room 440 was adjoining my office and I could secure the room. * * * My arrangement with Welch was nothing more than a division of commissions if I had a listing and he had a customer;" that they agreed on such an arrangement; that appellant told respondent he would pay all his own traveling expenses "when I went to Imperial Valley, and * * * I should expect him to do the same thing, which I have always done, and so has he as far as I know. We talked until 6 o'clock, coming to an agreement as to how or when the expenses should be paid. This was the winding up of the agreement. * * * He said he was a grading contractor and needed a stenographer in the office to meet customers, and I told him that it would cost \$20 a month for the rent of the office, 440 and 441; that if he would pay half of the office rent he could have the privilege of using the stenographer and telephone if he would pay half of the expenses. * * * He was willing to do that;" that appellant rented room 440 and sublet it to respondent; that respondent moved into this room and maintained his office there as a grading contractor and devoted his time and attention to that business; that the grading business of respondent was independent of and separate from the real estate business of the appellant, and that the respondent had no interest in the business of the appellant except that where respondent found a customer for the property listed with appellant, or appellant found a customer where respondent had a listing of land for sale, they would make a division of the commission earned, or, where other agents were interested in the deal, the commission would be split up according to the circumstances in each particular case; that this arrangement continued between the parties, and respondent continued to occupy room 440 until October 1, 1913, when appellant terminated respondent's occupancy of

room 440, rented the room to another, and withdrew from the arrangement for a division of commissions.

Appellant also testified that in some of the deals they had together an equal division of gross commissions was made, while in others they were retained by the one collecting them. The appellant denied that he promised to devote all of his time to the business or that he would keep books of account; "nothing was said by us * * * about entering into a partnership;" that he had no knowledge as to how or why half of the outside expenses were charged to respondent; that the intention was to charge only half the office expenses; that somebody struck balances in the account book without his permission; that his reason for telling respondent in a letter, which the latter testified to, "Be sure and have the old machine steamed up," was because he would prefer to patronize respondent's automobile. He explained his letter to respondent in which he said, "The trip was worth \$2,000 to us," by stating the word "us" to be a mistake; it should have been "me"; that he was a party to many other trades in which plaintiff got no commission; denied respondent was consulted with reference to negotiations with the agent, contradicted the testimony already referred to of Herman Leyer, H. E. and Alexander M. Williams, Miss Cressie Mitchell, John Welch, and Mrs. Welch, and testified he did not know monthly statements were rendered respondent, nor that letters which referred to respondent as his partner were written. Appellant produced a card printed May, 1913, reading "Edward H. Alcott, sole owner." He flatly contradicted respondent's testimony as to a partnership relation ever having existed between them; denied that he introduced respondent to anyone as his partner; denied having knowledge of the advertisements signed "Alcott and Welch"; and continued: "I did not insert that in the paper. * * * I could barely see to get around at that time. * * * My eyesight had been bad for three years." He admitted, however, discussing with respondent at one time the advisability of advertising in both names, respondent being well known in the valley; and he contradicted respondent's witnesses that he admitted to them he was respondent's partner.

Miss Kate Gatzman testified the items in the account book were mere memorandums, and that the balance for September, 1913, was not carried over in the October accounts because appellant said he was going to quit respondent.

The court found that on or about the 1st day of October, 1912, respondent and appellant entered into a parol contract of copartnership to carry on a real estate business together, dividing the expenses and losses between them equally; that the expenses of the Los Angeles office and of the Brawley office

and the profits were to be shared equally; that said partnership has been conducted until March 1, 1914, except for the failure of appellant to perform his duties under the agreement of partnership; and that he is guilty of serious misconduct.

[2, 3] We are of the opinion that the foregoing summary abundantly shows the evidence is sufficient to support the findings of partnership. This summary does not assume to refer to all of the evidence, for the record of the trial covers some 1,300 pages of the printed transcript on appeal. We have, however, fully examined the evidence and think we have developed it sufficiently for the purposes of this opinion. While it presents contradictions and inconsistencies on both sides as to the relationship between the parties, it will be presumed the court took all such matters into account in arriving at its decision. The respective versions of the parties as to the character of the relationship present a sharp conflict in the evidence and we are bound by the determination of the question by the trial court. The evidence of appellant's conduct and his admissions (section 1832, Code Civ. Proc.) as to the existence of the partnership, which we must assume the court believed and acted upon, would alone support the findings.

[4] Many of the assignments of insufficiency are addressed to the weight of the evidence and the credibility of the witnesses, which were for the trial court to determine. Appellant cites a number of authorities to support the proposition that in the absence of a written agreement of partnership he who alleges its existence must assume the burden of establishing it with clear proof, which indisputably is the law. Certain phases of the evidence are emphasized in the argument: For instance, it is pointed out that in a number of deals each of the parties retained the commission he collected; that there is a variance between the allegations and proof—it is alleged appellant was to devote all of his time to the partnership business, and that he subscribed for telephone service after the partnership was formed, as to which matters respondent's testimony is silent. But it was not necessary to allege or prove that appellant was to give all his time to the business in order to constitute a partnership. Other illustrations are that each party had his own individual cards and stationery printed subsequently to October 1, 1912, giving the same office address; that on respondent's card the appellant's name appeared as his "sole agent," respondent claiming, however, that this referred to his grading, and not to his real estate business; that respondent's name was not put on the door of room 441 with appellant's, nor did he have it printed on room 440 after removing the name of the former occupant; that there was no partnership bank account; that the advertisements which respondent

put in the Brawley News both for the grading and real estate business were in his individual name; that he had an individual rubber stamp made, the cost of which was charged to him personally, respondent testifying, however, that the stamp was used on his old stationery; that respondent presented for the first time at the trial a statement or claim purporting to show the expenses he incurred for the partnership to the extent of about \$2,500 for the months of January, February, March, April, and May, 1913 (which is included in the accounting), and as to which appellant makes the point that, notwithstanding respondent now claims he is entitled to this credit, he said nothing to appellant about it when the latter was endeavoring to collect from him one-half of the office expenses; that during this time respondent was "hard up" and borrowed money of appellant. But in view of what we have already said it will not be necessary to further consider the arguments of appellant as to the sufficiency of the evidence to sustain the findings of partnership.

2. The court found that the Yokum-Owen and Johnson-Ringer-Owen deals were partnership transactions, and the money held by the bank partnership funds; that the contracts with the agent and the sales agent, and the trust agreement and declaration of trust, were for the benefit of the partnership. Respondent testified these were partnership transactions, and appellant denied respondent was in any manner connected with them. The findings must be upheld.

3. The appellant contends that findings III, VI, and XI relative to the town site are without support in the evidence. His position is that the town site was his own personal undertaking, that respondent had no interest in it, and that he paid no part of the consideration. In other words, appellant's claim is that respondent's connection with the town site was by virtue of a contract entered into between them whereby respondent agreed to level, grade, and lay out the property; that he did the work and was paid for it.

The testimony of the parties as to the town site is strictly at variance. Respondent testified that the partnership owned the town site; that in July, 1912, either appellant or Prescott gave him for investigation a list of United States government lands in the Imperial Valley that were to be thrown open for homestead entry on August 22d following; that he told appellant the quarter section would make an "elegant town site"; that appellant said he did not have sufficient money to "scrip" it, but to let W. I. Alcott (appellant's son) file on it, "and later on maybe we would have the money and we would buy it from him"; that W. I. Alcott came to the Imperial Valley on August 20th, and on the night of the 22d respondent let him have an equipment and he went on the

land "a few seconds after midnight"; respondent testified he had witnesses present to note the making of the location. W. I. Alcott filed on the land September 23d. Respondent testified that he agreed to grade and clear the land as an offset for the moneys expended by appellant for the relinquishment and "scripping" of the location. There is a variance in the complaint, the evidence, and the findings as to the cost of the work. The complaint alleged it to be \$5,500; respondent testified that he and appellant figured it would cost \$4,000; while the finding is \$4,200. Respondent explained that "the \$5,500 stated in the complaint, I understood, included some work on the high-line canal," and that the item is apportioned between the town site and the high-line ditch in the accounting. However this may be, appellant's answer alleged that respondent agreed to do the town site work for him for \$4,200.

Respondent's testimony is corroborated by several of his witnesses. As already shown, H. E. Williams, Miss Cressie Mitchell, and Miss Louise Barker testified to admissions by appellant as to the town site. Miss Catherine Gatzman testified that she wrote letters to respondent at the dictation of appellant regarding lands in the Imperial Valley. Alexander M. Williams also testified appellant told him that he and respondent "should make at least \$100,000 apiece out of it. * * * You know he has an interest in the town site, but if he isn't careful he won't get anything." Mrs. Welch also gave corroborating testimony as to the ownership of the town site by the partnership. Appellant testified that in August, 1912, respondent told him about this quarter section and an adjoining quarter section at Imperial Junction; that he employed respondent to put W. I. Alcott on the 320 acres and agreed to pay him \$250 for his services—\$100 when W. I. Alcott went into the Valley, and the other \$150 on the making of the entry; that respondent put W. I. Alcott on the quarter section involved here on August 22d, where he remained until March, 1913; that appellant paid respondent \$100; that in February, 1913, he purchased the relinquishment from W. I. Alcott for which he paid him \$2,400, and secured scrip for the property at a cost of \$2,020; that he contracted with respondent to level and grade the town site for \$4,200; that the work was done by respondent and the contract price paid; and that respondent had nothing to do with the sale of any town-site lots or with platting the town.

Appellant produced a number of witnesses. Clarence J. Park testified he platted the town site under the appellant's direction. "I had a letter from Alcott to say as to how the work should be done. I located the center line on the streets, and Mr. Alcott and Mr. Welch and myself discussed the best manner of doing the work. * * * I had no conversation with Mr. Welch as to whether he

was doing the work by contract or otherwise." J. E. Arnold testified respondent told him he did the town-site grading by contract for \$4,000. "Nothing was said about Welch having any interest in the town site. Welch did say, however, 'If I had anything to do with Imperial Junction I would show them how to do it and stir things up.'" W. M. Boyle testified respondent told him he had graded the town site for appellant for \$4,000. Myron D. Witter testified he was connected with a Brawley newspaper; that respondent did advertising in his own name; that appellant ran an advertisement for "scripping" Imperial Junction in his own name. L. O. Crummer, testified that in his conversation with respondent, the latter never made any statement about having any interest in the town site, and W. I. Alcott testified he never had any conversation with his father about relinquishing the town site until March, 1913, and that he never discussed the subject with respondent. B. E. Colvin, F. G. Havens, and Hedge A. Havens testified they would not believe either respondent or Clarence R. Conover under oath.

The court further found that, pursuant to the agreement of partnership, respondent and appellant agreed to procure the relinquishment of the quarter section at Imperial Junction for the purpose of establishing a town site thereon, that appellant procured the relinquishment and paid to the homestead entryman (W. I. Alcott) \$2,400, and for the same purpose procured soldiers' additional rights, called scrip, and subsequently a patent for the quarter section, and informed respondent that he had paid \$1,715 (\$1,790 is the amount alleged in the complaint) therefor on account of the partnership; that respondent should promptly level and grade the land for the necessary streets and lots of a town site for the partnership account, and as an offset for the cash paid out by appellant, the difference in amounts to be adjusted in the partnership accounts; that respondent did level and grade the town site at a cost of about \$4,200 for the partnership account; "that appellant was guilty of serious misconduct in that he began advertising the said property as his sole estate and advertising himself as the sole owner and held out to the public falsely at times the claim that he was the sole owner of the said town site."

Upon this and other evidence it is plain that the findings touching the town site cannot be disturbed. As on the issue of the character of the relationship between the parties, the evidence of admissions by and the conduct of appellant would alone support a finding that the town site was a partnership affair. The evidence is involved in conflict on every material phase of this issue. It was for the trial court to determine whether the testimony of respondent or appellant as to this project was true, and, as their respective versions are diametrically opposed, it would

serve no purpose to state in detail the arguments of appellant. It is not questioned that respondent did the work, and according to the theory of appellant the contract price was \$4,200, which the court found to be the cost. We have quoted from respondent's testimony that the difference between the amount charged (\$5,500) and the amount found (\$4,200) was on account of the high-line ditch. Moreover, the findings are to the effect that respondent was to improve the property as an offset to appellant's cash contribution, and there is no suggestion that the doing of the work was dependent on the cost thereof.

Appellant lays stress on what he describes as inconsistencies and contradictions in respondent's position. Our attention is directed to an affidavit which he made on July 22, 1913, wherein he averred that his "occupation is a teaming contractor and his principal work is that of doing assessment work on government land entries," and that during the four years he had known the quarter section it has been in its natural desert state except for the work done by appellant and his predecessor in interest, W. I. Alcott. This affidavit was made in connection with the application of Carmen F. Carlson for reinstatement on the land. Attorney George R. Wickham, whom appellant employed in that proceeding, testified respondent stated to him he was to do the work for appellant and never spoke about his, the attorney's, employment or paid him any part of his fee. Reference is made to the following testimony of Mrs. Sadie B. Hendricks, having regard to the Hendricks' deal:

"I * * * demanded the money back. * * * I said to him, 'You said you were working for Mr. Alcott. Why don't you get it from him?' and he said that he was overpaid already. He said that he had a contract to grade Imperial Junction and was getting over \$4,000 for the work. * * *"

But, while this affidavit may appear inconsistent with respondent's claim that the town site was partnership property, it is conceivable the trial court concluded the parties were in collusion for the purposes of the contest.

[5] It may be said generally of appellant's contentions as to the town site that the evidence, considered together, is ample to support the findings. It was for the trial court to harmonize any inconsistencies or contradictions, and to consider the evidence of impeachment in arriving at its conclusion, and we must assume in favor of the judgment that this was done.

4. This is likewise true of appellant's contention in regard to a certain chattel mortgage for \$3,500, dated March 14, 1913, given him by respondent, which the former asserts and the latter denies was for a consideration. This transaction was not pleaded, and no

finding was made in regard to it. Appellant testified that in March or April, 1913, respondent executed the mortgage on his grading equipment (which was inventoried at \$5,602.50) for \$3,500; the consideration being made up of \$1,500 which appellant claimed respondent had borrowed in different sums from him, and \$2,000 for the R. M. Sipple tract—14—11—13—which respondent was to give to Mrs. Martin, his mother-in-law. Appellant had previously purchased the property from Sipple. This was the second mortgage respondent had executed on his grading equipment, one having been given to the First National Bank of Brawley for \$900. Appellant claims he paid for the grading work by the release of the \$3,500 mortgage and the payment to respondent of \$700 in cash. Respondent's version is that he said to appellant:

"I have got to get some money to keep things going and to get this thing straightened out.' He said, 'I thought we would make some money.' I said to him 'You told me you could raise money.' * * * He said, 'The bank has a first mortgage on your grading outfit; you give me a second mortgage and that will hold things together until we can sell some lots and take care of things. I will hold it until we get the town site fixed up and we can sell some lots. If we don't, we can't get the town site fixed up or get the water there either.'"

Respondent also testified that he received no consideration from appellant for the chattel mortgage; that it was given to protect respondent from his creditors while he was extending the high-line ditch to the town site; and that about a year after he completed that work appellant released the chattel mortgage, without any consideration.

Appellant argues that certain admissions and conduct of respondent preclude the idea that the mortgage was without consideration and was merely given to protect the equipment from the claims of respondent's creditors. Frank Birkhauser, attorney for the First National Bank of Brawley, testified that on or about July 31, 1913, in a conversation between himself and the parties, the respondent requested an extension of time, but that the bank wanted appellant to release certain of the mortgaged property so that it would have additional security before extending the time on the mortgage. The witness said:

"At a conversation in front of the Bungalow Hotel Welch said that Alcott's mortgage was paid by work, I think, on the town site."

Appellant also mentions the evidence that the stenographer wrote, "Bal. in full payment of chattel mortgage," on the check stub when, as he claims, the final \$500 was paid, and other matters which he asserts tend to prove that there was a consideration for the mortgage. In support of respondent's position that there was no consideration he em-

phasizes the fact that in Plaintiff's Exhibit I appears the entry of March 4, 1913, "Relinq. R. M. Sipple \$400," and on the same page of the book one-half of the total expenses for this month are charged to respondent, notwithstanding appellant's claim that he agreed to purchase this identical property a few days later for \$2,000. Moreover, respondent contends appellant has not satisfactorily accounted for the remaining \$1,500. Two items of \$500 and \$125, respectively, appear in schedule 10, and appellant makes the indefinite statement as to the payment of the remaining \$875:

"The balance of the chattel mortgage consisted of several small items. * * * It was all figured up at the time."

A finding against appellant's contention must be implied from the omission of a credit in the account for the \$875.

[8] Appellant makes the point that it is neither alleged nor found that respondent agreed with appellant to do the grading work, but merely that the appellant "urged and insisted" that it be done by respondent "as an offset for the cash paid out by defendant Alcott." The quoted language is from the complaint. We think this is equivalent to a formal allegation that the parties made an agreement to that effect. In any event the work was done. A partnership to engage in the real estate business having been found, the presumption is that all transactions within its scope would be for the benefit of such partnership.

5. Appellant also makes the point that respondent is entitled to no relief because by his own admissions the chattel mortgage was fraudulent. Respondent, in answer to this contention, relies on the testimony already quoted to show that appellant originally suggested the execution of the chattel mortgage. The presumption is that the court so resolved the evidence, and hence appellant is estopped to invoke the equitable doctrine.

6. Appellant contends that the evidence does not justify the implied finding that the work of bringing water to the town site through the high-line ditch was a partnership undertaking, and in debiting him with one-half of \$2,033.87—the amount of the loss on high-line ditch No. 5. This project was not pleaded, but findings in favor of respondent are to be implied from the accounting wherein the debts and the above loss appear. Respondent's testimony as to the high-line ditch is that in the latter part of 1912 he suggested to appellant it would be advisable to secure water for the town site, and that the Imperial Water Company had offered him a contract to extend the high-line ditch to the property; that he told appellant the contract would entail a loss, and that the latter replied, "Well, anyway, we can manage to get the water up to the junction, and whatever it is when we sell the town site * * *

we will balance it up.' He told me the loss whatever I would be put to, or we would be put to, on the high-line ditch, we would divide between us;" that he entered into a contract with J. W. Yokum, vice president and director of the Imperial Water Company, to extend high-line ditch No. 3 and high-line ditch No. 5, on a per diem basis for his teams; and that he made the extension and the water went through the ditch to the town site. The appellant testified he had no connection whatever with this undertaking, but that respondent did the work under a contract with J. W. Yokum. He stated further that about March 1, 1913, he learned for the first time that respondent was doing the work; that respondent "had gone in the hole on the high-line work"; came to him and wanted money "to pay his help on the high-line work." Appellant's position is that the extension of the high-line ditch was a matter between respondent and J. W. Yokum, and that he was in no way connected with it.

J. W. Yokum testified he had an oral agreement with respondent about work on high-line ditch No. 5; that he and respondent went to the Brawley Bank and signed up a contract whereby the latter was to get paid as he went along. Frank Birkhauser testified respondent and Yokum came in to arrange for some work on the high-line ditch, and that respondent was to get paid as he did the work. The evidence as to this work is such that the implied finding it was done for account of the partnership must be sustained. Respondent's testimony is flatly contradicted by appellant, but that only presents a conflict which the court resolved on the side of the former. In addition to the evidence already set forth, it appears, among other things, that in a letter to Mrs. Martin under date of August 15, 1913, appellant said:

"I am assured by the water company that they will furnish me water about November 1st, and, being one of the organizers of the water company No. 3, I am positive that the information is correct."

The court may have attached importance to this letter in view of appellant's testimony he was not aware the work was being done. We must conclude that respondent's version was accepted by the court. Moreover, the project was of great concern to the successful operation of the town site, and the trial court probably concluded the work was not done without the cognizance and co-operation of appellant.

7. Appellant next contends the evidence is insufficient to support findings III and VI, as to the Hall-Sutton, Bergon-Antes, Easton-Mitchell, and Flicker deals, and the accounting thereof, for the reason that they are contrary to the admissions of the pleadings and to the evidence. The method pursued by the court in the accounting was to credit each

(192 P.)

of the parties with the money paid out by him for the benefit of the partnership, and to debit each with the commissions received by him; the difference between the relative contributions and expenses forming the basis of the money judgment in favor of respondent. The account appears in ten schedules and is presented in recapitulatory form in the findings as follows:

Credit.

Money paid out by Alcott for benefit of the partnership:	
Expenses of real estate business (Schedule 1)	\$2,833 41
On account of town site of "Niland" (Schedule 2)	5,656 86
Traveling expenses account of town site (Schedule 3)	634 15
Total credit	\$9,113 42

Debit.

Commissions from real estate business (Schedule 4)	\$4,151 54
Sale of town lots at "Niland" (Schedule 5)	2,045 00
Total debit	\$6,196 54
Partnership owes Alcott	<u>\$2,916 88</u>

Credit.

Money paid out by Welch for benefit of partnership:	
Expenses of real estate business (Schedule 6)	\$1,781 15
On account of town site (Schedule 7)	4,200 00
Loss, high-line ditch (Schedule 8)	2,033 87
Total credit	\$8,015 02

Debit.

Welch received for use and benefit of partnership:	
Commissions from real estate business (Schedule 9)	\$1,835 00
Cash from Alcott (Schedule 10)	1,271 78
Total debit	\$3,096 78
Partnership owes Welch	<u>\$4,918 24</u>
Welch credit	\$4,918 24
Alcott credit	2,916 88
Welch over Alcott	<u>\$2,001 36</u>

The account then states the debts of the partnership:

High-line ditch No. 5	\$4,249 37
Debts in the real estate business	503 33
	<u>\$4,752 70</u>

In the Hall-Sutton deal the testimony of both parties agrees with the complaint and answer that a commission of \$900 was earned, received by appellant, and one-half thereof paid by him to respondent. The finding is that "the commission * * * was \$900, * * * and * * * was paid to the said defendant Alcott and shown in the accounting taken herein." In the accounting the \$900 is debited to appellant in schedule 4, but respondent is not debited with any part thereof in schedule 9. Appellant testified:

"That deal was all settled at the time it was made. It was settled by a division of the money; * * * there has never been any contention between us in regard to the Hall-Sutton money. * * * I turned over the money to Welch right there in my office in cash."

The following colloquy occurred:

"Mr. Alcott: The amount of the Hall-Sutton commission would be \$900. That deal was all settled at the time it was made. It was settled by a division of the money; by a division of the Hall-Sutton money.

"Mr. Clark: That is the allegation of the complaint and the admission of the answer.

"The Court: If that is the admission of the answer, there is not much use in going into it.

"Mr. Prescott: Well, it ought to be included in this statement.

"The Court: I cannot make them put it in the statement. It would be included in the judgment.

"Mr. Prescott: That is all right, then.

"The Court: That left \$818.03 to be divided.

"Mr. Clark: Your honor, of course, will have regard for the testimony of the plaintiff that it was divided between them.

"The Court: I know it was divided between them. Proceed, gentlemen."

Respondent testified:

"As a final result of the deal I believe Alcott drew down the money, paid the expenses, and gave me my share of the commission."

Obviously, if the parties each received one-half of the commission each should be debited accordingly, or the transaction omitted from the accounting entirely. Respondent gives no satisfactory explanation in his brief as to why he was not debited with \$450, and we do not find that appellant was anywhere given credit in the accounting for the payment of that sum to respondent.

It may be explained that Plaintiff's Exhibit 1 is the book of account referred to in the testimony of Miss Kate Gatzman as having been kept by appellant in which the expenses of the partnership paid by the Los Angeles office were entered. It was the practice of appellant at the close of each month during the first year to total the expenses, debit respondent with half thereof, together with any cash advanced to him, then credit him with half of the commissions of the particular month, and the difference, if any, between half of the commissions and half of the expenses, carried over to his credit or debit, as the case might be, in the succeeding month. Defendant's Exhibit 62A is a statement prepared by him of all commissions which he received. The Hall-Sutton deal does not appear in such monthly adjustments in Plaintiff's Exhibit 1, nor in Defendant's Exhibit 62A. The accounting is therefore erroneous in that, while appellant is charged with the entire commission, respondent was not debited with one-half thereof which the complaint alleges and he testified he received.

Respondent will be debited with \$450 and the debit against appellant reduced correspondingly.

[7, 8] But, apart from the accounting, no issue was presented by the pleadings as to the disposition of the commission. "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true. * * *" Section 462, Code Civ. Proc. It was said in *Burnett v. Stearns*, 33 Cal. 468:

"The finding should be confined to the facts in issue. The province of the court in respect to facts is to determine but not to raise the issue."

See, also, *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80.

"Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of fact being admitted it is conclusive. A finding against the admission is therefore outside the issues." *White v. Douglass*, 71 Cal. 115, 119, 11 Pac. 860.

It was declared in the *Matter of Doyle*, 73 Cal. 564, 570, 15 Pac. 125, 128:

"When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found.' * * * If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous."

See, also, *Hutchison v. Barr*, 190 Pac. 799; *Sutherland on Code Pleading*, § 1167.

"There can be no necessity of a finding as to a fact admitted by the pleadings. The finding is required only when an allegation of a material fact in the complaint is controverted by the answer, so as to raise an issue." *Swift v. Muybridge*, 8 Cal. 445.

The *Easton-Mitchell* deal comes under the same general rule. It is alleged in the pleadings and testified to by appellant and respondent that the commission of \$400 was earned and divided equally between them. The court found that appellant received the entire amount, which is accordingly debited to him in schedule 4, with no corresponding debit to respondent in schedule 9. In the absence of any issue of fact as to the division of the commissions, there was no need of findings except on the issue of partnership. Respondent must therefore be debited with \$200, and the \$400 debited to appellant in the accounting reduced correspondingly.

In the *Bergon-Antes* deal the complaint alleged that "a commission of \$238.20 was made and the same divided equally" between

the parties. This seems to be the full amount of the commission in this deal. The answer, however, admits the sale and alleges "that the commission was split in three parts and divided" equally between the parties and Frank C. Prescott, Jr. The court found appellant received the commission, and the amount, therefore, is debited to him in schedule 4, and no part of it is debited to respondent in schedule 9. Respondent's direct testimony is: "I was not present when it was settled. I never understood that Frank C. Prescott, Jr., had anything to do with it. I had no talk with Alcott about the commission." On cross-examination respondent stated:

"I don't know that Prescott got one third of the commission. Alcott told me that he did and I asked Prescott and he said he didn't."

It is argued in respondent's brief that the finding is in no way inconsistent, but in referring to the accounting this statement is made:

"The monthly balances were ignored and a general balance struck; \$116.60 went to Welch, \$116.60 to Alcott, and \$116.60 to Prescott, Jr."

Appellant's testimony is in line with his answer, but Plaintiff's Exhibit 1 shows that in making up the balance for December, 1912, respondent was credited with \$116.60 against his share of the expenses for that month, while Defendant's Exhibit 62A credits him with \$77.73, the same sum being debited to Prescott. The only issue calling for a finding as to this commission was whether it was divided into two or three parts. As the testimony in the two said exhibits presents a conflict, it must, in the face of the findings, be presumed the court concluded the parties alone were entitled to the commission, but, as the pleadings allege and admit the commission was divided, it follows it should not be debited to appellant alone. Respondent will therefore be debited one-half thereof—with \$116.60—and appellant's debit reduced correspondingly.

In the *Flicker* deal the complaint alleged that the partnership earned a commission of \$532, and that it was divided equally between the parties. The answer admits the commission was earned, but alleges it was split into three equal parts, the parties and one G. J. Reinert each receiving one-third. The court found appellant received and retained \$533.34. The only variation in the testimony of the parties (Reinert did not testify) is that, while appellant testified Reinert received one-third, respondent stated he received "a part of it," and in view of the vague and indefinite character of respondent's testimony on the point it must be assumed the court found that by the quoted phrase was meant his share of the commission. Appellant is debited in schedule 4, but respondent is not debited with any portion of the com-

mission in schedule 9. It is evident from the record that the total commission was \$800, and that the pleadings must be construed as alleging and admitting that one-third thereof was actually paid to Reinert. In other words, the only dispute between the parties concerning the commission was as to the two-thirds of the \$800—\$533.34 (stated, however, as \$532 in the complaint and answer). There can be no question but that Reinert actually received one-third of the \$800. This is borne out by Defendant's Exhibit 62A, for therein the amount of the commission is indicated as \$800, \$266.66 of which was paid to Reinert and \$266.67 credited each to respondent and appellant. Giving this interpretation to the pleadings, no issue is presented as to the division of the commission—the complaint and answer alleging it was divided—and there was no occasion for findings. Respondent must therefore be debited with \$266.67, and appellant's debit of \$533.34 reduced correspondingly.

It is proper to mention that in respect to the question of fact whether respondent actually received his share of the Easton-Mitchell, Bergon-Antes, and Flicker deals, or was merely given book credit therefor by appellant, that Defendant's Exhibit 62A contains this admission:

"Credits due Edmund Welch on commissions on Easton-Mitchell, the Bergon-Antes, and Flicker deals amounting to \$544.40 [\$200, \$77.73, and \$266.67, respectively, or a total of \$544.40] credited on office expenses." (Italics ours.)

However, in the presence of appellant's contentions we have, where applicable, decided according to the state of the pleadings. But, whatever may be the fact as to these deals, respondent actually received his share of the Hall-Sutton commission.

Appellant attacks the finding in the Hendricks deal which is to the effect that a sale was attempted in the business of, but no commission was made for the partnership. The complaint alleged the deal was made in the business of the partnership, and a commission of \$200 was earned "and the same accounted for in the partnership." The answer denies the deal was for the partnership, and alleges it was "made by the plaintiff alone and for his own account"; that appellant had nothing to do with it, nor did he claim or receive any part of the commission received by respondent. The commission does not appear in the accounting. Respondent testified the deal was made by him and Carroll Owen, and that he (respondent) got all the commission, and "it was never accounted for in the partnership." Appellant's testimony follows the answer. The finding is that the partnership did not earn the commission. All the evidence, however, shows respondent actually received the commission and retained it. The finding is therefore con-

trary to the complaint and the evidence. It was developed in the direct examination of respondent that an action brought by Hendricks against him alone for the recovery of the commission on the ground of fraud was then pending. It is not made to appear, however, whether this action is responsible for the finding. A new trial of this issue is necessary.

Appellant also questions the findings in the following deals, the first three of which were made by the respondent: It was alleged in the Hanson deal that the commission was \$475, and this amount was debited to respondent in schedule 9. The Wills deal was not pleaded. The respondent was debited with the entire commission as being \$150. Because respondent testified the commission was "\$150 or \$160" appellant claims the accounting was not correct. But the evidence would sustain a finding of either \$150 or \$160, and therefore cannot be disturbed. As we have sustained the findings of partnership, it follows that all deals after October 1, 1912, were partnership affairs, and, as appellant was credited with his share in the accounting, we shall not further consider the contentions as to these two deals. The Judd-Lewis deal was not pleaded. There was a conflict in the evidence as to whether the commission was "between \$300 and \$400" as respondent testified, or "\$400" as L. O. Crummer, appellant's witness, testified. The court found it to be \$320, and it was divided equally in the accounting. There was ample evidence to sustain the finding.

The point made by appellant in the Williams, Yokum-Owen, Johnson-Ringer-Owen, and Surfleuth deals, the commissions in which were received and retained by and debited to appellant, is that he made the deals independently of respondent. But this point is foreclosed by the findings of partnership. In the Terwilliger and Edgar-Andrews deals it was alleged they were conducted jointly by and the commissions divided equally between respondent and appellant. The latter's objections to these transactions is answered by the findings of partnership as is the point made in the Medberry deal.

Appellant also urges that respondent was improperly allowed a credit of \$230 in the judgment. The record shows that this sum is for one-half of \$460 which the court found was subsequently collected by appellant on account of principal and interest on the Yokum-Owen and Johnson-Ringer-Owen notes. The accounting shows that respondent's contribution to the partnership exceeded that of appellant's by \$2,001.36. The judgment directs that respondent be allowed \$230, as representing "one-half of defendant Alcott's subsequent collections on said notes of \$460"—making a total money judgment of \$2,231.36 in favor of respondent.

The first of these notes, dated March 20,

1913, was for \$1,600, to run for two years, with interest at 7 per cent. payable semi-annually. A \$168 interest debit appears in Defendant's Exhibit 62A and has been debited to appellant in schedule 4. When the judgment was entered on October 28, 1915, the fifth payment of interest was due, making a total of \$280 (5 times \$56), and, deducting therefrom the above \$168, a balance of \$112 remained. Four payments of \$56 each were indorsed on the note (each representing six months' interest). Another payment of \$56 appeared on the second note, evidently by mistake, as will be readily apparent from the difference in the respective interest payments. Here, then, was one of the "subsequent collections" of \$112.

The second note, dated March 21, 1913, was for \$1,700, to run for 90 days with interest at 7 per cent., payable quarterly. A payment of \$300 was made on the principal of this note on July 18, 1913, leaving \$1,400 due on the principal sum. Seven per cent. on \$1,400 makes a quarterly payment of interest of \$24.50, so that when the judgment was entered the total interest representing ten payments amounted to \$245. In Defendant's Exhibit 62A, appellant debited himself with six payments of \$24.50 each, or \$147, which sum is also debited in schedule 4. Six interest indorsements of \$24.50 each appear in this note. The difference between \$147, six payments, and \$245, ten payments, makes another of the "subsequent collections" of \$98. Hence these two "subsequent collections" make a total of \$210. Add to this \$250, a partial payment on the principal on May 14, 1914, and a total of \$460 results, one-half of which is credited to respondent in the judgment. In the computations of interest on this note no account is taken of the above \$300 partial payment on the principal between June 21, 1913, the close of the first interest quarter, and July 18, 1913, the date of said payment, or between May 13, 1914, the date of the payment of \$250 on the principal, and September 21, 1915, the end of the quarter immediately preceding the rendition of the judgment. But if the point is raised these items can be adjusted when the notes are liquidated.

8. Appellant's next contention is that the evidence is not sufficient to sustain the findings settling the account. We quote from the brief:

"The defendant's exceptions to the statement of the account by the court, which covers practically all of the items thereof."

One hundred thirty-four objections and exceptions were made and taken to the statement of account by the court, many of them relating to inconsequential items. We have considered these specifications, and do not think appellant could have been seriously prejudiced by any of the indicated rulings,

even if erroneous, for there is an abundance of competent evidence to sustain the account. It will not be necessary, therefore, to describe these specifications.

9. In connection with appellant's contentions that the evidence is insufficient to support the findings of partnership it is urged that the complaint is insufficient. It is asserted that—

"The allegations of the complaint as to the partnership in the real estate business are not only insufficient, but the specific allegations therein as to deals made and division of commissions earned are sufficient to show that no partnership in fact existed between the parties."

This point was raised on demurrer. We submit that the specific allegations as to the real estate deals in the complaint must control the general allegations of partnership. The demurrer is not contained in the record. It is sufficient to state that this contention overlooks other allegations of the complaint which make it clear that a partnership, and not an agreement for a division of gross earnings, is pleaded.

10. Appellant has cited a great many authorities in support of his contentions, which contain correct statements of the rules of law to which they are addressed. None of them is opposed to the conclusion we have reached. For instance, it is urged that the parties must have formed a definite intention to become partners. We have already subscribed to the doctrine that the burden of establishing a partnership is on the one alleging its existence. Appellant cites *Wheeler v. Farmer*, 38 Cal. 203, 213, to the proposition that "an agreement to divide the gross earnings does not constitute the parties to it partners." But neither that authority nor any of the others relied upon by appellant sustains his contention that the relationship between these parties did not constitute a partnership.

[9, 10] It may be conceded that an agreement to divide the gross earnings would not of itself constitute a partnership, but, according to the pleadings, the evidence, and the findings, the parties did more than agree to divide the gross earnings; they agreed to divide the profits of the business.

"A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim." Lord Cranworth in *Cox v. Hickman*, 8 H. L. Cas. 268; *Gilmore on Partnership*, p. 31.

It has also been declared that—

"Sharing profits is *prima facie* evidence of the existence of a partnership." *Gilmore on Partnership*, § 11, p. 31; *Uniform Partnership Act*, *Rowley Modern Law of Partnership*, § 84.

"Profits" is a relative term and contemplates losses. The Civil Code provides:

Section 2395:

"Partnership is the association of two or more persons, for the purpose of carrying on business together, *and dividing its profits between them.*" (Italics ours.)

Section 2404:

"An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

The appellant does not contend that the incidental expenses of the deals and the expenses of the Los Angeles office were not to be divided equally between them. Plaintiff's Exhibit 1 was kept under appellant's direction and shows that the expenses were entered therein and half of them charged to respondent. The evidence, including correspondence between the parties, the admissions and conduct of appellant, is sufficient to prove that the parties formed a definite intention to enter into a partnership relation, and that the business between them was carried on pursuant to this agreement and understanding. It is not claimed there was any stipulation between the parties that they should not divide the losses (section 2404, Civ. Code), and, as already stated, the court charged to each of the parties one-half of \$2,033.87, the amount of the loss on high-line ditch No. 5.

[11] 11. There is no merit in appellant's next contention that the failure of the court to make findings within the meaning of section 632, Code of Civil Procedure, prior to the taking of the account, was error. We quote from the record:

"The court announced that it would find in favor of the plaintiff as to the existence of a partnership * * * as to the real estate business and also in the town site."

It was clearly within the discretion of the court to make the findings on the issue of partnership either before or after the accounting was made.

[12] 12. Appellant complains of the action of the court in modifying the judgment after the entry thereof and while the motion for a new trial was pending. The modification was made upon the offer of respondent to waive \$2,033.87, the amount of the loss on the high-line ditch for which respondent was given credit in schedule 8, and which the court in the judgment also directed be paid out of the partnership funds. In other words, the double credit to respondent for the amount resulted in appellant having to stand his share of the loss twice. But, as the modification was in favor of appellant, he will not be heard to complain.

13. In the final paragraph of appellant's

opening brief it is stated the exceptions to the rulings on the admission and rejection of evidence "are all urged and not waived." This refers to some 105 rulings, many of them relating to the issue of partnership, the evidence to establish which we have found to be sufficient. The rulings are not otherwise specified, but even if, in particular instances, they were erroneous, it cannot be maintained appellant was prejudiced thereby.

The judgment is reversed, and the cause remanded for a new trial upon the issues as to the Hendricks deal only. With respect to the issues as to the partnership and all the issues relative to the accounting except those relating to the Hendricks deal, the findings as heretofore made by the court below shall stand as made, and after a new finding upon the issues as to the Hendricks deal the court below, upon a consideration of all the findings, shall enter judgment thereon dissolving the partnership and settling the entire account as before, except that as to the Hall-Sutton, Bergon-Antes, Easton-Mitchell, and the Flicker items of the account the judgment be in accord with the views expressed in this opinion, and as to the Hendricks deal in accord with the new findings thereon. Appellant shall recover costs of this appeal.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.

(185 Cal. 606)

IN RE RELPH'S ESTATE.

BLACKWELL v. SUPERIOR COURT OF STANISLAUS COUNTY et al.

(Sac. 3257.)

(Supreme Court of California. May 2, 1921.)

Executors and administrators ~~vs~~ 29(5)—Order, granting letters of administration, adjudication of fact of residence of deceased.

The order of the superior court of San Joaquin county, granting letters of administration, was an adjudication of the fact of residence of the deceased in that county, binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of deceased, including the probate of any subsequently produced will.

In Bank.

Application for writ of mandate by Ida Blackwell against the Superior Court of Stanislaus County and others to compel the court to proceed in the matter of the probate of the will of Glenn C. Relph, deceased. Writ denied.

J. B. Curtin, of Sonora, for petitioner.

PER CURIAM. The court is of the opinion that under the well-settled law of this state the order of the superior court of San Joaquin county, granting letters of administration, was an adjudication of the fact of residence of the deceased in that county, binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of the deceased, including the probate of any subsequently produced will.

The application for a writ of mandate to compel the superior court of Stanislaus county to proceed in the matter of the alleged will of the deceased is therefore denied.

All concur.

(52 Cal. App. 234)

STONE v. GILL. (Civ. 3499.)

(District Court of Appeal, Second District, Division 1, California. April 14, 1921.)

1. Municipal corporations ⇨706(5)—Evidence held to warrant finding automobile driver was negligent in failing to see pedestrian.

In an action for injuries to pedestrian who was struck by automobile which came up behind him while he was walking in the street, evidence held to warrant the jury in finding the automobile driver negligent in failing to discover the presence of the pedestrian in time to avoid striking him.

2. Municipal corporations ⇨705(10) — Fact that pedestrian was walking on street and not looking behind does not show contributory negligence.

Evidence that pedestrian was walking on the street at night and that he did not keep lookout behind him for approaching vehicles does not compel the court to find him negligent.

3. Damages ⇨132(7)—\$3,500 for broken leg and other injuries held not excessive.

An award of \$3,700, of which \$200 was for expenditures, leaving \$3,500 as compensation for injuries, is not excessive, where the evidence showed plaintiff suffered a broken leg and severe injuries to his ribs, hip, and back muscles which confined him to his bed for four weeks and caused great pain and loss of sleep, and that at the trial one bone had not yet healed, is not excessive.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by George R. Stone against J. W. Gill to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Walter J. Hartzell, of Redlands, and McNabb & Hodge, of San Bernardino, for appellant.

Burton E. Hales, of Redlands, for respondent.

CONREY, P. J. Action to recover damages for personal injuries resulting from a

collision between plaintiff and an automobile driven by the defendant. Judgment was entered in favor of the plaintiff for the sum of \$3,700, of which \$200 covered expenditures for medical attendance and nursing, and the remainder of the award was allowed as general damages for the injuries received. Defendant appeals from the judgment.

On the evening of February 20, 1919, between 6 and 7 o'clock, plaintiff was walking west on the public highway known as West Fern avenue, in the city of Redlands. The complaint alleged that while he was thus walking, the defendant negligently drove his automobile along the street in the same direction in which the plaintiff was walking and carelessly and negligently struck the plaintiff and ran over him, thereby causing the injuries for which recovery was sought. The grounds of appeal which are presented for consideration relate solely to the sufficiency of the evidence to sustain the findings. Appellant contends: (1) That the evidence is insufficient to prove actionable negligence on his part; (2) that the plaintiff was guilty of contributory negligence which constituted a proximate cause of the accident; (3) that the damages awarded are excessive.

[1] From the plaintiff's testimony it appears that he walked westerly near the middle of Fern avenue several hundred feet before he was struck by defendant's automobile; that it had been raining earlier in the evening, but was not raining during this walk on Fern avenue nor at the time of the accident; that at the time of the accident "it was not misting at all"; that the sidewalks were wet and slippery, and, on account of trees, were considerably darker than the street; that for this reason there was less danger of slipping on the street than while walking on the sidewalks; that while walking on Fern avenue at the time of and prior to the instant of the collision he was watching carefully for objects coming toward him from the front, but did not look behind; that he did not see appellant's machine or hear it (that there was no signal or horn blown); that there were street lights fixed to posts so that the greater part of the light was reflected onto the street. The plaintiff's wife testified that after the accident defendant told her that he ran into the plaintiff; that "his lights were very poor and he could not see him." The defendant testified that he could see an object about 75 or 100 feet ahead with the lights that were on his automobile. The accident occurred almost directly under one of the street lights. The defendant contended that by reason of the wetness of the street the reflections of light from the street interfered with his vision and that he was unable to see the plaintiff until too late to avoid a collision. On the other hand, the plaintiff testified that the

reflections from the street did not cause a glare and did not interfere with vision ahead. Defendant in his testimony said:

"I was going along, leaning out beyond my windshield to get a vision of the road, and he suddenly loomed up in the way of the car and I struck him."

Our attention has not been directed to any evidence showing the condition of the windshield except such condition as might be inferred from the preceding sentence as quoted. We are satisfied that the evidence is sufficient to justify the court's finding that by reason of negligence on the part of the defendant in driving and operating his automobile the plaintiff was struck and injured thereby. From the facts shown, and upon which that finding is based, the inference was fairly warranted that the defendant's failure to see the plaintiff in time to avoid striking him must have resulted from careless failure to use his opportunities for observation.

[2] The evidence was not sufficient to compel the court to find that the plaintiff was guilty of contributory negligence, resulting either from the fact that he was walking on the street or from the fact that he did not look backward to guard against objects approaching him from the rear. "It still remains the law that foot passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, which due amount of care, in its quantum, is governed by the circumstances attending the use which the pedestrian actually makes." *Raymond v. Hill*, 168 Cal. 473, 482, 143 Pac. 743, 747. The same rule was affirmed by this court in *Blackwell v. Renwick*, 21 Cal. App. 131, 131 Pac. 94. In *Blackwell v. Renwick* it was further held that while the plaintiff was walking along in the roadway of a street it was not his duty to turn constantly and repeatedly to observe the approach of possible vehicles from the rear, "where the drivers of such vehicles could plainly observe them in time to give warning or turn out and avoid a collision." The reason thus stated points to the distinction between the situation where a person is traveling along a highway in the line of direction of the highway, and the situation which exists where a pedestrian is about to cross a street and thereby suddenly places himself in the path of danger.

[3] No sufficient reason appears which would warrant this court in holding that the amount of damages awarded is unreasonably large. There is evidence to the effect that the plaintiff's left leg was broken, one foot sprained, some of his ribs torn loose, his hip seriously injured, and the muscles of his back and shoulder injured. The trial of the action took place one year after the

date of the accident. One of the broken bones had not yet healed, and, according to medical testimony, there would be a permanent disability in plaintiff's ankle, affecting his ability to walk easily. After the accident, plaintiff was confined to his bed for four weeks and suffered a great deal of pain and loss of sleep.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(52 Cal. App. 290)

ANDERSEN v. CHARLES et al. (Civ. 3502.)

(District Court of Appeal, Second District, Division 2, California. April 16, 1921.)

1. Pleading \S 8(4)—Specific performance \S 114(2)—Complaint held insufficient for failure to allege facts showing that a consideration received by defendants was adequate.

Civ. Code, \S 3391, subds. 1, 2, make necessary in a complaint for specific performance the allegation of facts showing that the agreement was as to defendants just and reasonable, and that the consideration received by them for the agreement was adequate, and the allegation in terms that the agreement is just and reasonable as to defendants, and that he received adequate consideration is insufficient as stating a mere conclusion; and, although the complaint alleges the value of the land where it does not allege the period over which the mortgage notes to be delivered to the defendants were to run or how many notes there were or how they were payable or what was their value, it is insufficient.

2. Specific performance \S 49(2)—Adequacy of consideration relates to time of formation of contract.

In an action for specific performance of a contract to sell land, where plaintiff was to give a mortgage securing notes for the price, the fact that plaintiffs have since made valuable improvements on the land, increasing its value as security, cannot be considered, since the question of adequacy of consideration relates to the time of the formation of the contract.

3. Appeal and error \S 1176(1)—On appeal from dismissal of complaint, court cannot direct judgment precluding another action.

Upon an appeal from a judgment dismissing the complaint in an action for specific performance of a land sale agreement, this court cannot at the defendant's request direct a judgment which will preclude the possible maintenance of another action by appellant upon a different complaint showing a meritorious cause of action.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by A. S. Andersen against M. S. Charles and others for a specific performance. Judgment for the defendants, and the plaintiff appeals. Affirmed.

Turnbull, Heffron & Kelley, of Los Angeles, for appellant.

Frank G. Falloon, of Los Angeles, for respondents.

WORKS, J. This is an appeal by plaintiff from a judgment for defendants in an action for specific performance, after demurrer sustained to plaintiff's amended complaint with leave to amend, but the right to amend not being exercised.

It is alleged in the amended complaint, exhibiting only so much of it as is necessary to a consideration of the points presented to us, that the contract sought to be enforced was one by which appellant agreed to buy and respondents agreed to sell certain described real property, consisting of 19 city lots in a group, at an agreed price of \$12,000; that respondents made a deed conveying the property to appellant, and delivered it to a certain abstract company; that at the same time appellant delivered to the abstract company a mortgage on the land mentioned, together with promissory notes secured by it, in the sum of \$12,000, bearing interest at the rate of 7 per cent per annum; that respondents agreed to accept the notes and mortgage as the full purchase price of the lots; that respondents received adequate compensation for the agreement sought to be enforced and for the property agreed to be conveyed; that the agreement was fair, just, and reasonable; that the assent of respondents to it was not obtained by misrepresentation, concealments, circumvention, or unfair practice of appellant, or by any promise of appellant which has not been substantially fulfilled; that the assent of respondents was not given under the influence of mistake, misapprehension, or surprise; that the value of the property agreed to be conveyed, both at the date of the agreement and at the date of filing the amended complaint was without certain improvements placed thereon by appellant, \$12,000; that the interest agreed to be conveyed was, at all times in the amended complaint mentioned, of the fair and reasonable aggregate value of \$12,000; and that respondents have caused the abstract company to refuse to deliver the deed. The pleading also sets up a communication from respondents by which they notify appellant that the agreement is rescinded upon certain stated grounds. It is alleged that appellant has at all times been ready, able, and willing to perform, has performed, and offers to perform, all of the conditions of the agreement on his part to be performed.

[1] Respondents claim that the amended complaint is insufficient because no facts are alleged going to show that the agreement was, as to them, just and reasonable, and that the consideration received by them for the agreement was adequate. Such a statement of facts is of course necessary in every complaint for specific performance (Civ. Code,

§ 3391, subds. 1, 2; *Joyce v. Tomasini*, 168 Cal. 234, 142 Pac. 67), and the allegation, in terms, that an agreement is just and reasonable as to the defendant, and that he has received an adequate consideration for it, states merely a conclusion. *Joyce v. Tomasini*, supra. The pleading now before us satisfies one of the requirements of the authorities, for it alleges the value of the land agreed to be conveyed. *Lynn v. Knob Hill Imp. Co.*, 177 Cal. 56; 169 Pac. 1009. Not only, however, does it not allege the period over which the notes were to run, nor how many notes were given, nor whether they were payable in installments, great or small, but there is no showing as to the ability of appellant to pay the notes, nor any allegation of any fact negating the possibility that the instruments are so much waste paper. These notes, secured by a mortgage upon the very land agreed to be conveyed, were the only consideration for the transfer, and, short of a showing of some value behind the paper, respondents' agreement to convey was made solely upon their faith in the value of the land itself. Surely, under such a state of affairs, no adequate consideration was received by respondents, and the agreement was, as to them, unjust and unreasonable. *Cummings v. Roeth*, 10 Cal. App. 144, 101 Pac. 434; *Klein v. Markarian*, 175 Cal. 37, 165 Pac. 3.

[2] We have not overlooked the fact that appellant, while in possession, placed certain valuable improvements upon the land. That circumstance cannot be considered in this action (*Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386), for the reason that "the point of time to which the question of adequacy [of consideration] must relate is the time of the formation of the contract" (*Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190). Nothing is availed appellant by reason of the fact that equities arise in his favor because of his expenditures upon the improvements, as "inadequacy of consideration is, under the law of California, an independent and distinct ground for denying specific performance." *Haddock v. Knapp*, 171 Cal. 59, 151 Pac. 1140.

[3] The respondents ask us, in the event that we sustain them in their contention that the amended complaint is insufficient, to modify the judgment in such manner as to show a judgment in their favor on the merits, the judgment actually entered being for a dismissal; but we cannot direct a judgment in the cause which will preclude the possible maintenance of another action by appellant upon a different complaint, showing a meritorious cause of action. *Robinson v. Howard*, 5 Cal. 428; *City of Los Angeles v. Mellus*, 59 Cal. 444; *Flood v. Templeton*, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N. S.) 579.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(52 Cal. App. 300)

SOLOMON v. REDONA et al. (Civ. 3164.)

(District Court of Appeal, Second District, Division 2, California. April 18, 1921.)

1. Death §2(2)—Presumption from absence.

The presumption recognized by Code Civ. Proc. § 1963, subd. 26, that one not heard from in seven years is dead, does not arise until the expiration of the seven years unless there are circumstances in evidence to quicken the time; and the party claiming that the death occurred before a particular time within the seven years has the burden of proving the precise time of death.

2. Descent and distribution §71(4) — Presumption owner of interest presumed dead left heirs.

In an action for partition of real estate, wherein no conveyance was produced from the owner of an interest who had not been heard from for more than seven years, plaintiff failed to show title to such interest; the law presuming that, if such owner were dead, she left heirs.

3. Partition §48—All cotenants not plaintiffs must be made parties defendant.

In a suit for partition, it is indispensable that all cotenants not united in the complaint be made parties defendant.

4. Partition §50—Duty of court to require presence of co-owner not named as party.

In equity and under Code Civ. Proc. § 389, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them brought in, it was the imperative duty of the court, even on its own motion, in a suit for partition, to require the presence of the owner of an interest not named as a party; the statute being mandatory.

5. Appeal and error §187(3)—Judgment reversed for nonjoinder of co-owner, though not called to attention of trial court.

In a suit for partition, if a co-owner is not made a party plaintiff or defendant and a non-jointer appears by the record, the appellate court will reverse the judgment whether the attention of the trial court was called to the defect or not.

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Bernardo J. Solomon, administrator of the estate of Helen R. Solomon, deceased, against Carlos Redona and another for partition of real property. From an interlocutory decree in favor of plaintiff, defendant Carlos Redona appeals. Reversed.

Haas & Dunnigan, of Los Angeles, for appellant.

Henry E. Carter, of Los Angeles, for respondent.

FINLAYSON, P. J. Helen R. Solomon, now deceased, brought this action for a peti-

tion of real property alleged to be owned by herself and two of the defendants as tenants in common. From an interlocutory decree in favor of plaintiff the defendant Carlos Redona appeals. Helen R. Solomon having died after the appeal was perfected, the administrator of her estate was duly substituted as plaintiff in her stead. Notwithstanding the substitution, we shall, for convenience, refer to Helen R. Solomon as the plaintiff and respondent, just as though she were still alive and prosecuting the appeal in her own name.

One of the points made by appellant is that the owner of an undivided one-tenth was not made a party to the action, and that therefore the decree does not determine the interests of all the various co-owners.

The complaint alleges that plaintiff is the owner of an undivided three-fifths of a lot in the city of Los Angeles; that the defendant and appellant Carlos Redona is the owner of an undivided one-fifth, and that Jose S. Redona, another defendant, is the owner of the remaining undivided one-fifth. Carlos Redona, answering, denied that plaintiff and Jose S. Redona own three-fifths and one-fifth, respectively, or any interest whatever, and alleged that, on the contrary, he is the sole owner of the lot. The court found the facts as alleged in the complaint, and thereupon entered the interlocutory decree from which the defendant Carlos Redona appeals.

The facts essential to an understanding of the question to be discussed are substantially these: Fermina S. de Redona, the mother of plaintiff and defendants Carlos Redona and Jose S. Redona, acquired the lot on April 13, 1859, as her sole and separate property. She died July 26, 1910. It seems that she survived her husband, and that she died intestate, leaving as her sole heirs three children who survived her and certain grandchildren, the lawful issue of two deceased daughters. Besides two children who died before reaching majority and without having been married, Fermina S. de Redona was the mother of five children, two of whom, married daughters, predeceased her. Of these five, the three who survived their mother are Helen R. Solomon, the plaintiff in this action, and the two defendants Carlos Redona and Jose S. Redona. The two who departed this life before their mother's death were Sarah Redona Bryant and Virginia Redona Carpenter. Sarah Redona Bryant left one surviving child, Josefa Roberts, formerly Josefa Bryant. Virginia Redona Carpenter left surviving her two children, John and Rachel. Before the date of the trial, Rachel, who had attained her majority and had married before her grandmother's death, had not been heard of by her relatives in Los Angeles for more than seven years. When last heard of, which, according to one of plaintiff's witnesses, was "close to eight years ago," she was living in Globe,

Ariz. The case was tried in July, 1916. So that Rachel Carpenter was last heard of by her relatives in Los Angeles some time in the second half of 1906, or thereabouts. Her grandmother, it will be recalled, died July 26, 1910.

A deed to plaintiff from Josefa Roberts and John Carpenter was introduced in evidence. By this deed plaintiff acquired, in addition to the undivided one-fifth that she inherited from her mother, Fermina S. de Redona, the one-fifth that Josefa Roberts succeeded to as the sole surviving child of Sarah Redona Bryant, and the undivided one-tenth that John Carpenter succeeded to as one of the two children of Virginia Redona Carpenter. The remaining one-tenth was succeeded to by Rachel Carpenter if she survived her grandmother. Where that one-tenth is vested depends upon facts as to which the record is silent.

[1] There is no direct evidence of the death of Rachel Carpenter. Nor does the record disclose any fact from which her death may be inferred as an inference of fact. Except the presumption of law recognized by subdivision 26 of section 1963 of the Code of Civil Procedure—the presumption that a person not heard from in seven years is dead—there is nothing to sustain respondent's contention that Rachel Carpenter has departed this life. It is uniformly held that the presumption of death that the law deduces from the fact that a person has not been heard from in seven years does not arise until the expiration of the seven years, "unless," as was said in *Burr v. Sim*, 4 Whart. (Pa.) 150, 33 Am. Dec. 50, "there are circumstances in evidence to quicken the time." Here there was no evidence that Rachel Carpenter was subject to any special peril, such as plague, battle, earthquake, shipwreck, dangerous disease, or other circumstance that might "quicken the time" designated by the Code. Therefore, assuming, without deciding, that under the facts of this case there is any presumption that Rachel Carpenter is dead, still that presumption could not arise until some time in the year 1915, or about five years after the death of her grandmother, Fermina S. de Redona.

There are one or two decisions of the Supreme Court of this state that lend color to the view that the rule in this jurisdiction is that, in the absence of any evidence tending to fix the time of death during the seven years' absence, the person unheard of is presumed to be alive until the expiration of the seven years. *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; *Western Grain, etc., Co. v. Pillsbury*, 173 Cal. 135, 138, 159 Pac. 423. In some of the other jurisdictions the rule is that, while a presumption of death arises from the unexplained absence of a person unheard of for seven years, the presumption extends only to the fact of death at the end of

the period, and does not include the date of death, leaving the precise time of death, whether at the end or at any other particular time within the period, to be determined as a question of fact, the burden of showing the time of death being upon the party who claims that it occurred on or before any particular date within the seven-year period. Ann. Cas. 1917A, p. 82 et seq., note to *McLaughlin v. Sovereign Camp*.

"Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead—there is none as to the time of the death. If it become important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury, besides the mere lapse of seven years since being last heard from." *Spencer v. Roper*, 35 N. C. 333.

Here, to maintain plaintiff's allegation that she is seized of an undivided three-fifths of the lot, the burden is on her to prove that Rachel Carpenter died before July 26, 1910, the date of her grandmother's death, assuming, for the purpose of this decision only, that if Rachel Carpenter did predecease her grandmother, her brother John Carpenter, plaintiff's grantor, became vested with the undivided one-tenth that otherwise would have descended to Rachel. But it was some time in 1908, at Globe, Ariz., or about two years before the grandmother died, that Rachel was last heard of. As there is no circumstance tending to show that she died prior to July 26, 1910, it follows that the result must be the same whether we adopt the rule that the person "unheard of" is presumed to be alive up to the end of seven years, or the rule that there is no presumption as to when the death occurred during the seven years' absence, but that the burden is upon the party claiming that it occurred on or before a particular time within the seven years to prove the precise time of death; for plaintiff, upon whom that burden rested, made no attempt to assume it by showing at what precise time, during the period of seven years' absence, Rachel Carpenter died.

If Rachel Carpenter and her brother, John, were both alive at the date of their grandmother's death, then, as the sole surviving children of Virginia Redona Carpenter, who was one of the five children of Fermina S. de Redona, each, Rachel and John, succeeded to an undivided one-tenth.

"If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation." Subdivision 1, § 1386, Civ. Code.

[2] Plaintiff has produced no conveyance from Rachel Carpenter. The deed to plaintiff from Rachel's brother, John, did not convey the undivided one-tenth that vested in Rachel on her grandmother's death. For even if, by reason of the disputable presumption declared by subdivision 26 of section 1963, it must be presumed that Rachel Carpenter died some time before the action was commenced, nevertheless there is no proof that her brother, John, is her sole heir. It was not shown that there was ever any administration of Rachel Carpenter's estate. In fact, no attempt has been made to show where the undivided one-tenth vested on the death of Rachel.

For these reasons we conclude that plaintiff has failed to show title to the undivided one-tenth that presumably vested in Rachel Carpenter on her grandmother's death. It can only be regarded as a title vested in some co-owner who has not been made a party to the action. Indeed, there is some evidence from which it may be inferred that Rachel Carpenter's father survived her and that he was alive at the time of the trial. A witness testified that the father telegraphed to Arizona to inquire of his daughter's whereabouts. We infer, from the few facts disclosed by the record, that Rachel Carpenter's husband—she married in 1900 a man of the name of Emmett—had obtained a divorce from her. We likewise infer from certain facts presented by the record that Rachel had no children. It is possible, therefore, that her father, who was not a party to the action, is her sole heir, and that he is vested with the undivided one-tenth. Subdivision 2, § 1386, Civ. Code. Though there may be no presumption that Rachel Carpenter, if dead, left any issue, the law does presume, if she be dead, that she left an heir or heirs capable of succeeding to her estate. *Modern Woodmen v. Ghromley*, 41 Okl. 532, 139 Pac. 306, L. R. A. 1915B, 728, Ann. Cas. 1915C, 1063. However this may be, it is quite clear that the owner of the undivided one-tenth, whoever he or she may be, is not a party to this action.

[3] In a suit for partition it is indispensable that all cotenants who have not united in the complaint be made parties defendant. *De Uprey v. De Uprey*, 27 Cal. 330, 87 Am. Dec. 81; *Gates v. Salmon*, 85 Cal. 576, 593, 95 Am. Dec. 139; *Id.*, 46 Cal. 361, 373, 374; *Sutter v. San Francisco*, 36 Cal. 112; *Hill v. Den*, 54 Cal. 6; *Ferris v. Montgomery L. & I. Co.*, 94 Ala. 557, 10 South. 607, 33 Am. St. Rep. 146, and note; *Burchett v. Clark*, 162 Ky. 586, 172 S. W. 1048; *Freeman on Cotenancy and Par-*

tion, § 463. If one of the co-owners is not bound by the decree in partition, the purpose of the suit fails of accomplishment, for no one will then become a tenant in severalty. Appellant, whom plaintiff admits owns an undivided one-fifth, is entitled to have, in this proceeding, a title not subject to the possibility of the entire partition being opened up by parties not before the court.

[4] It is the general rule in equity, continued in force by our Code of Civil Procedure, that all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy. It is provided by section 389 of the Code of Civil Procedure that—

"When a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in."

This provision of the statute is mandatory. When it appeared to the court, as, from the evidence, it necessarily must, that it was essential to a full and complete determination of the controversy before it that the owner of the undivided one-tenth should be made a party, it was the imperative judicial duty of the court to order that party brought in. It was not a matter of discretion, but of duty for the court, even upon its own motion, to require the presence of such co-owner. *O'Connor v. Irvine*, 74 Cal. 442, 16 Pac. 236. See, also, *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. (N. S.) 275.

[5] In a suit for partition, if a co-owner is not made a party plaintiff or defendant, and the nonjoinder appears by the record so that an appellate court may take cognizance of it, it will reverse the judgment, whether the attention of the trial court was called to the defect or not. 30 Cyc. 201, 202; *Russell v. Bell*, 160 Ala. 480, 49 South. 314.

Because the ownership of the undivided one-tenth is not represented, the decree must be reversed.

Appellant has presented several other interesting questions—questions that necessarily must arise on a retrial of the action—but we do not think it proper to pass upon them in the absence of the owner of the undivided one-tenth that, on the record now before us, presumably vested in Rachel Carpenter upon her grandmother's death.

Judgment reversed.

We concur: WORKS, J.; CRAIG, J.

(52 Cal. App. 312)

CALIFORNIA PRODUCTS, INC., v. MITCHELL et al. (Civ. 3254.)

(District Court of Appeal, Second District, Division 2, California. April 19, 1921. Hearing Denied by Supreme Court June 18, 1921.)

1. Landlord and tenant \S 278—Landlord who entered premises in possession of tenant by removing lock from door guilty of "forcible entry."

Landlords who entered premises in possession of delinquent tenant by removing a lock from the door, and who removed the tenant's property therefrom and substituted own property in place thereof, and who thereafter remained in possession and excluded tenant therefrom, held guilty of forcible entry under Code Civ. Proc. \S 1159, making every person who breaks open doors and windows or other parts of a house guilty of forcible entry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forcible Entry.]

2. Forcible entry and detainer \S 8, 10—Questions of title and right to possession immaterial in action for forcible entry.

Under Code Civ. Proc. \S 1172, questions of title, of right to possession and of the defendant's good or bad faith in holding possession, are immaterial, since under the statute all entries on the actual possession of another are unlawful.

3. Landlord and tenant \S 278—Lease held not to give landlord right to make forcible entry.

Lease entitling lessor, on nonpayment of rent, "without previous notice or demand to re-enter the demised premises and the same peaceably to hold and enjoy thenceforth as if this lease had not been made," did not give the lessor the right to make a forcible entry by removing lock from door and removing lessee's personal property from premises and substituting their own therefor, and thereafter retaining possession excluding the lessee therefrom.

4. Landlord and tenant \S 179—Entire premises properly awarded to lessee of a part in forcible entry proceeding, where he had acquired other leases.

In lessee's action against lessor for forcible entry, the court did not err in ordering restoration of the entire premises to the lessor, where other portions of the premises had been leased to other parties, and where such other leases had been assigned to plaintiff.

5. Appeal and error \S 1079—Points conclusively answered in respondent's brief, and not pressed in appellant's reply brief, waived.

Points conclusively answered in respondent's brief, not pressed in appellant's reply brief, will be considered as having been waived.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the California Products, Incorporated, against Anna Mitchell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Glen M. Ely and Charles W. Hackler, both of Los Angeles, and Allen G. Mitchell, of Pomona, for appellants.

Kemp & Clewett, of Los Angeles, for respondent.

WORKS, J. This is an action under a complaint in two counts, one based upon a forcible entry, the other upon a forcible detainer. Judgment went for the plaintiff, and the defendants appeal.

The evidence shows, without dispute, that at a time when the agents of respondent were away from the premises in question, the appellants removed a certain lock from the door by means of which access was had to the place and to which lock respondent had the key. Appellants then effected an entrance to the premises and substituted a heavy padlock in place of the lock. Thereupon certain personal property of respondent was removed from the place, property of one of appellants was placed therein, and thereafter that appellant remained in possession of the premises, excluding respondent therefrom. At the time when appellants effected their entrance into the property, respondent was five months in arrears in the payment of its rent. Respondent was in possession, before the entry of appellants, under a lease from some of them, the instrument containing a provision that in case the rent reserved by it were at any time unpaid it should be lawful for the lessors, "without previous notice or demand, to re-enter the demised premises and the same peaceably to hold and enjoy thenceforth as if this lease had not been made."

The appellants contend that the evidence does not support several findings of the trial court, the point made being dependent upon the settlement of two questions of law. It is insisted by appellants: First, that the acts committed by them did not amount to a forcible entry; second, that they were permitted to retake possession of the premises, even in the manner in which they did, under the provision of the lease which we have quoted.

[1] The first question is not difficult of solution. The Code provides (Code Civ. Proc. \S 1159) that every person is guilty of a forcible entry who breaks open doors, windows, or other parts of a house, and it has been held (*Winchester v. Becker*, 4 Cal. App. 382, 88 Pac. 296) that one who enters the house of another by the use of a false key, thus unlocking the door in the absence of the occupant, is within the language of the section. The court said, in deciding the question:

"The meaning of the provision is that any opening of a closed door or window involving the use of force is to be regarded as 'breaking open' the door or window or house."

The acts of the appellants in the present action clearly amounted to a forcible entry.

[2, 3] Coming now to the second question, did the terms of the lease confer upon appellants the right to take possession of the property by means of a forcible entry, at the same time extending to them immunity from successful suit under the forcible entry statute? In such an action it is necessary for the plaintiff to show, only, in addition to the forcible entry, that at the time of the entry he was peaceably in the actual possession of the property entered. Code Civ. Proc. § 1172. Therefore questions of title cannot arise in such actions, nor can even questions as to the right of possession. Under the older state of the law the rule was different, but since the adoption of the Code "all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of defendant no longer affects the right of recovery in this form of action." *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447; *White v. Pfeiffer*, 165 Cal. 740, 134 Pac. 321. We see nothing in the lease which gave appellants leave to enter the demised premises in defiance of the provisions of the salutary statutes against forcible entries. The right was certainly not conferred through any principle of waiver. Considering the nature of the provisions of the statutes on the subject and the decisions construing them, some of which have been cited above, a lease must contain most direct and positive language in order to amount to a consent by a tenant that his possession may be invaded by a forcible entry. Such a consent would place him at the mercy of his landlord. In a given case a landlord might claim rent to be unpaid and the tenant dispute the claim. Such a question might easily arise. If it did arise, a landlord armed with a lease conferring the right to forcibly enter, upon nonpayment of rent, need but await the temporary absence of the tenant, then take possession by whatever means, thus settling the disputed question for himself, or placing the burden of its settlement upon the tenant. Not only so, but under the contention of appellants he might make entry in the face of the tenant, even to the breaking down of doors, so long as he committed no breach of the peace as to others. It would require the most positive language in a lease to allow such practices, and we find no such language in the instrument before us. Nor do we decide that such powers may be placed in the hands of a landlord by the terms of a lease. There are most decided considerations of public policy upon such a question. Forcible entries, made in the best of faith, may easily lead to brawls, affrays, and breaches of the peace.

Appellants were guilty of a forcible entry, the terms of the lease are no defense, and

the findings inelghed against are supported by the evidence.

[4] The next question made by appellants is that the trial court erred in ordering restitution of the entire premises to respondent. This point is made in view of the fact that, at the time the lease was made to respondent, two certain other parties had leases to parts of the property; but the contention of appellants is completely answered by the fact that these two leases were assigned to respondent, and that, at the time of the forcible entry complained of, it was in possession of the whole premises. Respondent was clearly entitled to a restitution of the place in its entirety.

[5] Two other points are presented by appellants, but we do not deem them worthy of extended notice. They are conclusively answered in respondent's brief, and they are not pressed in appellants' reply brief. Under such conditions we may well consider them as waived.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(52 Cal. App. 286)

FRANKLIN v. IRVINE. (Civ. 3487.)

(District Court of Appeal, Second District, Division 1, California. April 15, 1921.)

1. Malicious prosecution §72(2)—Instruction on probable cause erroneously refused.

In an action for malicious prosecution, an instruction that if the plaintiff had done acts such as to lead a reasonable man to believe that he would be in danger in resisting, and defendant, having reason to believe he was the owner of the property taken by plaintiff, fairly presented the facts to the district attorney, and acted upon his advice, defendant had probable cause for filing his complaint of robbery and larceny, and was not liable whether or not malice was proved, correctly stated the law, and should have been given; there being evidence to prove all the conditions set forth.

2. Malicious prosecution §72(2)—Instruction held incorrect in leaving question of probable cause to jury.

In an action for malicious prosecution, it is not sufficient to give to the jury a definition of probable cause and instruct them to find whether or not the facts are within the definition, but the court should instruct them that if certain facts are established, there was or was not probable cause; the question of probable cause being for the court.

3. Malicious prosecution §72(2)—Error in refusing defendant's instruction on probable cause not cured by refusal of plaintiff's request.

Error in refusing a correct instruction on facts constituting probable cause, requested by defendant, in an action for malicious prosecution

tion, was not cured by a refusal to give another instruction on such facts requested by plaintiff.

4. Malicious prosecution §72(2)—Instruction on probable cause erroneous.

In an action for malicious prosecution, an instruction that, unless plaintiff "intended to take from defendant meat belonging to defendant," there was no probable cause for the prosecution of plaintiff, was erroneous.

5. Malicious prosecution §19—Innocence of accused insufficient to sustain action.

In an action for malicious prosecution, it was error to refuse an instruction that to justify an arrest on a criminal charge it is not necessary that the crime shall have been committed, plaintiff's innocence of the offense charged not being sufficient to entitle him to recover damages, if the facts were such as to induce in the mind of a reasonable man the honest belief that a crime was committed.

6. Malicious prosecution §72(2)—Erroneous instruction on probable cause not neutralized by instruction on advice of counsel.

In an action for malicious prosecution, an erroneous instruction that unless plaintiff intended to rob defendant there was no probable cause for plaintiff's arrest and prosecution was not neutralized by an instruction that in seeking the advice of the district attorney defendant was required only to disclose all the facts which he had reasonable ground to believe existed, and not to investigate possible defenses, and that if he made a full, fair, and complete disclosure of all the material facts known to him, and acted on the advice of the district attorney in filing his complaint, it was a complete defense.

7. Malicious prosecution §72(2)—Instruction omitting element of want of probable cause erroneous.

In an action for malicious prosecution, an instruction that if complaints issued, plaintiff was arrested, placed under bond, and the action dismissed, there was a sufficient prosecution, if coupled with malice, to constitute malicious prosecution, was erroneous, as omitting want of probable cause.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action for malicious prosecution by Cecil Franklin against Ben D. Irvine. Judgment for plaintiff, and defendant appeals. Reversed.

W. J. Ford, of Los Angeles, and Frank Birkhauser, of El Centro, for appellant.

Joseph F. Seymour, Jr., Wilbur W. Randall, and Walter B. Kibbey, all of El Centro, for respondent.

CONREY, P. J. Action to recover damages on account of malicious prosecution of two criminal charges against the plaintiff. The defendant appeals from the judgment.

The assignments of error are directed to certain instructions given by the court to the jury and to the refusal of other instructions

requested by the defendant. Without passing on all of the points presented in support of the appeal, it will be sufficient to select for discussion those hereinafter mentioned.

[1] Appellant requested that the jury be instructed as follows:

"If from the evidence in this case you believe that prior to the 28th day of October, 1918, the plaintiff, Cecil Franklin, had done acts or had so conducted himself as to lead a reasonable man to believe that he would be in danger in resisting the acts of said Cecil Franklin under the circumstances disclosed by the evidence to have existed on the 28th day of October, 1918, and if you further believe from the evidence that the defendant on such date had reason to believe, and did believe, that he was the owner of certain property in the possession of him, the said defendant, and that said property was taken away from said defendant by the said plaintiff, and that the said defendant was then and there in fear of said plaintiff, which fear prevented him from resisting the acts of said plaintiff, and if you further believe that said defendant fairly presented the foregoing facts to the district attorney of Imperial county, and acted upon the advice of such district attorney in filing the criminal complaint of robbery set forth in count 1 of this complaint, or in filing the complaint of larceny set forth in count 2 of this complaint, then I instruct you as a matter of law that the defendant had under such circumstances probable cause for the filing of such complaint or complaints, as the case may be, and your verdict must be for the defendant, whether there be proof of malice or not."

[2] Evidence had been presented tending to prove all of the conditions set forth in the proposed instruction, and since the instruction correctly states the law it should have been given. In an action of this kind it is not sufficient for the court to give to the jury a definition of probable cause and instruct them to find for or against the defendant according as they may determine that the facts are within or without that definition.

"Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly." Ball v. Rawles, 93 Cal. 222, 228, 23 Pac. 937, 938, 27 Am. St. Rep. 174; Runo v. Williams, 162 Cal. 444, 454, 122 Pac. 1082.

[3] The error of the court in refusing this requested instruction is not cured by the fact that the court refused to give another in-

struction on facts constituting probable cause as requested by the plaintiff. Respondent insists that the subject-matter of the instruction requested by appellant was included in other instructions given by the court. We have examined these other instructions as set out in respondent's brief. They do not supply any sufficient substitute for the rejected instruction.

[4] The court instructed the jury as follows:

"I instruct that one of the elements of both of the crimes charged against the plaintiff is intent, unless you believe from the evidence that plaintiff intended to take from defendant meat belonging to defendant, or to which he was entitled to possession, and the defendant honestly believed that plaintiff intended to deprive defendant of the use of the same, there was no probable cause for the arrest and prosecution of plaintiff."

[5, 6] The contention of appellant must be sustained, that this instruction in effect informed the jury that, in addition to defendant's honest belief that plaintiff intended to deprive defendant of his property, the plaintiff must actually "have intended to take from defendant meat belonging to defendant," and that otherwise there was no probable cause for the arrest and prosecution of the plaintiff. The fact that a plaintiff who seeks to recover damages for malicious prosecution of a criminal charge against him was not guilty of the offense charged is not alone sufficient to entitle him to recover damages. If the facts within the knowledge of the defendant were of such a character as to induce in the mind of a reasonable man the honest belief that a crime was committed, he is justified in seeking to have such crime punished, even though the facts within his knowledge did not in point of law constitute a crime. *Dunlap v. New Zealand, etc., Co.*, 109 Cal. 365, 370, 42 Pac. 29. In the case at bar, in addition to giving the instruction above noted, the court refused to give other instructions requested by appellant, correctly stating the rule that, to justify an arrest on a criminal charge, it is not necessary that in fact the crime shall have been committed. The error complained of in the instruction given may have been mitigated, but we are not satisfied that its effect upon the minds of the jurors would necessarily be neutralized, by the following instruction:

"In seeking the advice of the district attorney, you are instructed that the defendant is required only to disclose all the facts which are within his knowledge, or which he has reasonable grounds to believe do exist. He is not required to investigate possible defenses which might thereafter be made by the proposed defendant in a criminal case. If he does make a full, fair, and complete disclosure of all the material facts known to him, and acts upon the advice of the district attorney in filing such

criminal complaint, it is a complete defense, and your verdict must be for the defendant."

[7] The court instructed the jury as follows:

"In order to constitute malicious prosecution it is not essential that there should have been a trial. If you find from the evidence that complaints issued, plaintiff was arrested, placed under bond, and thereafter the action was dismissed, there was sufficient prosecution which, coupled with malice, constituted malicious prosecution."

The defect in this instruction is that it informed the jury that upon proof of the facts stated, coupled with malice, these facts alone were sufficient to constitute malicious prosecution. The necessary element of want of probable cause was omitted. It is true, however, that the court elsewhere instructed the jury that both want of probable cause and malice must exist before the plaintiff would be entitled to a verdict in his favor. From our examination of the instructions, together with the evidence, it seems reasonably probable that the errors which we have found in the instructions were seriously prejudicial to appellant. It is not at all certain that under correct instructions the same verdict would have been rendered.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(52 Cal. App. 271)

TROPLOWITZ v. SEIGLER. (Civ. 3786.)

(District Court of Appeal, First District, Division 1, California. April 15, 1921.)

Assault and battery §43(6)—Circumstances of provocation not to be considered in estimating actual damages.

Where no element of punitive damages was presented to the jury in an action for damages for assault and battery, it was error to instruct the jury that they might consider circumstances of provocation in estimating the amount of actual damages to which the plaintiff would otherwise be entitled.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by E. Tropelowitz against Harry Seigler. From a judgment for nominal damages, the plaintiff appeals. Reversed.

James P. Sweeney and Frank J. Fontes, both of San Francisco, for appellant.

Joseph H. Mayer, of San Francisco, for respondent.

RICHARDS, J. This appeal is by the plaintiff from a judgment based upon a verdict in his favor for damages in the sum of

\$1 in an action for damages for an alleged assault and battery.

The evidence in the case showed that the parties to the affray met in Lick alley, between Post and Sutter streets, in the city of San Francisco, and after a few words, came to blows. The evidence is in conflict as to which of the parties struck the first blow, but the evidence also shows without substantial conflict that the defendant struck the plaintiff in the face, knocking out three of his natural teeth which had theretofore supported other artificial teeth, necessitating considerable dental work and requiring him thereafter to wear a plate; and that he also suffered the consequential physical pain and mental anguish resulting from his compulsion to the wearing of a set of false teeth for the rest of his natural life.

Upon the trial of the case the plaintiff requested the following instruction:

"The court further instructs the jury that in this case if it believes from the evidence that the defendant committed the assault alleged in plaintiff's complaint, the jury cannot consider any alleged provocation in reduction of the actual damages accruing to plaintiff from his pain, physical injuries, loss of time and moneys expended, or any other element of actual damages, but only in reduction of or set-off against the exemplary damages."

This instruction the court refused to give, and also refused to give in terms any and all of the instructions asked by the plaintiff, but instead thereof gave the following brief oral instructions as its only instructions to the jury in the case:

"The Court: There is no law to give you; it is simply a question of whether or not this assault was committed. If you should find that it was committed with provocation on the part of the plaintiff, then you may consider that matter, in mitigation of damages. On the other hand, if you consider it was not justified by the circumstances and situation surrounding, and should find that this party sustained the injuries which he claims he sustained, and that it was an unprovoked assault, then the plaintiff would be entitled to recover such damages as, under all the circumstances of the case, you should deem just. If you should conclude to award damages, you are entitled to consider the nature of the injury and the extent of it, and whether there was any loss of time or bodily pain resulting therefrom.

"If, upon the other hand, as I have said before, you consider that there were circumstances to mitigate the assault, then you may take

such circumstances into consideration in fixing the amount of damages, if any, that you may conclude to award. I think that is all that is necessary. I think the jury fully understand the issue."

The plaintiff, upon this appeal, contends that the verdict of the jury was grossly inadequate to what the undisputed proof showed to be his actual damages from defendant's assault and battery. He also contends that the trial court erred in refusing to give his requested instruction above set forth, and also erred in giving its own instructions touching the right of the jury to consider circumstances of provocation in mitigation of any actual damages which they might find plaintiff sustained. We deem it only necessary to consider the latter point, since if the jury were rightly instructed by the court that they might consider matters of provocation in mitigation of the actual damage sustained by the plaintiff, they doubtless could obey that instruction to the extent of awarding the plaintiff a merely nominal sum in damages for injuries which were, according to the undisputed evidence, much in excess of such sum. We are of the opinion that the trial court was in error in refusing to give the plaintiff's requested instruction, and was also in error in giving its own instruction of opposite tenor and effect. The Supreme Court has recently set this subject at rest in the case of *Benjamin v. Walton*, 181 Cal. 115, 183 Pac. 529, wherein it said:

"It is sufficient in this regard to say that, the question of punitive damages having been expressly withdrawn from the jury, no circumstances of provocation, whether accruing before or at the time of the assault, could in any way be considered in mitigation of the actual damages suffered by plaintiff by reason of the assault."

In the case at bar, as in that case, no element of punitive damages was presented to the jury, and it follows that they were erroneously instructed that they might consider circumstances of provocation in estimating the amount of actual damages to which the plaintiff would otherwise be entitled. We think this error was prejudicial, and was the direct cause of the verdict for only nominal damages which the plaintiff was awarded by the jury.

The judgment is reversed.

We concur: WASTE, P. J., KERRIGAN, J.

(52 Cal. App. 307)

PACIFIC GAS & ELECTRIC CO. v. TAYLOR
et al. (Civ. 1815.)

(District Court of Appeal, Third District, California. April 19, 1921.)

1. Continuance — 12—Held improperly denied where chief defendant ill in another state.

In condemnation proceedings, continuance because of absence and illness in another state of the only defendant familiar with the facts of the defense and the whereabouts of witnesses held improperly denied.

2. Continuance — 46(10)—Counsel's affidavit reciting contents of telegram as to party's illness held not objectionable as recital of hearsay.

Objection would not be sustained on appeal to affidavit for continuance by defendants' counsel on the ground that the recital thereon of the illness detaining the chief defendant in another state was hearsay testimony, in that it was merely the statement by his attorney of the contents of a telegram, where no such objection was made below, as, where such showing is made without objection to the form in which it appears, it is competent and should be accorded legitimate probative force.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Condemnation action by the Pacific Gas & Electric Company against Harry W. Taylor and others. From judgment awarding defendants less than claimed, they appeal. Reversed.

Charles F. Hanlon, of San Francisco, for appellants.

Thos. J. Straub and Wm. B. Bosley, both of San Francisco, and Jones & Jones, of Oroville, for respondent.

BURNETT, J. The action was in condemnation, and judgment was in favor of plaintiff, condemning the property and awarding defendants the total sum of \$51.50 for the various items of damage. It may be stated that in their answer the defendants claimed that the proposed improvement would result in their damage to the extent of \$63,000. Notwithstanding this great disparity between what was awarded and what was claimed, there is abundant evidence to support the finding of the jury. However, the defendants were not present at the trial, and no showing was made on their behalf, and this suggests the only serious question in the case. That question is whether the trial court should not have granted the motion of defendants for a continuance of the trial. The motion was made on account of the absence of one of the defendants (the other defendant living outside of California), and was supported by the affidavit of his counsel, Charles F. Hanlon. From said affidavit it appears that said Taylor was in the city of

Boston at the time of the trial; that he was detained there on account of a serious illness; that very important business required his attention at that place, and for that purpose he left California on or about May 14, 1917, before the case had been set for trial; that said Henry W. Taylor was the only person familiar with the facts constituting the defense, and the only person who knew the whereabouts of any of the witnesses that he desired to be called on his behalf; that it would be necessary to take witnesses upon the ground to enable them to give an intelligent estimate of the value of the property to be taken, and that the aid of Taylor was needed for this purpose; that affiant did not know what witnesses could be procured by said Taylor; that he had "no means whatever of getting said witnesses and has none now, and has consulted with no witness or witnesses, except plaintiff's officers." Other considerations are set forth in the affidavit that emphasize the importance of the presence of said defendant; in fact, its necessity for the proper trial of the case.

The situation is thus made similar to that characterizing *Jaffe v. Lillenthal*, 101 Cal. 175, 35 Pac. 636; *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976; *Betts Spring Co. v. Jardine M. Co.*, 23 Cal. App. 705, 139 Pac. 657.

In the first of these it appears that—

"On the 21st of December, 1891, this cause was set for trial for January 6, 1892. On that day plaintiff's attorney moved for a continuance upon affidavits of the plaintiff and his physician showing in substance that the plaintiff, who then and for about a year prior thereto resided in Seattle, Wash., was confined to his room by an attack of acute rheumatism, to which he was subject, and was wholly unable to move or leave his room, and in the opinion of his physician would not be able to leave his room in less than two months. The affidavit of plaintiff further stated that his presence at the trial was indispensably necessary; that he was the only person who knew the whereabouts of the witnesses necessary to be called on his behalf; that their names had not been communicated to his attorney, nor the matters to which they would testify. D. M. Delmas, Esq., attorney for plaintiff, also presented his own affidavit that plaintiff's presence was necessary; that he did not know the names of plaintiff's witnesses, nor the details of the case."

There were no counter affidavits, but the motion for a continuance of the trial was denied, and plaintiff's attorney left the courtroom. It was held that the due administration of justice required the reversal of said order.

In the *Morehouse Case* it was held that—

"A showing of the continued illness of the defendant of such a nature that he could neither attend the trial of an action brought against him to quiet title to real estate, nor have his deposition taken without serious in-

jury and great risk of life, is sufficient to entitle the defendant to a continuance of the cause; and when there is nothing to contradict the showing, or to raise a suspicion as to the good faith of the application, it was error to refuse the continuance."

In *Betts Spring Co. v. Jardine M. Co.*, supra, it appeared that the defendant was ill; that in search of health he had journeyed to Europe, whence he would return in two months; he was the only witness to prove the defense; there was no intimation that the motion was not made in good faith nor was there any showing that the plaintiff would be injured or prejudiced by the delay. The appellate court for the First district held that it was an abuse of discretion for the trial court to refuse the continuance. Among the cases cited therein is *Storer v. Heltfeld*, 17 Idaho, 113, 105 Pac. 55. Therein it appeared that one of the defendants was in another state for the purpose of attending the funeral of his brother and looking after his estate, and the Supreme Court of Idaho held that this reason was sufficient to excuse his failure to attend at the time set for the trial. It was declared that the defendant had the right, unless he absented himself without reason, to be present to advise and assist his counsel, as well as to testify on his own behalf, and accordingly, under the showing made, the Supreme Court concluded that the continuance should have been granted.

[1] The showing made by appellants herein seems to be as potential and persuasive as that appearing in any of said citations, and we may add that we find in the record no evidence of the want of diligence or of good faith on the part of the moving defendant. The trial court, no doubt, was impressed with the importance of an expeditious trial of the action and believed that the motion for postponement was for delay, but attributing full significance to the rule that clothes the trial court with a large discretion in matters of this kind, we are of the opinion that defendants should have an opportunity to present fully their defense to the action. We cannot be unmindful of the fact that, while the public interest is subserved by the rightful exercise of the power of eminent domain, yet the property is taken against the will of the owner, and he should be extended every legal consideration to enable him to show the extent of the damage that he may suffer.

Certain specific reasons are advanced by respondent why the action of the lower court should be upheld, to which we may briefly direct our attention.

[2] Objection is made to the affidavit that the recital therein as to the illness of Mr. Taylor was hearsay testimony; it being merely the statement by his attorney of the contents of a telegram. Manifestly it would be more satisfactory if there had been an affidavit from Mr. Taylor himself or from his

physician in reference to the illness, but it is fair to say that appellants had no opportunity to obtain such evidence. Moreover, the rule is that, where such showing is made without any objection to the form in which it appears, it should be considered as though it were competent; and legitimate probative force should be accorded to it. In this connection we must remember that there was no controversy in the court below as to Taylor's illness, nor was any objection made to the form of the affidavit or to the failure to produce a physician's certificate.

This and other features involved in the controversy are covered by the following quotation from 9 Cyc. p. 96:

"The illness of a party is not ipso facto a cause for continuance of the cause; but where a party's presence at the trial is indispensable and the character of his illness is such as to render his presence at the time impossible a continuance should be granted, if it appears that he has been guilty of no negligence. * * * The fact of illness must be established by some satisfactory sworn statements, either in the shape of an affidavit, or the certificate of a physician that satisfies the court of the inability of the party to be present. From the very nature of the relief asked the decision of the question must necessarily rest almost entirely within the discretion of the trial court, and such discretion will not be interfered with unless the same has been abused to the extent of prejudicing the applicant's right to a fair trial of the cause."

It is quite plain from the facts recited in said affidavit that defendants could not have a fair trial in the absence of said Taylor, and therefore, legally speaking, the denial of the motion prejudiced their substantial rights.

Respondent's contention that said Taylor acted without due circumspection in leaving the state is, we think, without merit. It appears that, before leaving the state, Taylor had attended court at Oroville with his counsel on April 16, when a motion to set the case for trial was heard and denied, the court stating "that it would not set the case for trial until the pleadings were settled." When he left for Boston on May 14, the pleadings were still unsettled, and he had reason to believe that he would have ample time to return after the case was in condition to be tried. We need not recite all the facts, but we think it sufficiently appears that the said Taylor manifested due caution and diligence, and that he made an honest attempt to return to the state to protect his interest, but was prevented by an unavoidable illness.

As to the delay in setting the case for trial we cannot see that appellants should be charged with any remissness. From the record, indeed, we conclude that both parties proceeded with the usual expedition to frame the issues, and exercised ordinary diligence in preparing the cause for trial. In this connection it may be observed, moreover, that

the various motions made by plaintiff to strike out parts of defendants' answer would indicate a purpose to proceed deliberately and to give due care and attention to the settlement of the pleadings before a trial was had. It may be mentioned also that plaintiff on the day of the trial filed an important amendment to the complaint, thus injecting a new issue into the case.

There are some verbal criticisms of said affidavit, but we think they demand no special notice. We are satisfied that, considered in its entirety, it is not vitally defective, and it constitutes sufficient support for the motion of appellants.

We have carefully examined the record and read the cases cited by both parties, but we deem it inadvisable to pursue the discussion further.

It appears to us that a just regard for the rights of the defendants demands a new trial, and the judgment is therefore reversed.

We concur: **PREWITT** Presiding Justice pro tem.; **HART**, J.

(52 Cal. App. 225)

ROSE et al. v. CONLIN et al. (Civ. 3760.)

(District Court of Appeal, First District, Division 1, California. April 13, 1921. Hearing Denied by Supreme Court June 9, 1921.)

1. Mortgagee \S 497(2)—Mortgagor and successor in interest concluded by description in judgment in foreclosure.

Mortgagor and his successor in interest are concluded by a description in a foreclosure decree of the land covered by the mortgage where no appeal was ever taken.

2. Eminent domain \S 154—Judgment obtained in action to recover compensation for taking and use of land stands in place of land.

A judgment for mortgagor in an action against a railroad to recover compensation for the taking and use of land by the railroad stands in the place of the land condemned, and the lien of a mortgage on the land is transferred to the judgment.

3. Eminent domain \S 152—Mortgagee held entitled to have it determined she was equitably entitled to benefits of judgment obtained against railroad for land taken.

A mortgagee, who was not made a party to an action by mortgagor against railroad to recover compensation for the taking and use of land by railroad company pending proceedings to foreclose the mortgage, is entitled to commence and maintain an action against a successor of the mortgagor to have it determined that she was equitably entitled to the benefits obtained by such mortgagor against the railroad, there being a deficiency judgment in the foreclosure proceeding.

4. Mortgagee \S 586—Commissioner's deed held to relate back to date of mortgage.

A commissioner's deed under a decree of foreclosure of purchase-money mortgage related back to the date of the mortgage, and re-invested the mortgagee, who was the grantee under such deed, with all the right to and interest in the land for the purchase money for which the mortgage was given.

5. Estoppel \S 68(2)—Mortgagor could not set up adverse possession of railroad in action by mortgagee to obtain benefits of judgment obtained by mortgagor against railroad.

Where mortgagor obtained a judgment against a railroad for compensation for the taking and use of land in an action wherein railroad contended it had acquired by long possession a permanent title or right of occupancy, he was in no position to assert the existence in the railroad company of a paramount right to the use of the land in an action by mortgagee to have it determined that she was equitably entitled to the benefits of the judgment obtained against the railroad.

6. Limitation of actions \S 43—Statute held not to start to run until there was a res to which remedy could be applied.

The right of mortgagee to commence and maintain an action for the purpose of having it determined that she was equitably entitled to the benefits of a judgment obtained by mortgagor against a railroad for compensation for the taking and use of the land did not arise until there was a res to which the remedy could be applied in the form of a final judgment in the defendant's favor for compensation against the railroad company.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by Emma Rose and others against Henry Conlin and others. Judgment for plaintiffs, and the named defendant appeals. Affirmed.

Charles W. Cobb and Henry Conlin, both of San Francisco (E. C. Chapman, of San Francisco, of counsel), for appellant.

Garret W. McEnerney, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff Emma Rose in an action wherein the plaintiffs sought to have it determined that the said Emma Rose was the equitable owner of a certain judgment for the sum of \$15,560 which had been recovered by the defendant Henry Conlin in the case of Conlin v. Southern Pacific Railroad Co., 40 Cal. App. 743, 182 Pac. 71.

The facts out of which that case, and also the present case, arose may be summarized as follows: The San Francisco & San Jose Railroad Company was incorporated under the laws of the state of California on August 18, 1860, for the term of 50 years, and for the purpose of constructing, maintaining,

and operating a railroad between San Francisco and San Jose. On June 6, 1862, Alvinza Hayward, who was then the owner in fee simple of a tract of land at or near the city of San Mateo, conveyed to said San Francisco & San Jose Railroad Company an estate in a portion of said land which this court, in construing the deed of conveyance thereof, determined to be an estate for years therein, or, to be specific, 50 years, in the case of East San Mateo Land Co. v. Southern Pacific Railroad Co., 30 Cal. App. 223, 157 Pac. 634. This estate for years was transferred to several successive railroad corporations until it vested in the Southern Pacific Railroad Company, the defendant in the two cases above referred to, and was adjudged in the case of Conlin v. Southern Pacific Railroad Co., supra, to have expired on August 18, 1910.

After the expiration of said term of years the said Southern Pacific Railroad Company continued in the possession of the tract of land affected by said former estate for years, and is still in possession of the same in the course of the maintenance and operation of its railroad system from San Francisco to San Jose and beyond. In the meantime Alvinza Hayward died, and his daughter, Emma Rose, one of the plaintiffs herein, succeeded to and became the owner of the estate of her deceased father in the lands out of which said estate for years had been carved, and of the reversionary rights in and to said lands after the termination of said estate for years. On September 8, 1908, said Emma Rose conveyed certain of the said lands which she had thus succeeded to as the daughter and heir of Alvinza Hayward, deceased, to East San Mateo Land Company, a corporation, and in such conveyance she included her reversionary interest in the lands (which may be designated as the railroad parcel) so determined by this court in the case of East San Mateo Co. v. Southern Pacific Co., supra, and is, therefore, no longer susceptible of dispute—and least of all by those who have succeeded to whatever interest the said East San Mateo Land Company acquired, and in that case asserted by virtue of said conveyance from Emma Rose to it.

On said September 8, 1908, and as a part of the same transaction by which it acquired said lands and interest from said Emma Rose the said East San Mateo Land Company executed a mortgage back to her for a considerable portion of the purchase price of said properties. Some question has been raised in this case as to whether said mortgage, in its description of said properties, embraced the reversionary interest in said railroad parcel, and, while it is true that there are certain differences in the wording of the conveyance to said corporation of this particular portion of said properties, and of the mortgage given back by it to Emma Rose, we are not only

satisfied that these differences in verbiage did not suffice to show an intent in the parties to the entire transaction to exclude the reversionary interest in said railroad parcel from the effect of said mortgage, but we are further satisfied that this question is no longer open to consideration, for other reasons which will be presently made to appear.

On November 29, 1912, an action was commenced for the foreclosure of the mortgage last above referred to, the nominal plaintiff in said action being Andrew F. Burke, who purported to be acting in said matter as the assignee of Emma Rose, but who, it is conceded, was acting in the premises merely as her agent and trustee. The defendants in said foreclosure suit were the East San Mateo Land Company, the Southern Pacific Company, and other persons. The complaint in said foreclosure suit expressly averred that the said railroad parcel and the respective rights of the defendants therein were among the properties affected by said mortgage, the foreclosure of which was sought in said action, and the lis pendens in said action also expressly referred to said railroad as affected by said foreclosure suit. The said defendant East San Mateo Land Company was duly served with summons in said action, and entered its appearance therein, raising certain issues which were heard and determined in said suit. The said Southern Pacific Company was also served with summons in said action, and it also appeared and answered therein. One of the issues which the last-named defendant presented in its said answer consisted in its claim that the plaintiff therein, Emma Rose, had no interest in the said railroad parcel, basing its said claim upon the ground that paramount title had been acquired by the railroad company prior to August 20, 1908, growing out of its occupation and use of said premises for railroad purposes. With respect to this issue the trial court, upon the hearing of said foreclosure suit, expressly refused to determine it, and so declared in its finding, and provided in its decree that nothing therein contained should be deemed to be an adjudication upon the question of the paramount title of the railroad company to that particular parcel of land.

[1] The decree of foreclosure, in said action was made and entered on June 2, 1917, but was so made and entered nunc pro tunc as of December 5, 1916. No appeal was ever taken from said foreclosure decree, which included in its terms an express description of the said railroad parcel as being a portion of the premises embraced in said mortgage and affected by said decree in so far as the rights and interests of the mortgagor were concerned, and this fact supplies, in our opinion, the additional and conclusive reason why the defendant and appellant Henry Conlin, in the present action, as the successor in interest of said mortgagor, cannot be heard to contend

that the mortgage of his predecessor in interest did not embrace in its description the said railroad parcel, including whatever interest therein had been acquired by it through the conveyance from Emma Rose.

[2] Subsequent to the making and entry of said foreclosure decree an order of sale was duly issued thereon, and on February 24, 1917, a foreclosure sale was had under said order, at which sale said railroad parcel was struck off to said Andrew F. Burke, acting as agent for said Emma Rose. The sum realized at said foreclosure sale being insufficient to satisfy the judgment in said action, a deficiency judgment was docketed on December 4, 1917, for the sum of \$25,038.93. On December 2, 1918, a commissioner's deed was duly issued to Emma Rose, as the person then entitled thereto under said foreclosure sale, which deed embraced in its description of the properties covered by it the said railroad parcel of land. In the meantime, and while the foreclosure proceedings above referred to were going on, the East San Mateo Land Company, as the then owner of said railroad parcel of land, commenced an action to recover compensation from the Southern Pacific Company for its continued occupation and use for the purposes of its railroad system of the said railroad parcel of land after the expiration of the estate for years granted to its predecessor therein by Alvinza Hayward, as above set forth.

The complaint in said action alleged that said plaintiff therein was the successor by mesne conveyance of all the right, title, and interest of said Alvinza Hayward in said parcel of land; that the estate for years granted by said Alvinza Hayward to the predecessor of the defendant in that action had ceased and terminated on August 18, 1910, and that thereupon the estate in remainder and reversion had reverted to and become vested in the plaintiff in that action, and that the defendant therein had, immediately upon the termination of its said estate for years, therein appropriated and continued to use said parcel of land for its benefit as a railroad corporation, and for its right of way for the operation of its railroad system thereover, without having paid said plaintiff compensation for said appropriation and use. These allegations were followed with a prayer for the value of the land so taken, appropriated, and used in the sum of \$77,800.

A more particular reference to the extended averments of said complaint would serve to show beyond reasonable dispute, in our judgment, that said action thus brought by said East San Mateo Land Company was one essentially and solely for the recovery of such compensation for the taking and use of said parcel of land by said railroad company as it would have been the right of said East San Mateo Land Company, as the then owner of said land, to have had awarded to it in a proceeding for the condemna-

tion of said land, and of all necessary rights of way thereover under the law of eminent domain, had such a proceeding been initiated by said railroad corporation; and that, this being so, whatever sum of money the trial court should determine to be due and payable to the plaintiff in such an action must be held to stand in lieu of the land so taken and used by the railroad company for quasi public uses under the law of eminent domain. The following authorities so hold, and we are satisfied that their conclusion in that regard is sound, equitable doctrine, and is susceptible as such to application to the facts of the case at bar; *Sawyer v. Landers*, 56 Iowa, 422, 9 N. W. 341; *Platt v. Bright*, 31 N. J. Eq. 81; *Bright v. Platt*, 32 N. J. Eq. 362; *Kansas City v. North American Trust Co.*, 110 Mo. App. 647, 85 S. W. 681.

[3, 4] Our attention has been called to the case of *Anderson v. Citizens' Sav. & Trust Co.*, 197 Pac. 113, just decided by the Supreme Court, which is claimed by appellant as authority for its contention that the plaintiff herein should have asserted her claim in the compensation suit, and that, not having done so, the judgment in that suit is to be held to be final in determining who was entitled to such compensation. It is sufficient to say, however, in response to this contention, that the plaintiff herein was not made a party to the action commenced by the East San Mateo Land Company against the Southern Pacific Company to recover compensation for the lands, premises, and rights of way appropriated and being used by it, and which were covered by this plaintiff's mortgage then in course of foreclosure; nor was said plaintiff brought into said action at any time prior to the rendition of the judgment therein rendered in favor of Henry Conlin, successor in interest of the original plaintiff in that action, by virtue of transfers made by it of its rights of action after said suit was begun.

It may be said that the plaintiff herein could have injected herself into that action as intervener therein, and thus had the rights and claims which she here asserts determined therein. Had she done so, it cannot be questioned that the trial court in that action would have been bound to take cognizance of her equitable interest in said railroad parcel of land by virtue of her mortgage thereon, and have protected that interest in its judgment awarding compensation to the parties entitled thereto for the taking and use of said land by the railroad under its right of eminent domain; but the plaintiff was not bound to inject herself into that case; and, had she sought to do so at any time prior to the sale in the foreclosure suit, she would doubtless have been met with the proposition that the other properties covered by her mortgage would suffice to pay her debt, and that she must exhaust her remedies as to those before she could claim the right to any part

of the compensation to be awarded to the plaintiff therein in the action instituted by him.

The course pursued by the plaintiff herein, while attendant with certain risks, would seem to be the logical and orderly course to be pursued by her. She had instituted her foreclosure suit before the East San Mateo Company, her immediate debtor, began its suit for compensation against the railroad company. She pursued that foreclosure suit to its termination in a foreclosure sale, with the result that, on November 24, 1917, she became, through her agent, the purchaser of all of the properties upon which her mortgage had been foreclosed, including the railroad parcel, for the taking of which by the Southern Pacific Company the defendant herein was still prosecuting his action for compensation. On December 14, 1917, a deficiency judgment in her favor was docketed in the sum of \$25,083.93. On December 2, 1918, a commissioner's deed was executed to her conveying, among other properties, the said railroad parcel, which deed, under well-known rules of law, related back to the date of her mortgage, and reinvested her with all of the right to and interest in the said parcel of land for the purchase money of which said mortgage had been given. *Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704; *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232, 31 Pac. 958, 79 Am. St. Rep. 118; *People's Sav. Bank v. Hodgdon*, 64 Cal. 95, 27 Pac. 938. In the meantime the defendant's action for compensation for the taking and use of said parcel of land by the railroad under its right of eminent domain was still pending, and was not finally determined upon appeal so as to become a final judgment until the denial of a rehearing by the Supreme Court of the case of *Conlin v. Southern Pacific Co.*, supra. The present action was commenced on May 19, 1919.

In thus proceeding to a foreclosure and sale under her mortgage, and to the issuance of a commissioner's deed thereunder, the plaintiff herein, Emma Rose, had reinvested herself with the ownership of this particular portion of the properties mortgaged to her, and had also procured a deficiency judgment for the sum still remaining due and payable upon said mortgage. In so doing she was apparently following to its logical conclusion the procedure intimated, if not expressly decided, in the case of *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 665, 128 Pac. 9, 18, wherein the appellate court, quoting from the case of *Matter of Morris Avenue*, 118 App. Div. 121, 103 N. Y. Supp. 182, said:

"The question as to the right of an award between a mortgagee and the owner of the equity has arisen in several cases and the rule seems to be well established that, where a mortgage has been given upon property prior to the

taking of a portion thereof by the city, if, upon a foreclosure and sale after the taking by the city, the amount realized is insufficient to meet the mortgage debt, the lien of the mortgage would extend to and embrace so much of the damages awarded as should be needed to make good the deficiency."

We are satisfied from the foregoing facts and cases that the plaintiff herein was entitled to commence and maintain this action for the purpose of having it determined that she was equitably entitled to the benefits of the judgment obtained by the defendant Henry Conlin herein against the railroad company.

[5] It may be proper at this point to refer briefly to certain further contentions urged by the appellant herein. Among these is the contention that the railroad company, by virtue of its occupation and use of the parcel of land in question for the permanent and quasi public uses and purposes of a railroad right of way, had thereby acquired, long prior to the date of the acquisition of any interest in said premises by Emma Rose, and therefore long prior to the conveyance by her to the predecessor to the defendant herein of said railroad parcel, and of its mortgage back to her, a permanent title or permanent right of occupancy of said parcel of land which was paramount and superior to her said conveyance and mortgage, and hence was not covered thereby; and that, this being so, the plaintiff herein could not have acquired any right to share in the benefits of the judgment obtained by the defendant herein against the railroad through the foreclosure of said mortgage and sale to her of said mortgaged premises. We perceive no merit in this contention. It was made by the railroad company in the action for compensation, and was therein opposed by the defendant herein; and it was therein decided that the rights of the railroad company with reference to occupation and use of the premises in question were referable to the term of years under which it had entered into possession of the same, and were altogether bounded by the words of the grant of said term. The appellant herein is therefore in no position to assert the existence in the railroad company of a paramount right to the use, occupation, and maintenance of its right of way over said railroad parcel, since its existence would have sufficed to have defeated his own right of recovery in the compensation suit.

[6] We also find no merit in the defendant's plea of the statute of limitations. The right of the plaintiff to commence and maintain the present action against said defendant arose when there was a res to which the remedy sought therein could be applied, in the form of a final judgment in the defendant's favor for compensation against the railroad company.

We do not deem the other points urged by

the appellant of sufficient merit to require discussion in detail.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 796)

ROSE et al. v. CONLIN et al. (Civ. 3558.)

(District Court of Appeal, First District, Division 1, California. April 13, 1921. Hearing Denied by Supreme Court June 9, 1921.)

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Emma Rose and others against Henry Conlin and others. Judgment for plaintiffs, and the named defendant appeals. Affirmed.

Charles W. Cobb and Henry Conlin, both of San Francisco (E. C. Chapman, of San Francisco, of counsel), for appellant.

Garret W. McEnerney, of San Francisco, for respondents.

PER CURIAM. Upon the authority of *Rose v. Conlin* (No. 8760) 198 Pac. 653, this day decided by this court, the order is affirmed.

(52 Cal. App. 796)

ROSE et al. v. CONLIN et al. (Civ. 3559.)

(District Court of Appeal, First District, Division 1, California. April 13, 1921. Hearing Denied by Supreme Court June 9, 1921.)

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Emma Rose and others against Henry Conlin and others. Judgment for plaintiffs, and named defendant appeals. Affirmed.

Charles W. Cobb and Henry Conlin, both of San Francisco (E. C. Chapman, of San Francisco, of counsel), for appellant.

Garret W. McEnerney, of San Francisco, for respondents.

PER CURIAM. Upon the authority of *Rose v. Conlin* (No. 8760) 198 Pac. 653, this day decided by this court, the order is affirmed.

(52 Cal. App. 294)

FINN v. DIAMOND LAUNDRY CO.
(Civ. 3298.)

(District Court of Appeal, Second District, Division 1, California. April 16, 1921.)

1. *Mechanics' Lien* §277(5) — Variance between notice of lien and complaint held fatal.

In an action to enforce a mechanic's lien for plumbing done for a laundry company, where the notice of lien recited one contract and the complaint was based upon an entirely different

contract, the variance was fatal in view of Code Civ. Proc. § 1187.

2. *Mechanics' Lien* §277(5) — No recovery for extra work where such work covered by specific contract recited in notice of lien.

In an action to enforce a mechanic's lien for plumbing done for a laundry company, where the notice of lien recited an agreement to pay plaintiff \$600 for superintending the work, and the complaint alleged that the identical work which plaintiff was to superintend constituted extra plumbing work, for which 10 per cent. of the actual cost should be paid as compensation, there could be no recovery as for extra work.

3. *Mechanics' Lien* §279 — Claimant has burden of establishing right to recover for extra work.

To recover for extra work in a proceeding to enforce a mechanic's lien, the burden of showing that the work was in fact extra work held to be upon plaintiff.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by R. J. Finn against Diamond Laundry Company, to enforce a mechanic's lien. Judgment for plaintiff, and defendant appeals. Reversed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

SHAW, J. In an action to foreclose a mechanic's lien, plaintiff had judgment, from which defendant has appealed.

The notice of lien filed sets forth two separate and distinct contracts under and in accordance with which plaintiff, as therein stated, performed work and labor in superintending the installation of plumbing fixtures in a building which defendant, as owner, was constructing.

By the complaint each of these contracts is made the subject of a separate cause of action. In the first count thereof it is alleged that defendant, through its duly authorized agent, made a contract with plaintiff to superintend the installation of all "rough plumbing and plumbing proper in the building of the defendant * * * at all times during its construction and until its completion," which "said plumbing is and shall be known and referred to herein as the original contract work;" that the building is a laundry building, and, in addition to the plumbing and pipe fitting aforesaid (that is, "rough plumbing and plumbing proper"), has installed in it plumbing fixtures, supply and waste pipes; system of piping to and from laundry machinery for hot and cold water; for treated and untreated water; high and low pressure steam lines; gas, oil, and compressed air lines; a vacuum cleaning system, and a

sprinkler system, all of which was to be put in and was actually put in and installed in said building of defendant, and used by it as and for a laundry; that defendant promised, undertook, and agreed to pay plaintiff for said work as superintendent of the installation of said plumbing proper as aforesaid only, being the original contract work in the aforesaid building, the sum of \$600, \$575 of which it has paid.

The contract, as stated in the notice of lien, and upon which the cause of action is based, is as follows: That defendant, as owner, was engaged in constructing a building for use as a laundry and, acting through one Joseph H. Smailes, as its duly authorized agent, employed plaintiff—

"as superintendent of plumbing, having complete and entire charge of all plumbing and pipe fitting in the building at the aforesaid site, at all times during its construction and until its completion; that said work consisted of the installation of plumbing fixtures, supply and waste pipes, very complicated and special systems of piping to and from laundry machinery for hot and cold water, treated and untreated water, high and low pressure steam lines, gas, oil, and compressed air lines, vacuum cleaning system, and sprinkler system, all in said building. That said contract of employment was entered into on or about August 23, 1916, and for which said work and labor as aforesaid the said * * * Joseph H. Smailes contracted and agreed to pay the undersigned at the time of the completion of said building the sum of six hundred dollars (\$600) for original contract work as set forth above, on which said price the sum of five hundred and seventy-five dollars (\$575) has been paid."

It thus appears that, after stating that he was to have charge of all the plumbing and pipe fitting, the nature and character of which is set out with great particularity and detail plaintiff avers that, for superintending the installation of all of the work set forth above (which is all of that specifically described in the notice of lien), he was to be paid \$600. But this is not the contract declared upon in the complaint, which alleges the work was done under and pursuant to another and entirely different contract, to wit: One for superintending the installation of all "rough plumbing and plumbing proper" in the building. Certainly the plumbing described in the notice of lien could not be deemed rough plumbing. However, conceding such interpretation such fact could not avail plaintiff herein, for the reason that, whatever its character, he, as appears from the notice of lien, was to superintend the installation of all that so particularly described, and for the work and labor in so doing he was to receive as compensation the sum of \$600.

[1] Conceding, as found by the court, that the evidence established the existence of the contract set forth in the complaint, and that plaintiff performed the work thereunder, then it follows that the notice of lien filed was

untrue; and, since no claim of lien upon the contract set forth in the complaint was ever filed, there could be no lien upon which to base the action. In other words, there was a fatal variance between the complaint and the notice of lien upon which the action was founded. *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195. In discussing the requirements of section 1187 of the Code of Civil Procedure, providing for notice and claim of lien, the court in the last-cited case said:

"The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. * * * In all essential particulars it [the statement] must be true."

The statement of lien filed by plaintiff was not calculated to inform defendant as to the nature of the claim and contract which he asserted in his complaint. The language used therein imported a contract made between plaintiff and defendant's agent under which the former was to receive \$600 for superintending all of the plumbing specifically described in the notice of lien. See *Santa Monica, etc., Co. v. Hege*, 119 Cal. 377, 51 Pac. 555, to the effect that, where the proof shows the contract set forth in the notice of lien to be untrue, it is fatal to the asserted lien.

In the second count of the complaint it is alleged that defendant promised and agreed to pay plaintiff for the labor of superintending the installation of extra plumbing work the sum of 10 per cent. of the actual cost thereof, which extra work consisted of all plumbing work of every kind or description other than that which plaintiff designates as original contract work, which extra plumbing work is described in the complaint as follows:

"All plumbing fixtures; supply and waste pipes; all systems of piping to and from laundry machinery for hot and cold water; treated and untreated water; high and low pressure steam lines; gas, oil, and compressed air lines; a vacuum cleaning system; and a sprinkler system, and all laundry piping; * * * and which said extra plumbing work was not set forth in the original plans and specifications, which were incomplete, for the purpose of making use of said building as a laundry; * * * that the total cost of said extra plumbing and laundry piping was and is the sum of \$18,828.30;" 10 per cent. of which, due to plaintiff, is the sum of \$1,882.82.

The contract upon which this cause of action is based, as stated in the notice of lien, is that defendant "further contracted and agreed to and with the undersigned, R. J. Finn, to pay him * * * the sum of 10 per cent. of the actual cost of all extra plumbing work of every kind and description, laundry piping, etc., as necessary to complete said building, which said 'extra work' was not set

forth in the original plans and specifications, which were incomplete," and that the total cost thereof was \$20,493.66.

[2] It is apparent that the work which plaintiff in this count described as extra work is identically the same, in part at least, as that comprised in the work which, as shown by the contract set forth in the notice of lien, he, as we have hereinbefore held, agreed to perform for the \$600; and, hence, to the extent that it was the same, he could not recover therefor as extra work.

[3] Moreover, if any part thereof was work not called for by the "original plans and specifications, which were incomplete," the burden of showing such fact devolved upon plaintiff. Upon this point no attempt was made to segregate the extras from what plaintiff terms the original contract work. On the contrary, counsel for respondent says that it was, as stated by plaintiff, impossible to do so. Hence the court was left to mere conjecture as to the character, extent, and cost, both as to the work done under the original contract and that constituting extras. Plaintiff's theory, in support of which some meager evidence was introduced, that he was to receive \$600 for work to the extent of \$5,850, and 10 per cent. of the cost of all work over that amount, is not only inconsistent with the contracts set forth in the notice of lien, but likewise inconsistent with the allegations of the complaint.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(52 Cal. App. 274)

Ex parte BRACKLIS. (Cr. 559.)

(District Court of Appeal, Third District, California. April 15, 1921.)

1. Jury \Leftrightarrow 4—Jury in a felony case must consist of 12 men.

A jury in a felony case must consist of 12 men, and a defendant on trial cannot waive his right to such a jury; the right secured by the Constitution being the right as it was known at common law.

2. Jury \Leftrightarrow 127—Accused must depend upon examination of jurors to acquaint self with qualifications.

A party on trial must depend upon an examination of the jurors on voir dire to acquaint himself with their qualifications, and he cannot go ahead and take the chance of a favorable verdict and then raise the point after verdict that a juror was not qualified.

3. Jury \Leftrightarrow 142—Accused held not entitled to discharge by reason of decrepit juror.

While a defendant may not waive a constitutional jury of 12 persons, he can, by acquiescence or by silence, waive the qualifications of any jurors, and after a verdict an accused can-

not for the first time claim that there were only 11 jurors, in that one of the 12 was not in possession of his natural faculties by reason of decrepitude.

4. Habeas corpus \Leftrightarrow 3—Person having ample remedy in court below not entitled to.

Habeas corpus was not proper remedy to obtain release by one claiming that judgment was void because one juror was not in possession of his natural faculties by reason of decrepitude, since accused had an ample remedy in the court below by a motion on a proper showing to set aside the judgment.

5. Habeas corpus \Leftrightarrow 30(1)—Alleged error must render judgment utterly void.

Unless alleged error is so great that it renders the judgment utterly void, it cannot be raised by habeas corpus, as a writ of habeas corpus cannot be converted into a writ of error.

Application by A. P. Bracklis for writ of habeas corpus to be directed to the sheriff of Sacramento county to secure his release. Writ dismissed.

C. B. Harris and A. B. Reynolds, both of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., C. Chas. Jones, Deputy Atty. Gen., and Hugh B. Bradford, Dist. Atty., and Thomas A. Farrell, Asst. Dist. Atty., both of Sacramento, for respondent.

PREWETT, Presiding Judge pro tem. The petitioner was charged with the commission of a felony. He was convicted thereof by a jury of 12 men. He sets out in his petition that one of these jurors was not a competent juror, in that he was not in possession of his natural faculties, and was so decrepit that he was unable to comprehend the nature or character of the charge upon which the said A. P. Bracklis was being tried, and was unable to comprehend the nature and effect of the testimony adduced during the trial. He argues from this that the jury consisted of but 11 men, and that he was therefore deprived of his constitutional right of trial by jury.

[1] 1. It may be conceded that a jury in a felony case must consist of 12 men, and that a defendant on trial cannot waive his right to such a jury. The right secured by the Constitution is the right as it was known at common law. *People v. Powell*, 87 Cal. 349, 25 Pac. 481, 11 L. R. A. 75; *Matter of O'Connor*, 29 Cal. App. 225, 155 Pac. 115. At common law as well as under the constitutional provision, a jury in a felony case must consist of 12.

[2] 2. It is a general doctrine in this state that a party on trial must depend upon his examination of the jurors on voir dire to acquaint himself with their qualifications, and that he cannot go ahead and take the

chances of a favorable verdict and then raise the point after verdict. This rule is so pronounced that he cannot even raise the point for the first time on motion for a new trial or on appeal. Still less can it be raised on habeas corpus, where only jurisdictional matters may be inquired into.

"It appears by the affidavit on motion for a new trial that one Dahl, a juror who sat in the case, was not a citizen of the United States, and this fact is relied upon for a new trial. After a verdict is rendered it is too late to raise for the first time the question now presented. * * * Counsel admit the soundness of this doctrine as a general proposition, but insist that the present case is an exception to the rule. The general doctrine is based upon the proposition that the objection comes too late, inasmuch as counsel should examine the juror as to his general qualifications in the first instance." *People v. Evans*, 124 Cal. 206, 56 Pac. 1024.

In another case the defendant, on motion for a new trial, offered to show that one of the jurors was a nonresident. The court overruled the point by saying:

"The objection to the juror went to his competency, and had it been timely made, full opportunity for which was given defendant before the jury was sworn, should have been sustained. It was too late to raise the objection after the trial." *People v. McFarlane*, 138 Cal. 481, 171 Pac. 568, 72 Pac. 48, 61 L. R. A. 245. "An objection to a juror must be taken before he is sworn to try the cause." *People v. Boren*, 139 Cal. 210, 72 Pac. 899.

In *People v. Henderson*, 28 Cal. 465, one grand juror was not a citizen and another was not a taxpayer. The court said:

"The defendant * * * examined such jurors as he saw fit as to their qualifications, and exercised his right of challenge. No objection was made to either of these two jurors, nor did defendant question them upon the points referred to. Conceding the point to be otherwise good, under these circumstances the objection came too late, when taken for the first time after indictment found. The objection should have been made by challenge at the time of the impaneling of the jury."

"The objection that one of the jurors was an alien could not be taken for the first time upon the motion for a new trial. The defendants might have examined him upon the subject, and exercised their right of challenge before he was sworn, but having failed to do this, they must suffer the consequences of their own neglect." *People v. Chung Lit*, 17 Cal. 820.

It would be as impracticable as it is unnecessary to attempt to quote from the large number of California cases approving the foregoing doctrine.

3. The petitioner, however, insists that the disqualification of this juror was one that went to his entire capacity to act at all; that, in effect, he was not a juror. The description of his infirmity as contained in the

petition is not very full or satisfactory, but it may readily be deduced therefrom that the alleged infirmity was the decrepitude of age or illness. The petition contains no suggestion of insanity or any sudden physical or mental stroke that overwhelmed his faculties. The infirmities arising from old age are usually so apparent that a party could not be excused from observing them and questioning the juror concerning them. A case might be imagined where an adroit person cunningly insane might deceive the court and counsel, but, if so, we have no evidence of such a condition in this case.

[3] What may be the rule in a case where a juror becomes insane during the progress of the trial, or where he successfully conceals his insanity from counsel until after the trial, it would be idle to inquire. In this case, there is no complaint that the juror was insane. It is charged only that he was not in possession of his natural faculties by reason of decrepitude. While a defendant may not waive a constitutional jury of 12 persons, it seems that he can, by acquiescence or by silence, waive the qualifications of any juror. Especially is this so in a case where the infirmity arises from the decrepitude of the juror. The authorities are clear that a party cannot sit idly by and take the chances of a favorable verdict, and then after verdict raise a point which he should have raised before the juror was sworn. The very purpose of the voir dire examination as to general qualifications is to ascertain whether or not the juror is a fit person to serve in that capacity at all. Having failed when he could and should have acted, the petitioner waived such limited disqualification as may have existed.

4. Petitioner has not shown that he was not aware of his alleged infirmity during the trial. We have shown by the foregoing authorities that it is quite necessary, in order to be heard on this point at all, that he should show that he was unaware of the objection to the juror in time to make seasonable objection to him.

[4, 5] 5. But petitioner is not seeking the proper remedy. There was, at most, no such wide departure from the established forms of procedure as to render the whole judgment void. He had an ample remedy in the court below, of which remedy he should have availed himself. He should have moved the court on a proper showing to set aside the judgment. This method of procedure is sustained in the case of *People v. Perez*, 9 Cal. App. 285, 98 Pac. 870. This proceeding is in the nature of a writ of error coram nobis, and, while not such in form, it answers the same purpose. *People v. Silver*, 154 Cal. 556, 98 Pac. 543.

Unless this alleged error is so great that it renders the judgment utterly void, it cannot be reached by habeas corpus, for it is

well settled that the writ of habeas corpus cannot be converted into a writ of error.

"To grant this, however, would be to wrest the writ of habeas corpus from its primary purpose and to give it an operation that is not contemplated by the law. Its function is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since it was issued to render it invalid. It is not designed to retry issues of fact or to answer the purpose of an appeal." In *re Leonardino*, 9 Cal. App. 680, 100 Pac. 708.

The writ is dismissed, and the petitioner remanded.

We concur: BURNETT, J.; HART, J.

(52 Cal. App. 237)

STEPP et al. v. WILLIAMS et al.
(Civ. 2230.)

(District Court of Appeal, Third District, California. April 14, 1921.)

1. Waters and water courses §152(8)—Evidence held to sustain a finding of an appropriation by plaintiffs' predecessor.

In an action to quiet title to water of a spring, evidence held sufficient to establish an appropriation by plaintiffs' predecessor.

2. Waters and water courses §130—No usufruct can be acquired in waste waters.

Waste waters from the ditch of an irrigation district are of a vagrant and fugitive character; so long as they are not controlled by the owner of the ditch from which they escaped they are subject to appropriation and use by others, but no usufruct can be acquired therein.

3. Frauds, statute of §72(1)—The right in water is "real property" within the statute.

Water, being a part and parcel of the land to which it is appurtenant, is "real property," and a conveyance or agreement to convey such an interest is within Code Civ. Proc. § 1971, and section 1974, subd. 5, and must be in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Property.]

4. Frauds, statute of §158(4)—Evidence held to show executed parol grant.

In an action involving the right to water for irrigation purposes, evidence held to establish an executed parol grant to plaintiff's predecessor.

5. Waters and water courses §138—Riparian right cannot be acquired by mere use unless the user gives cause of action.

As a general proposition, a riparian right cannot be acquired by mere use or lost by disuse unless there is such an invasion of the rights of the party against whom title by prescription is claimed that he would have had a ground of action against the intruder.

6. Waters and water courses §138—Right to waters of spring held established by adverse user.

In an action involving the right to the waters of a spring, plaintiffs held to have established adverse title as a result of user by their predecessor.

7. Frauds, statute of §119(2)—To prevent manifest injustice, equity will prevent reliance on the statute.

Under principles of estoppel to prevent a manifest injustice, or, in other words, prevent acts which would work what in the eyes of equity would be a fraud on the rights of another equity will prevent reliance on the statute.

8. Frauds, statute of §144—Parties held estopped from denying the validity of parol grant of waters.

Where defendants' predecessor made a parol grant of the waters of a spring, and plaintiffs' predecessor, acting thereon, established an irrigation ditch at the expense of approximately \$2,000 and made a considerable annual outlay therefor, defendants are equitably estopped from denying the validity of the parol grant, though it was subject to an attack because within the statute.

9. Waters and water courses §152(11)—Decree adjudging priorities sufficient.

Where the court found that the flow of a spring was 175 inches, that plaintiffs were entitled to 100 inches, defendants being entitled to 40 inches reserved by their predecessor, the decree which stated that plaintiffs were entitled to their 100 inches is not defective, because it did not state the amount to which the defendants were entitled, etc.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Emma S. Stepp and another against Judith E. Williams, individually, and as executor of the last will and testament of Chas. W. Williams, deceased, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Jamison & Wylie, of Alturas, and C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellants.

D. B. Robnett, of Alturas, for respondents.

HART, J. The defendants own certain lands in Modoc county, Cal., upon which there is a spring, the waters of which flow over and across the lands of defendants; plaintiffs claim a four-fifths interest in the spring and in the waters flowing therefrom under an alleged oral grant from Chas. W. Williams, deceased, the predecessor in interest of defendants. Plaintiffs brought this action to quiet their alleged title to the waters of said spring, and for an injunction restraining defendants from interfering with the said waters claimed by plaintiffs. Defendants, Judith E. Williams, both in her individual

and representative capacity, and Gary Williams, answered said complaint, denying the allegations of the complaint as to the grant of said waters of said spring, and by way of cross-complaint alleged the ownership of said spring and the lands on which the same is located, and a right and title to said spring by reason thereof and by reason of their riparian rights, and by prescription.

The court, in substance, found as follows:

The spring, the right to the waters of which is in controversy here, is situated on the lands of the defendants, who, as to said lands, are the successors in interest of one Charles W. Williams. Continuously from and including the year 1882 to the time of his death on the 25th day of February, 1918, said Williams was the owner and in the occupancy of the land on which the spring in question is situated.

In the year 1883, Charles W. Wells, who was at the time of the commencement of this action deceased, but in the year just named the husband of Emma S. Stepp, one of the plaintiffs herein, made homestead entry of certain land, and also a desert land entry of certain other land, and after due proceedings received a patent therefor from the United States government, all said lands, as well as the plaintiffs' land, upon which the said spring is located, being situate in Modoc county. The plaintiffs are the successors in interest of said Wells in the homestead and desert entries above mentioned. The said lands of plaintiffs "are all of a dry, barren nature, and would not produce crops in paying quantities without artificial irrigation, and the said lands would be of little or no value without such irrigation, and at the times said lands were entered by said Charles W. Wells said lands were of this character, all of which was well known to said Charles W. Wells;" that either in the year of 1882 or of 1883 said Williams "told Charles W. Wells, husband of said plaintiff, Emma S. Stepp, that he, the said Wells, could have the said spring and the waters running therefrom, except a small quantity of water required by the said Charles W. Williams, not exceeding 40 inches, measured under a 4-inch pressure."

Wells and his wife, plaintiff Stepp, relying upon the offer of the waters of said spring so made to Wells by said Williams, thereupon "commenced the construction of a levee around said spring to restrain the waters thereof from flowing onto the lands of said Charles W. Williams, and commenced the construction of a ditch leading from said levee and spring to the lands of said Charles W. Wells and said Emma S. Stepp, * * * and diligently prosecuted the work of constructing said levee and ditch until the same was completed, and upon the completion of said levee and ditch said Charles Wells diverted and appropriated all the waters of said spring and the stream issuing therefrom,

except 40 inches, measured under a 4-inch pressure, so reserved by said Charles W. Williams, and by means of said ditch conveyed the same to the aforesaid lands of said Charles W. Wells and plaintiff, Emma S. Stepp, his wife, and applied the same to a beneficial use in the irrigation of said lands and the production of valuable crops, and for stock and domestic purposes, as hereinbefore found;" that the ditch so constructed by said Wells and his said wife was of an average width of 5 feet and of an average depth of 2 feet, and was and is between 6 and 8 miles in length; that it required a period of 5 years to complete the construction of the ditch, during which time said Wells devoted "all the time and money he was able to devote to the construction of the same," and the cost of the original construction of the dam and ditch was approximately \$2,000.

That, after being told by said Williams that he might have the said spring and water, said Wells proceeded to clear a portion of his lands, and planted an orchard, consisting of two or three dozens of fruit trees, and also planted about 300 acres of said lands in crops of hay, grain, and alfalfa, all of which required artificial irrigation, and for which said Wells had no supply of water except from the said spring; that said Wells expended large sums of money in improving the said property by fencing the same and constructing other improvements thereon, "all of which said improvements would be useless unless said Charles W. Wells was able to cultivate said lands and irrigate the same and produce crops thereon; that all of said facts were known to and by the said Charles W. Williams and said * * * Williams was at all times apprised of the work that said * * * Wells was doing and having done in the construction of said ditch and dam and in the clearing and cultivating of said lands, and the diversion, appropriation, and use of said waters of said spring by said * * * Wells, as aforesaid"; that the use of 100 inches of the waters of said stream and spring by the said Wells was at no time interrupted by said Williams.

That the original amount of water "appropriated and diverted" by Wells from said spring "under grant of right" from Williams was "at least 125 inches, measured under a 4-inch pressure," but Wells, on the 16th day of May, 1884, granted by a deed of conveyance to one Wm. H. Nelson, the owner of certain lands over which the said ditch was constructed, "or was to be constructed," an undivided one-fifth interest in and to said ditch and the said water right, since which time Wells and his successors in interest have claimed, diverted, and used as their own, "and under their own right," 100 inches of said spring and stream, measured under a 4-inch pressure, "over and above any and all interest in and to the waters of said spring

which they had theretofore deeded to the said William H. Nelson."

That the plaintiffs and their predecessors in interest, for over 30 years from the time of the completion of the dam and ditch by means of which they diverted and used the waters of said spring to the time of the commencement of this action, have "continuously, uninterruptedly, openly, notoriously, under a claim of right, and adversely to the defendants and their predecessors in interest, and adversely to said Charles W. Williams, and with the knowledge and acquiescence of said * * * Williams, diverted, appropriated, claimed, and used, 100 inches of the waters of said spring and stream * * * upon the aforesaid lands for the irrigation thereof, and for the production" of the crops above mentioned, and for stock and domestic use; that during all said time said number of inches of water "have been necessary and indispensable for the proper irrigation of said lands and for the production of said crops," etc.

It is further found that ever since the completion of said dam and ditch the plaintiffs and their grantors have cleaned and maintained the ditch every year, at an annual cost of \$250 and that said work of "cleaning and maintaining" has been open and notorious, and was within the knowledge of said Williams during his lifetime, and without objection, interference, or interruption by him or his agents.

It was found that the payment of all taxes of whatsoever kind and nature assessed or levied against the lands of plaintiff and against the ditch and water right in question for more than 5 years continuously immediately preceding the commencement of this action had been made by plaintiffs.

The court also found that the waters of the spring were riparian to the lands of the defendants, but the riparian rights of the latter thereto to the extent of 125 inches measured under a 4-inch pressure, ceased to exist by virtue of the grant of said waters to the plaintiffs and their grantors, etc. But it was also found:

"That, during the years 1882, 1883, and 1884, a great deal of the lands of the said Chas. W. Williams lying below and west of the said spring were saturated with water, and were swamped, and were thus rendered unfit for cultivation, and said defendants' predecessors in interest required no water for the irrigation of said lands; * * * that the lands of said defendants and the crops growing upon the same will not dry up and wither away, or not mature, nor will the said lands, nor the whole thereof, or any part thereof, become unproductive or of little value, nor will defendants be compelled to abandon the cultivation of said lands (as alleged in the complaint), if they are deprived of the said 100 inches of the waters of said spring," etc.

The judgment awards to plaintiffs the first 100 inches of the waters flowing from said

spring and the stream, measured under a 4-inch pressure, and quiets their title thereto, and enjoins defendants or their agents, etc., from interfering with or in any manner obstructing the right of the plaintiffs to take and divert in the manner described by the findings said number of inches of the waters flowing from said spring.

This appeal is from said judgment, by the alternative method (Code Civ. Proc. §§ 953a and 953b).

The findings above recapitulated are attacked upon the ground that there is no evidence to provide them with the requisite support. The several assignments under this head constitute the principal bases for the claim that the judgment should be reversed.

A vast amount of evidence, both for the plaintiffs and the defendants, was received in the case. We have examined it with care, and upon such examination we have found no reason for doubting that the findings are sufficiently supported. To enter here upon a detailed examination of the evidence would involve a task which would require an extended statement herein of the testimony, and we will, therefore, in a general way only refer to the testimony, except in an instance or so where specific reference to the testimony of some particular witness may be deemed essential to or at least proper for the purposes of the decision. As in nearly all cases where the question as to the sufficiency of the support of the findings afforded by the evidence is an issue submitted on appeal, there is here, as to some of the essential points, a substantial conflict, and, as learned counsel concede, in such a situation as to the proofs a reviewing court is required to leave the determination of such conflict precisely where the Constitution has placed it, viz.: With the tribunal before which the proofs have been directly adduced. But there are certain of the essential facts as to the existence of which in this case there is neither any controversy here nor, consequently, a conflict, but which counsel for appellants earnestly contend do not establish a legal right in the plaintiffs to the waters or any portion thereof of the spring in question.

It should first be explained that both Charles W. Williams, the original owner of the land on which the spring the right to the waters of which is here in controversy is located, and the predecessor in interest of defendants, and Charles W. Wells, who located and owned the lands now owned by the plaintiffs, and to and for the benefit of which the plaintiffs claim the right to take the waters of said spring, were deceased at the time of the commencement of this action; that Judith E. Williams, defendant executrix, and Gary Williams, her codefendant, are respectively, widow and son of said Charles W. Williams; that plaintiff Emma S. Stepp is the widow of Chas. W. Wells, deceased, she, however, having intermarried with one Stepp after

the death of said Wells, and that the plaintiff Mary V. Graham is the daughter of said Emma Stepp by her former husband, Wells.

In considering the evidence it will be convenient, and perhaps less apt to be confusing, to designate the lands of plaintiffs and the ditch constructed for the purpose of carrying the waters of said spring to said lands as the "Wells lands" and the "Wells ditch," respectively.

As the findings show, the spring in controversy is located in a corner of the Williams lands, which are, of course, riparian thereto. There are two springs in near proximity to each other, one being referred to in the testimony as the North, or Warm, spring and the other the South spring, the latter spring being also on the Williams lands. It is from the North or Warm spring that the plaintiffs claim the right to take and divert and convey the waters to their lands.

It should further be explained that there is testimony tending to show that a considerable portion of the Williams land situated near these springs was of a swampy or marshy character and that, therefore, as to that portion of said land there was no necessity for artificial irrigation. There was, however, a small acreage of the Williams lands near the springs, variously estimated by the witnesses as embracing from 30 to 40 acres, which, to make it productive, did require irrigation at the time of the alleged gift of the waters of the North spring by Williams to Wells.

The Williams and the Wells lands, as well as lands owned by other parties, were situated not far distant from Pitt river. Much of the Williams lands was irrigated by means of a large ditch through and by which the waters of said river were diverted and used for agricultural purposes. There were several thousands of acres of land irrigated by means of this ditch (generally referred to by the witnesses as the "Big Ditch"), the lands so irrigated being owned by different parties, including, as stated, the Williams lands. These lands were situated east and northeast of the Wells ditch, and the evidence shows that in irrigating said lands from the "Big Ditch" a large quantity of the waters diverted through said ditch would get away, and become "waste waters," which flowed sporadically—that is, whenever particular lands entitled to the use of said waters were being irrigated—towards the Wells ditch, and would ultimately seep therein, very often in sufficient quantities to overflow the last-named ditch.

There is no dispute as to the fact that the climate in the locality in which the lands of the plaintiffs are situated is of extreme aridity, and that, consequently, said lands are dry and barren, and would be wholly useless and worthless for the production there-

on of the usual agricultural crops and garden truck without artificial irrigation.

It is also undisputed that in the year 1883, when Wells made the homestead and desert land entries mentioned in the findings, the lands which were thus taken up by him were covered with sagebrush, the removal of which, to render said lands available for practical agricultural purposes, was absolutely necessary. The evidence discloses that, having in mind the location of these lands, Wells first set about to find a water supply for the irrigation of the same, and, according to the testimony of the witness Cable, had a conversation with Charles W. Williams, the predecessor of the defendants, in which said Williams said to Wells that if he (Wells) could raise the dam then surrounding the spring in question to such a height as would facilitate the flow of the waters therefrom into a reservoir or ditch he could have all the water of said spring, except a quantity sufficient to irrigate the 30 or 40 acres near the spring, referred to in the findings, for the purpose of irrigating his lands, and for domestic purposes. This conversation occurred before Wells had taken decisive steps looking to the due location of the lands. It is further made to appear by the evidence that, acting upon and accepting this offer by Williams, Wells immediately proceeded to construct a ditch connecting the spring with his lands. The distance between the spring and the said lands is approximately seven miles. It appears that he was a man of limited means, and, as a result, was required to prosecute the work of construction with a degree of diligence only which was commensurate with his financial ability. The consequence was that the work of constructing the ditch covered a number of years. In fact, the undisputed evidence is that Wells began the work of building the ditch in the year 1883, and finished it in the year 1888, the total cost thereof, not including the labor he himself bestowed upon the work, being approximately \$2,000.

After the completion of the ditch, Wells, on the 20th day of October, 1888, filed, and on the same day caused to be recorded in the office of the county recorder of Modoc county, a written notice whereby he gave notice that he had "appropriated all the water from the springs commonly known as the Williams Springs situated in the [describing the Williams lands] to the extent of 400 inches of water measured under a 4-inch pressure." Said notice was also at that time posted at the spring in question, the point of diversion of the waters thereof.

The ditch, as constructed, passed over and through a portion of the land of Williams, and in close proximity to the latter's residence. The ditch also passed through and over a portion of the land of one W. H. Nelson, which adjoined the lands of Wil-

lliams, and, as the findings show, Wells, as a consideration for the right to run the ditch over and through the land of Nelson, conveyed by deed to the latter a one-fifth interest in said ditch and the water right connected therewith. This deed was recorded in the office of the county recorder of Modoc county, at the request of said Nelson, on the 2d day of June, 1884. It may also be stated here that Williams having later become the owner by purchase of the Nelson land over which said ditch passes, likewise became the owner of Nelson's one-fifth interest in the ditch and the water right.

The undisputed evidence also shows that, while the work of constructing the ditch was in progress, Wells made material and extensive improvements on his lands, erecting thereon a house in which to live, erecting fences around the lands, removing the sage-bush thereon, and otherwise putting the lands in a condition suitable to use for agricultural and other like purposes. He planted a small orchard on the land, and raised a limited amount of garden products and produced alfalfa, and cultivated the wild hay growing thereon. The water for these purposes, prior to the completion of the ditch, was hauled to the lands by Wells, by what particular means the record does not disclose.

As stated, the work of building the ditch was completed in the year 1888, from which time until after the death of C. W. Williams, which occurred on the 25th day of February, 1918, Wells and his successors in interest have continuously diverted to and used upon their lands the waters of said spring for irrigating, stock, and domestic purposes.

There is testimony by a large number of witnesses—persons who had either been employed on the Wells ranch or at times had been in possession of it under leases—that the water from the spring was diverted by means of the ditch in question to and used upon said ranch in the irrigation of from 200 to 250 acres thereof for upwards of 30 years or more without molestation or protest from or by Charles W. Williams. The same witnesses, as well as Mrs. Stepp and her son, testified that every year, during the period above mentioned, Wells, and, subsequently to his death, Mrs. Stepp, caused the ditch to be cleared of moss growing and debris accumulating therein from one end of the ditch to the other—that is, from the Wells ranch to the spring—and that the expense each of said years of performing that work averaged in money the sum, approximately, of \$250. Some of the work of clearing the ditch of the obstructions which impeded the free passage of the waters of the spring through the ditch to said ranch necessarily was done on the portion of the Williams land over which the ditch passes and, as seen, near the residence of Williams, and the witnesses just referred to testified that at no time did C. W. Williams, or any mem-

ber of his family, or any one acting for him, ever interfere with or protest against such work being so done either on his premises or at the springs. In fact, it appears that, on one occasion, when Wells was building the ditch, and before its completion, Williams, at the request of Wells, performed some work on the ditch near the spring, for which Wells compensated him to the extent of \$27 or thereabouts.

On another occasion, Mrs. Stepp testified said Williams was present while she had some Indians cleaning the ditch, and at that time Williams not only did not protest against the cleaning of the ditch, but had an Indian employee of his, who was with him at the time, to show the other Indians how to do the work properly. In brief, as to C. W. Williams' attitude relative to the maintenance of the ditch, there is evidence showing, or at least plainly tending to show, and sufficient to support a finding to that effect, if the trial court believed it, that Williams, down to the day of his death, all along regarded his gift or grant of the waters of the spring to Wells, except the small quantity reserved for the irrigation of some 35 or 40 acres of his own land, as perfectly valid, and that the right to said waters or the use thereof had and was vested in Wells. For instance, on one occasion, many years after he had given said waters to Wells, and while the latter was using the same through and by means of the ditch constructed by him, Williams, in a conversation with the witness Layton, in a way expressed regret that he had given the waters of the spring to Wells, explaining that when he parted with his right to the waters flowing from the spring he had no use for all said waters, but that since then conditions had changed, so that the said waters would "now come in very handy" to him. In this same conversation he further explained to the witness that many years prior to the date of said conversation Wells had said to him (Williams) that he contemplated constructing a ditch whereby he could convey water for irrigation to the lands he proposed to locate from Pitt river, that he (Williams) then said to Wells: "There's no use of your going to that expense; if you can raise the dam at this spring so as to get the water therefrom into a ditch, you may have the water, except a small amount for irrigating the 30 or 40 acres of my own land lying near the spring," or words to that effect.

It further appears that in the years of 1916 and 1917 a controversy arose between the plaintiff and the Williamses over the waste waters flowing from the "Big Ditch," some of which, as seen, would, on occasions, drift into a swale near the Wells ditch, and thence by seepage into said ditch, often filling the same to the point of overflowing. The Williams people claimed that the plaintiffs were entitled to no part of said waste

water, and insisted upon their right to impound the same for their own exclusive use and purposes. Williams, it appears, had constructed a flume across the Wells ditch for the purpose of conserving said waste waters, and thus had prevented the flow of the same into said ditch. A conversation occurred early in the year 1917 between the plaintiff, Emma S. Stepp, and Gary Williams, one of the defendants, and in the presence of the witness Graham, a Mr. Hughes, son-in-law of C. W. Williams, and the attorney for the plaintiffs. In that conversation, so Mrs. Stepp and Graham testified, Gary Williams stated that the right of Mrs. Stepp to the waters of the spring was not disputed by him or any of his family; that they knew that the plaintiffs owned the waters of the spring, but, as to the waste waters from the "Big Ditch," they did not know whether plaintiffs owned them or not, but that they (the Williamses) were of the belief that they owned the waste waters.

There is testimony that the spring in question was the only available source affording a definite supply of water of a sufficient flow for the necessary irrigation of the Wells lands; that the Wells ditch, if kept clean, and free from sediment and other obstructions, has a carrying capacity of at least 200 inches of water; that for many years—in fact, continuously from the time that the ditch was completed down to the time of the obstruction thereof by the damming up of the ditch by the defendants in August, 1918 (after the death of C. W. Williams)—at least 125 inches of water, measured under a 4-inch pressure, over and beyond the 35 or 40 inches of water, likewise measured, which the court found that Chas. W. Williams had reserved for use on the 35 or 40 acres referred to above, flowed into the ditch from said spring and thence to the lands of the plaintiffs; that, as seen, one-fifth of said amount of said waters (25 inches thereof) was conveyed by Wells to William H. Nelson; that the amount of the waters so conveyed and reaching the lands of plaintiffs was necessary for the proper irrigation of fruit trees, crops of hay, and garden truck produced thereon, and for stock and domestic purposes. It is true that there was no testimony introduced showing that an exact measurement had ever been made of the waters flowing through the ditch from the spring, but a civil engineer did testify that the ditch, at a certain point therein, was capable of carrying 500 or 600 inches, while there was other testimony, based upon the observations and judgment of those thoroughly acquainted with the ditch for many years, to the effect that 100 inches were required for the necessary uses of the plaintiffs, and that the latter, until their ditch was interfered with in the year 1918 by the defendants, as above explained, always secured all the water necessary or requisite

for sufficiently irrigating from 200 to 300 acres of their ranch.

[1, 2] The above rather general résumé of the evidence is taken mainly from the testimony of witnesses introduced by the plaintiff, and is clearly confirmatory of the declaration made in outset hereof that the findings are well supported. Indeed, as above suggested, there is, upon some of the points, little, if any, substantial variance between the testimony received upon behalf of the plaintiffs and that of the defendants. The latter themselves in effect admitted that some water from the spring in question had continuously, for many years, been diverted from the spring into the Wells ditch, and thence to the Wells ranch. They claimed, however, that the said ditch, because of not being of the proper grade, was incapable of carrying more than 30 or 40 inches of water from the spring to the Wells ranch, and that thus no greater number of inches of water from the spring had ever been diverted into the ditch. This testimony, however, was based upon observations made just before this action was commenced, and at a time when the defendants had refused to permit the plaintiffs to go upon their land, as the latter had always theretofore done without being interfered with, for the purpose of clearing the part of the ditch thereon of such obstructions as had accumulated therein during the months the ditch was not in actual use. And, in this connection, this pertinent suggestion may well be ventured: That it is not probable that Wells and his successors, who own approximately 800 acres of land wholly worthless for agricultural purposes without artificial irrigation, would have constructed at an expense of \$2,000 and maintained at a yearly cost of approximately \$300 a ditch the carrying capacity of which would not exceed 30 inches of water, which according to the testimony, would irrigate not to exceed 30 or 40 acres of land. But, be that as it may, upon the question of the carrying capacity of the ditch there is, as we have shown, positive testimony for plaintiffs in direct conflict with the testimony for the defendants last referred to.

There is the further claim, though (and this was the main theory upon which the defendants resisted at the trial the right of plaintiffs to more than 30 or 40 inches of water from the spring, if any at all), that by far the greater portion of the water carried to the Wells ranch through the latter's ditch was from the waste waters escaping from the "Big Ditch." But, as in rebuttal of that proposition of fact, the plaintiff showed, even by one of the defendants and some of their other witnesses, that the said waste waters were subject to such control by the owners of the "Big Ditch" as that they could be, and often were, diverted from the Wells

ditch, and therefore could not get into that artificial waterway.

As we have seen, there were several times when the certain lands entitled to irrigation from the "Big Ditch" were being irrigated the waste waters therefrom would flow in a different direction from the Wells ditch and would never reach said ditch. Gary Williams, one of the defendants, testified that he could so manipulate the "Big Ditch" that, when irrigating from it, he could either overflow the Wells ditch or make it dry. In a word, from the testimony for the plaintiffs, as well as from some of that for the defendants, it is a reasonable inference to say that the Wells ditch was supplied with the waste waters from the "Big Ditch" only periodically, or whenever it might happen that certain lands entitled to be irrigated from the latter ditch, and which sloped towards the Wells ditch, were being irrigated. These waste waters were of a vagrant or fugitive character, and, while so long as they remained so or were not controlled by the owner of the ditch from which they escaped they were subject to appropriation and use by others, a usufruct could not be acquired therein (*Dannenbrink v. Burger*, 23 Cal. App. 587-596, 138 Pac. 751); hence, the plaintiffs could not rely upon them as providing a source for a definite or continuous supply of a sufficient quantity of water for their necessary purposes, and it is not reasonable to suppose from the evidence that they intended to do so when they built their ditch. Indeed, as is plainly evident, the construction of the ditch to the spring and the building of a dam around the spring in a manner to permit the flow of the waters of the spring into the ditch are themselves convincing evidence of the fact that plaintiffs expected and intended to rely for their water supply wholly upon the spring. But, at all events, it is clear that upon this point, as well as upon all the other vital facts, there at least exists a substantial conflict in the evidence.

As before stated, the fixing of quantities as to the waters flowing from the spring and those customarily carried therefrom by the ditch to the lands of plaintiffs is based upon testimony involving the opinions or the best judgment of those familiar with the spring and the ditch, and generally with the requirements as to water for irrigation purposes under the conditions shown to exist in the locality in which the lands of plaintiffs and those of the defendants are situated. There were no exact measurements shown. In such a case more or less difficulty in defining the precise rights of the parties is always to be expected, and the court can do no more than to exercise and apply its best judgment under the circumstances as shown in arriving at a conclusion as to what is just and right as to both the contending parties. To this end it may draw such inferences from all the testi-

mony and the general situation as the same may reasonably afford. Here (and we are now speaking of the quantity of water awarded to plaintiffs) we have testimony showing the capacity of the ditch, the amount of water in bulk it has usually conveyed to the lands of plaintiffs in the irrigating seasons, the number of inches required to irrigate a certain area, the number of acres irrigated by plaintiffs, and an approximation of the quantity of water which ordinarily flows from the spring into the ditch. From all these facts the court could form a fair and reasonable judgment and conclusion as to the quantity of the waters of the spring to which the plaintiffs are entitled, and at the same time allow to the defendants enough of said waters to measure up to the reservation made by C. W. Williams, and this, we conclude, after a careful reading of the testimony, it has done. Indeed, it has done more, for it has given to the defendants 35 inches of water in excess of the amount which was reserved by their predecessor from the alleged grant of the waters of the spring to Wells.

And thus we are brought to a consideration of other legal points arising and involved in this controversy.

The plaintiffs contend that the evidence and findings show that C. W. Williams conveyed to their predecessor in interest by an executed parol grant the waters of the spring in question, and that also they acquired a title to said waters by adverse user or prescription. On the other hand, the defendants, in addition to the contention that the findings derive no support from the evidence, of which proposition we have already disposed adversely to their position, maintain that, inasmuch as the plaintiffs' predecessor did not take actual possession of the waters of the spring until some 5 years after the alleged grant of the waters of the spring, there was not, and could not have been, an executed parol grant of said waters; that the alleged grant is, therefore, void, since water, being a part and parcel of the land to which it is appurtenant, is real property, which cannot be transferred or granted except by an instrument in writing. Code Civ. Proc. § 1971. Or, it is further contended, if the transaction amounted only to an executory oral agreement to convey the water, the transaction or agreement is still void, since it is also the law that an agreement to convey real estate or any interest therein, to be valid or of legal force, must be reduced to writing. Code Civ. Proc. § 1973, subd. 5.

[3] There is no legal proposition better settled in this state than that the interest here claimed by the plaintiffs is an estate in real property, and that a conveyance or an agreement to convey such an interest is within the statute of frauds, and must therefore be in writing. *Hayes v. Fine*, 91 Cal. 391, 398, 27 Pac. 772, and cases therein named;

Churchill v. Russell, 148 Cal. 1, 4, 82 Pac. 440.

[4] It is believed, however, that the gift of the waters to the predecessor in title of the plaintiffs involved an executed parol grant of said waters. It is true that Wells did not, upon being given the right to the waters of the spring, proceed immediately to use the same. In the very nature of the case this was impossible. But he did proceed at once with the preliminary preparations essential to the putting of the waters to use, and prosecuted those preparations as expeditiously as the circumstances and conditions and the nature of the grant would permit, and this, we think, was sufficient in such a case as this to constitute an executed parol grant. However, if that position were logically assailable, it would seem to us that there can be no doubt that the evidence establishes in the plaintiff title to the waters by prescription or adverse user.

[5, 6] In the first place, it is to be noted that in the year 1888 Wells posted a notice of the appropriation of 400 inches of the waters of the spring at the spring, the point of diversion of said waters, and caused said notice to be recorded in the office of the recorder of Modoc county. From that time on and until interrupted in the diversion of said waters by defendants in the year 1918, he and his successors, under a claim of right, continuously, openly, notoriously, and, indeed, with the actual knowledge of Charles W. Williams and the defendants here, diverted and conveyed to his ranch by means of the ditch the waters of said spring, or so much thereof as was necessary for their purposes. Here, then, is clearly shown a prescriptive right, since such use under such circumstances would carry with it a presumptive grant—that is, such use involves all the elements of a prescriptive right to said waters by adverse user. *Roseberry v. Clark*, 23 Cal. App. 549, 557, 138 Pac. 923; *Faulkner v. Rondini*, 104 Cal. 140, 146, 37 Pac. 883. In stating this conclusion, we are not unmindful of the general proposition that a riparian right cannot be acquired by mere use or lost by disuse, by which it is meant, as we understand that doctrine, that, unless there is such an invasion of the riparian rights of the party against whom title by prescription is claimed that he would have had a ground of action against the intruder, no prescriptive title to such waters can arise or be established. *Faulkner v. Rondini*, supra. We have here, however, not only the invasion by a nonriparian owner of the riparian rights of the defendants, but an invasion of which the riparian owners had actual knowledge, and such an invasion as would have constituted a ground of action in his favor against the invader. Upon what theory may it be held that thus a prescriptive title to the waters in question

is not established, such invasion having more than covered the statutory period of five years prescribed for the acquisition of such a title or title by adverse user or possession? Indeed, we think we are justified in holding, upon this record, that the plaintiffs have established a parol grant, followed by adverse user. *Roseberry v. Clark*, supra.

[7, 8] But this case may, in strict harmony with the evidence and the findings, be considered upon the theory that the use of the waters of the spring by Wells and his successors, the plaintiffs herein, was under a license from the predecessors in interest of the defendants, and that the better doctrine of the case, and one upon which it may justly be decided in favor of the plaintiffs, involves an equitable concept whose animating principle is natural or abstract right and justice—a principle which justly discountenances or frowns upon transactions the consummation of which would work a gross injustice upon the rights of a person. The doctrine referred to is that of estoppel, which, while never operating to destroy the very salutary rules involved in the statute of frauds, will, upon the highest considerations of right and justice, deny to individuals the privilege of invoking the protection of that statute where their acts and conduct in a transaction with others would render the statute a shield to rather than a prevention of manifest injustice, or, in other words, the prevention of acts which would work what in the eyes of equity would be a fraud upon the rights of another person.

The cases applying the doctrine referred to, where the proved facts and circumstances are such as we have in the instant case, are numerous, both in this and other jurisdictions, and among them are, notably, *Churchill v. Russell*, 148 Cal. 1, 82 Pac. 440; *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 803, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; *Roseberry v. Clark*, 23 Cal. App. 549, 138 Pac. 923; *Smith v. Green*, 109 Cal. 228, 234, 41 Pac. 1022; *Blankenship v. Whaley*, 124 Cal. 300, 304, 57 Pac. 79; *Flickinger v. Shaw*, 87 Cal. 126, 131, 25 Pac. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; *Raritan Waterpower Co. v. Veghte*, 21 N. J. Eq. 475; *Re Erick v. Kern*, 14 Serg. & R. (Pa.) 271, 16 Am. Dec. 497. See, also, comment of Prof. Freeman on the last-named case in 16 Am. Dec. 501 et seq.

It is sufficient to refer specifically herein to a few only of the above cases to illustrate the application to a case of this kind of the equitable doctrine or principle mentioned.

Churchill v. Russell, as in the case at bar, involved the question of the validity of an executed parol license given by the plaintiff to the defendants to take the waters of a certain stream known as Butte creek, in Siskiyou county. The plaintiff's predecessor in interest had, many years prior to the giving of said license, duly appropriated all of

the waters of said stream. Before permission to divert the waters of the stream to their land was given by one Boyes, plaintiff's predecessor in title, the defendants had an interview with Boyes, in which they said to the latter that they had an opportunity to purchase the homestead right of a man named Snell to certain land situated near the plaintiff's lands, and also stated that if he (Boyes) would grant to them the right forever to 20 inches of the waters of said creek they would purchase said homestead right and prove up on it. Boyes assented to that proposition and explicitly assured the defendants that, as he disliked Snell, and would like to see him leave the community, they could have for all time the 20 inches of water asked for. The defendants purchased the Snell homestead right and proceeded with the work necessary for effecting the diversion to the land that they had thus acquired of the said water, and to make improvements upon said land. Several years thereafter the plaintiff, the successor in interest of Boyes, brought an action to restrain the defendants from diverting the waters of said creek. The Supreme Court, in deciding the case, declared that the plaintiff, if having knowledge or notice of the license by Boyes to defendants, would, under the facts above stated, be estopped from denying the latter's right to divert 20 inches of water from said creek to their land.

In *Stoner v. Zucker*, 148 Cal. supra, at page 520, 83 Pac. 810, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, Mr. Justice Henshaw, after reviewing some of the cases exemplifying the application of the principle, with characteristic clearness, thus summarizes the rule as applicable to cases similar in their facts to the one before us:

"The recognized principle, therefore, is that where a licensee has entered [upon the premises of another] under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for."

The rule as it is stated in *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 475, supra, as follows, is noticeably applicable to the facts of this case as proved and found:

"To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not per-

mit advantage to be taken of the form of consent, although not according to the strict mode of the common law, or within the statute of frauds; and to defeat such a purpose will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee."

Without further quotation from the above-cited cases, all of which are illuminating upon the proposition in hand, it is to be said that the rule, to the extent that it is announced in those cases, is sustained by the courts of a majority of the American state jurisdictions. The case of *Kinsell v. Thomas*, 18 Cal. App. 683, 124 Pac. 220, while not as to the facts precisely this case, applies the doctrine to an executed parol grant of real property.

The findings, supported as we think by sufficient evidence, bring this case (as has already been stated) clearly within the rule as it is declared in the California cases and the New Jersey case above quoted. Here, as we have seen, the predecessor in title of the plaintiffs, relying upon the grant of the waters of the spring to him by the predecessor of the defendants, not only made valuable and expensive improvements upon his own land, but went to great expense in digging a ditch for the purpose of securing the use of the waters so granted to him. Not only that, but he maintained the ditch and the dam around the spring for many years at a large annual outlay of money and labor, and with the actual knowledge not alone of the predecessor of the defendants but of the defendants themselves. It seems to us that, if there ever was a case where equitable estoppel should intervene to prevent injustice, this is the case, for it would be manifestly inequitable and unjust to permit the defendants, upon the facts as they were proved and found, to deny the validity of the parol grant or license (if, under the facts, the latter, technically, be the appropriate characterization of the transaction) upon which the plaintiffs rely for their title to the waters in dispute.

Another point made by the defendants is that they acquired the right to all the waters of the spring as against the plaintiffs by adverse user. What has been said above regarding the sufficiency of the evidence to support the findings constitutes a sufficient reply to this point. We may, in addition, say that even the defendants and their witnesses themselves admitted that during the irrigation season there was always more or less water from the spring flowing in the ditch. Moreover, the testimony is, as we have shown, that the plaintiffs always used the waters flowing in the ditch when they needed them. Of course, there are times when waters for irrigation are not needed

or used by the owner thereof, but an adverse right cannot be acquired against the owner by a person using the waters at times when the owner does not require them for his own purposes. If the claimant has used the water at such times as he needed it, it is regarded by the law as a continuous use. *Hesperia Land, etc., v. Rogers*, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209, *Silva v. Hawn*, 10 Cal. App. 544, 551, 102 Pac. 952.

It is further objected that the findings and the judgment are fatally uncertain in that they fail to find and adjudicate the paramount right and define the right of the defendants. We are of the opinion that the decree is, under the peculiar circumstances of this case, sufficiently certain and definite in the adjudication of the respective rights of the parties.

[9] The court found that the natural flow of water from the spring was 175 inches, measured under a 4-inch pressure. It also found, as seen, that the plaintiffs were entitled to the first 100 inches of the water of said spring likewise measured, and upon evidence by the defendants themselves that an inch of water to the acre would be sufficient to fulfill the terms of the reservation by their predecessor, that the defendants were entitled to 40 inches, measured under like pressure, which were reserved by their predecessor when he granted the said waters to the predecessor of plaintiffs. These findings, as we have shown, are sufficiently supported evidentially. While the decree does not specifically state the amount of water that the defendants are entitled to take from the spring, it is obvious that if, as the findings and the decree declare, the plaintiffs are entitled to 100 inches of said water, the defendants have available to them for their own use all the waters of the spring over and above the amount to which the plaintiffs are entitled, which amount, according to the findings, would be 35 inches in excess of the quantity to which the defendants are entitled under the reservation by their predecessor. While the court could just as well have specifically fixed the rights of the defendants in the decree, as it did those of the plaintiffs, still it is very clear that by the decree, viewed by the light of the findings, the defendants are made to know precisely what their rights in the spring are. The decree here is wholly dissimilar to those in the cases cited by appellant, of which *Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961, may be given as an example. In that case the judgment merely declared that the defendants were entitled to "sufficient water for the proper irrigation of so much of their several lands as they have heretofore irrigated with such water." Ob-

viously, such a decision cannot be upheld, since it is plain that by it to the defendants themselves was practically committed the determination of the quantity of water that they were entitled to.

We have found no reason for disturbing the judgment and it is therefore affirmed.

We concur: **PREWETT**, Presiding Judge pro tem.; **BURNETT**, J.

(Idaho, 20)

MURPHY MERCANTILE CO. v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Idaho. May 27, 1921.)

Sufficiency of evidence and construction of surety bond.

Held, that the evidence in this case is sufficient to support the judgment, that the court did not err in its construction of the bond, and correctly applied the law to the facts of this case.

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by the Murphy Mercantile Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Karl Paine, of Boise, for appellant.

Davidson & Davison, of Boise, for respondent.

BUDGE, J. This action was brought by respondent to recover \$1,459.69 from appellant as surety upon a bond to reimburse the former for any pecuniary loss sustained by reason of the fraud or dishonesty of its employees. The cause was tried before the court without a jury, and from a judgment in favor of respondent in the sum of \$1,124.14, this appeal is taken.

From an examination of the record and the authorities, we have reached the conclusion that the evidence is sufficient to support the judgment, that the court did not err in its construction of the bond (*United States F. & G. Co. v. Egg Shippers' S. & F. Co.*, 78 C. C. A. 345, 148 Fed. 353), and correctly applied the law to the facts of this case.

No reversible error appearing in the record, the judgment of the trial court is affirmed; and it is so ordered. Costs are awarded to respondent.

RICE, C. J., and **DUNN** and **LEE, JJ.**, concur.

MCCARTHY, J., disqualified.

(34 Idaho, 37)

LANE v. OREGON SHORT LINE R. CO.
(No. 3360.)

(Supreme Court of Idaho, May 27, 1921.)

1. Carriers \S 218(4) — Contract requiring shipper of live stock to care for shipment at his own risk held valid.

A contract between a shipper and carrier, which provides that the shipper would "at his own risk and expense, load, unload, care for, feed and water the stock until delivery of the same to the consignee at destination," is valid and binding.

2. Carriers \S 228(2) — Burden on shipper to show negligence resulting in injury to live stock.

Where a shipper accompanies a shipment of live stock under such a contract, the burden of proving negligence resulting in injury thereto rests upon him.

3. Carriers \S 211 — Carrier transporting live stock must furnish reasonable facilities for feeding, watering, and resting them.

It is the duty of a carrier transporting live stock to furnish reasonable and proper facilities and opportunities for feeding, watering, and resting them.

4. Carriers \S 208 — No inference of negligence from carrier's failure to provide stockyards with patented locks.

No inference of negligence can be drawn from the failure of a carrier to provide its stockyards with patented locks, unless the circumstances are shown to be such that a prudent person would have provided locks.

5. Carriers \S 218(8) — Carrier's duty performed when it furnishes suitable yards where shipper contracts to care for live stock at his own expense.

When live stock is accompanied by the shipper under a contract to care for them at his own risk and expense, and when he has unloaded them in the stockyards, the carrier's duty is performed when it furnishes suitable yards in proper condition and reasonably secure.

Appeal from District Court, Lincoln County; H. F. Ensign, Judge.

Action by James H. Lane against the Oregon Short Line Railroad Company for damages for loss of sheep. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

Geo. H. Smith, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, for appellant.

C. O. Stockslager, of Shoshone, for respondent.

RICE, C. J. Respondent, Lane, recovered a judgment against appellant railroad company for damages to an interstate shipment of lambs, alleged to have been wholly and entirely due to the careless and negli-

gent manner in which the stockyards in the village of Shoshone were managed and controlled by appellant. An agent of respondent accompanied the shipment under a shipping contract which provided that the shipper would "at his own risk and expense, load, unload, care for, feed and water the stock until delivery of the same to consignee at destination." When the lambs reached Shoshone they were unloaded by respondent's agent and placed in the stock pens provided by appellant and were fed by respondent. The gates were fastened by pins which dropped into hasps, and were not provided with patented locks. After feeding the lambs, respondent's agent fastened the gates and left the sheep unattended. During the night a large number of the lambs escaped from the pens, and 38 of them were lost. In the morning the gates were found closed, and in the same condition in which they had been left the night before.

[1] The provision in the shipping contract quoted above is valid and binding between the shipper and the carrier. Webster v. Union Pac. R. Co. (D. C.) 200 Fed. 597; Cranor v. Southern R. Co., 13 Ga. App. 86, 78 S. E. 1014.

[2] Where a shipper accompanies a shipment of live stock under a contract to care for them en route, the burden of proving negligence resulting in injury thereto rests upon him. Starr v. C., B. & Q. R. Co., 103 Neb. 645, 173 N. W. 682; McBeath v. Wabash, etc., R. Co., 20 Mo. App. 445; Weesen v. Mo. Pac. R. Co., 175 Mo. App. 374, 162 S. W. 304; Needy v. West. Md. R. Co., 22 Pa. Super. Ct. 489; Bartelt v. O. R. & N. Co., 57 Wash. 16, 106 Pac. 487, 135 Am. St. Rep. 959; 4 R. O. L. p. 995, § 462; 10 C. J. p. 381, § 583.

[3] It is the duty of a carrier transporting live stock to furnish reasonable and proper facilities and opportunities for feeding, watering, and resting them. Pecos & N. T. R. Co. v. Meyer (Tex. Civ. App.) 155 S. W. 309; Hutchinson on Carriers, vol. 2, p. 555, § 510. In this case, so far as the evidence discloses, the pens were suitable and in good condition.

[4] It is claimed that the failure to provide the gates with patented locks was negligence. No inference of negligence can be drawn from such failure, unless there was a showing of such circumstances that a prudent person would have provided locks, as, for example that others in the community locked their pens and corrals in which live stock was kept at night, or that sheep or other live stock had escaped from the pens previously, or that it was customary for railroad stockyards to be provided with locks. Beckman v. So. Pac. R. Co., 39 Utah, 472, 118 Pac. 118; Ft. Worth & D. C. R. Co. v. Gatewood (Tex. Civ. App.) 185 S. W. 932; Colsch v. C., M. & St. P. R. Co., 149 Iowa,

176, 127 N. W. 198, 34 L. R. A. (N. S.) 1013, Ann. Cas. 1912C, p. 915.

[5] The court instructed the jury at the request of respondent that the gates should be so secured that they could not be opened by any one who attempted to interfere with the possession of the property without committing a crime. This instruction does not state the proper measure of the duty of a carrier of live stock when unloaded into the yards for food and rest, accompanied by the shipper under a contract such as was executed in this case. Under such circumstances, the carrier is not an insurer, and its duty is performed when it furnishes suitable yards in proper condition and reasonably secure. *Mo., O. & G. R. Co. v. French*, 52 Okl. 222, 152 Pac. 591; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okl. 302, 135 Pac. 406, 6 N. O. C. A. 717; *Beckman v. So. Pac. R. Co.*, supra.; *Starr v. C., B. & Q. R. Co.*, supra.

There is in the record an entire absence of evidence of negligence on the part of appellant, and its motion for a directed verdict in its favor should have been granted.

The judgment is reversed, with directions to dismiss the action. Costs awarded to appellant.

BUDGE, MCCARTHY, DUNN, and LEE, JJ., concur.

(34 Idaho, 30)

QUIRK v. DIANA MINES CO., Limited, et al.
(No. 3358.)

(Supreme Court of Idaho. May 27, 1921.)

1. Attachment \S 282—Statute for prorating among creditors held constitutional.

Held, that C. S. \S 6781, providing that any creditor who, within 60 days after posting and publishing of notice of attachment, shall commence and prosecute to final judgment his action for his claim against the defendant, shall share pro rata with the attaching creditor in the proceeds of defendant's property, is constitutional.

2. Attachment \S 171—Purpose of posting notice of attachment is to give creditors opportunity to prorate.

The purpose of posting and publishing notice of attachment is to give creditors of a defendant in an attachment action notice, so that if they desire to prorate they may immediately commence and prosecute to final judgment their claims against the debtor.

3. Attachment \S 171—Plaintiff must inform himself as to whether clerk has posted notice of attachment.

It is the duty of plaintiff in an attachment action to inform himself as to whether or not the clerk has posted and published notice of the attachment, and to require the clerk to act in case of his failure so to do.

4. Attachment \S 171—Clerk's failure to post notice held not to affect rights of creditors.

Creditors are not to be deprived of their right to prorate, if they commence their actions otherwise in time, on account of the failure of the clerk to perform his statutory duty, nor is the plaintiff in an attachment action entitled to any benefit resulting from such failure.

5. Attachment \S 171—Posting and publication by clerk after time fixed by statute not a nullity.

Posting and publication by the clerk of notice of an attachment after the time fixed by the statute for giving notice is not a nullity.

6. Attachment \S 282—Statute requiring notice and publication of attachment proceedings construed.

C. S. \S 6781, is construed to mean that creditors who commence their actions within the time prescribed, had the clerk performed his statutory duty, and prosecute their claims to final judgments thereafter, and within 60 days after the notice is posted and published, are entitled to prorate in the proceeds of the attached property.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by P. H. Quirk against the Diana Mines Company, Limited, and others. From a judgment refusing to permit certain judgment creditors to prorate in the proceeds of attached property, defendants appeal. Reversed and remanded.

Chas. M. Kahn and M. L. Church, both of Boise, for appellants.

J. R. Smead and Elliott & Healy, all of Boise, for respondent.

RICE, C. J. On August 9, 1917, respondent commenced an action against the Diana Mines Company, Limited, and on the same day procured the issuance of an attachment in the action which was placed in the hands of the sheriff of Boise county and served August 10, 1917. Notice of the attachment was posted and published by the clerk on October 20, 1917. Appellant creditors, 8 in number, commenced actions against the Diana Mines Company more than 2 days after the issuance of the writ of attachment, and recovered judgments within 60 days after the posting and publication of the notice thereof. Two of the appellants recovered judgments within 60 days after the notice should have been posted and published according to law. Appellants placed executions in the hands of the sheriff of Boise county, who had served the writ of attachment, and informed him that they claimed the right to prorate in the proceeds of the attachment. It was stipulated that the posting and publication of the notice of attachment by the clerk was without the knowledge of respondent or any representative of his, and was not acquiesced in by him then or at any subsequent time; that

the failure and neglect of the clerk to post and publish the notice at the time specified by law was not known to respondent or any representative of his at the time, nor until the early part of October, 1917.

The court denied appellants the right to prorate in the proceeds of the attachment. Its refusal was based upon the ground that the notice of the issuance of respondent's writ of attachment, published by the clerk on October 20, 1917, was the voluntary act of the clerk, without warrant or authority in law, and was therefore a nullity, and did not afford any of appellants the right to prorate in the proceeds of respondent's attachment; and, further, that the sheriff had and has no authority to determine the right of the creditors to prorate in the proceeds of respondent's writ of attachment, but is bound by the terms of the writ which had been placed in his hands, and should follow strictly the directions therein contained until such time as he may be directed or ordered to do otherwise by the judgment or order of a court of competent jurisdiction in the premises.

The statute involved in the consideration of this appeal is C. S. § 6781, which, so far as it is material, is as follows:

"* * * And two days after issuing such writ and delivering it to the proper officer, the clerk must post at the front door of the courthouse, and cause to be published in some newspaper published in the county, if there be one, a notice, setting out the title of the cause and the fact that an attachment has been issued against the property of the defendant. Such notice shall be kept posted at least ten days and shall be published, if in a weekly paper, in three issues thereof, and if any other than a weekly paper in at least six issues. Any creditor of the defendant, who, within sixty days after the first posting and publication of such notice, shall commence and prosecute to final judgment his action for his claim against the defendant, shall share pro rata with the attaching creditor in the proceeds of the defendant's property where there is not sufficient to pay all judgments in full against him."

[1] Respondent insists that the provisions of the statute quoted above are unconstitutional and void. The constitutionality of this statute was considered in *Greene v. Rice*, 32 Idaho, 504, 186 Pac. 249, and it was there decided that the law was valid. Practically all of the objections presented by respondent in this case were there considered, and we now reaffirm the decision in the *Greene Case*. In that case, speaking through Mr. Justice Budge, the court said:

"The manifest purpose of the act is to provide a fair and equitable distribution of the available and attached assets of the debtor."

The statute provides that, 2 days after issuing the writ of attachment, and delivery to the proper officer, the clerk must post and cause to be published a notice of the attach-

ment. We are called upon in this case to determine the consequences, if any, which result from a failure of the clerk to post and publish the notice of attachment 2 days after the issuance of the writ as directed by the statute and his actual posting and publication 72 days thereafter.

In *Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038, it is said:

"This notice is not issued to the defendant in the attachment proceedings, nor is it for his benefit. The notice is not essential to give the writ validity and binding force. This notice is required solely in the interest of creditors of the defendant. The closing sentence of section 4304 [now C. S. § 6781] indicates clearly this intention, and provides the things to be done by any creditor who shall desire to 'prorate with the attaching creditor.'"

[2] The purpose of the statute is to give notice to creditors of a defendant in an attachment action, so that if they desire to prorate they may immediately commence and prosecute to final judgment their claims against the debtor. If they obtain notice by any other means and commence their actions and prosecute them to final judgment, are they precluded from prorating in the proceeds of the attachment on account of the failure of the clerk to obey the direction of the statute, by reason of the provision of the statute that any creditor of the defendant who, within 60 days after the first posting and publication of notice, shall commence and prosecute to final judgment his action or claim against the defendant shall share pro rata with the attaching creditor?

The right to prorate does not depend upon whether or not the creditor actually is cognizant of the posting and publishing of the notice. Under the statute, if he commenced his action after the posting and publication of notice and obtained judgment within 60 days, he is entitled to prorate whether his action in bringing suit was prompted by a knowledge of the giving of notice or not.

[3] It is contended that the duty of giving the notice was placed by law upon the clerk, and not upon the plaintiff in an attachment action and that the plaintiff has no control over the action of the clerk. Though the duty of giving notice devolves upon the clerk, the plaintiff cannot excuse his lack of knowledge as to whether or not the clerk has performed his duty. The publication is at plaintiff's expense; his interests are materially affected by the action of the clerk, and it is his duty to inform himself as to whether or not the clerk has acted, and it is within his power to compel the clerk to act.

[4, 5] Creditors are not to be deprived of their right to prorate, if they commence their actions otherwise in time, on account of the failure of the clerk to perform his statutory duty, nor is respondent entitled to any benefit resulting from the failure of the clerk since he neglected to cause the clerk to do his

duty. Neither is the giving of notice 72 days after the issuance of the writ a nullity. Statutes fixing the time within which an officer is to perform a duty, so far as the rights of third persons are affected thereby, are usually held to be directory, rather than mandatory. The respondent could have compelled the clerk to give notice at any time. He is not entitled to the benefit of the limitation fixed in the statute until the time prescribed has expired after the actual giving of the notice.

[6] The statute, therefore, must be construed to mean that creditors who commence their actions within the time prescribed, had the clerk performed his statutory duty, and prosecute their claims to final judgments thereafter, and within 60 days after the notice is posted and published, are entitled to prorate.

We recognize the fact that the right to prorate is purely statutory, and that creditors have no such rights, except as obtained from the statute. When conditions arise, as in this case, where the clerk has failed to perform his duty, it becomes necessary to construe the statute which is plain when its provisions have been followed. We think a correct construction of the statute prevents the failure of an officer to do his duty from depriving parties litigant of valuable rights. Nor can a plaintiff obtain valuable rights through official failure where he has neglected to cause the officer to do his duty.

The judgment appealed from is reversed, and the cause remanded for further proceedings in accordance with this opinion. Costs awarded to appellants.

BUDGE, McCARTHY, DUNN, and LEE, JJ., concur.

(34 Idaho, 41)

REILLY et al. v. LUCRAFT. (No. 3359.)

(Supreme Court of Idaho. May 27, 1921.)

1. Evidence §273(2)—Grantee's self-serving statements in grantor's absence inadmissible to prove repudiation.

Self-serving statements of a grantee, made in the absence of the grantor, are not admissible to prove repudiation of an agreement to exchange real estate.

2. Mortgages §285—Agreement between original grantor and third party substituting latter's name held not to release liability on covenant to pay mortgage debt.

After acceptance of a deed containing a covenant of assumption of a mortgage debt, and an agreement by the grantee to convey to a third party, the fact that, by agreement between the original grantor and such third party, the name of the latter is substituted in the original deed, for that of the original grantee, does not release his liability on such covenant.

Appeal from District Court, Payette County; Ed. L. Bryan, Judge.

Action by Mary I. Reilly and husband against William Lucraft on contract to assume mortgage debt in purchase of land. Judgment for plaintiffs, and defendant appeals. Affirmed.

R. E. Haynes, of Payette, and Thompson & Bicknell, of Caldwell, for appellant.

R. B. Scatterday, of Pontiac, Ill., O. M. Van Duhn, of San Francisco, Cal., and Frank T. Wyman, of Boise, for respondents.

McCARTHY, J. This action was brought by respondents to recover \$761.63, which they were forced to pay under a deficiency judgment, obtained against them in the circuit court of Linn county, Ore., subsequent to the foreclosure and sale of certain lands in South Dakota to satisfy a mortgage thereon in the sum of \$1,589.75, originally given by respondents, but alleged to have been assumed by appellant in a land trade agreement, wherein appellant exchanged certain Missouri land of his for the South Dakota land of respondents.

In December, 1912, respondent Mary I. Reilly owned certain land in South Dakota subject to a mortgage of \$1,589.75, plus interest, and appellant owned certain land in Missouri subject to a \$500 mortgage, plus interest. In the latter part of December respondents and appellant agreed to trade lands, each assuming and agreeing to pay the debt, exclusive of interest, covered by the mortgage upon the land acquired. Deeds were prepared by F. H. Lyon, in whose office the parties severally appeared and executed them. Each gave the other a check for the accumulated interest.

Appellant claims that respondents represented the mortgage upon their lands to be for \$1,500, and that, when he found the debt was \$1,589.75, he refused to carry out the deal, and so notified respondents. This is denied by respondents. Appellant claims that a new three-cornered agreement was entered into by respondents and himself and one J. O. Bowker whereby respondents would take the Missouri land subject to a mortgage of \$500, Bowker would take the South Dakota land subject to the mortgage of \$1,589.75, and appellant would take certain Iowa land, owned by Bowker, subject to a small mortgage, and pay \$1,000 in addition thereto. Respondents claim that they were not a party to such an agreement, that appellant, after accepting the deed from them, made his own deal with Bowker. Bowker and Lyon made a deal by which Lyon was to take the South Dakota property. Bowker and Lyon, to save recording fees, and with Reilly's consent, had the name of Lucraft erased in the deed given by the Reillys, and that of Lyon substituted.

The deed to the South Dakota land was then recorded by Lyon. The mortgage on this land, not being paid, was foreclosed, and a deficiency judgment taken against the Reillys. Suit was brought against them in Oregon upon this deficiency and judgment taken. This judgment they paid, and brought this action against Lucraft and Lyon to recover the amount so paid by them.

The court found that respondents sold and conveyed the South Dakota land to appellant for a good and valuable consideration, subject to the mortgage of \$1,589.75, which sum the appellant expressly agreed to assume and pay as a part of the consideration and purchase price; that the Reillys delivered the deed executed by them for this land to appellant; that appellant made a deal with Bowker, whereby Bowker was to take this land; that no agreement, express or implied, was ever made, releasing appellant from his promise to pay the mortgage assumed by him; that appellant did not refuse to consummate the deal with respondents, and the contract between them was in force at all times mentioned in the pleadings; that appellant accepted the South Dakota property under said contract; that respondents did not agree to convey the land to Bowker, and did not thereafter, at the request of Bowker, convey the land to Lyon; that, by reason of the failure of appellant to pay the mortgage, it was foreclosed, and the property sold, and the proceeds were insufficient by \$691.35 to meet the mortgage; that thereafter suit was instituted by the holder of the note and mortgage against respondents, and they were compelled to pay the said sum of \$691.35 and expenses, amounting to a total of \$761.63; that respondents demanded from appellant the said sum prior to the filing of this suit, and that there is now due, owing, and unpaid to respondents from appellant the sum of \$761.63.

Appellant's first assignments of error are the admission in evidence, over objection, and without proper certification, of respondents' Exhibits B and C, copies of the deed recorded in South Dakota, and of the record of foreclosure of the mortgage. We have examined these exhibits, and find they were fully certified to and admissible.

[1] It is next objected that the court erred in refusing to permit appellant to testify to his complaint made to Lyon as to the amount of the mortgage on the Reilly land. This was not error, because such a statement by appellant to Lyon, in the absence of respondents, would not affect the obligations between him and them.

[2] The evidence was conflicting as to whether the original deal was consummated, or was repudiated by appellant. There is evidence to support the findings. In such case it is the established rule that this court

will accept the findings of the trial court. *Watkins v. Mountain Home Co-operative Irr. Co.*, 33 Idaho, —, 197 Pac. 247; *Nell v. Hyde*, 32 Idaho, 576, 186 Pac. 710. Furthermore, the actions of appellant in retaining the check given him by respondents, and in negotiating the subsequent trade with Bowker, negative a repudiation. He did not return the deed to Reilly nor the check, but traded the land to Bowker, and used the check given him by Reilly as part payment in the new deal. This was a sufficient exercise of dominion and ownership of the land to prove his acceptance. The evidence is sufficient to sustain the court's finding that the original deal between respondents and appellant was closed by the latter's acceptance of the deed. Once this happened, appellant's liability on the mortgage was fixed, and no subsequent transfer could release him. The recording of the deed in his name was not necessary. His obligation was not released by the subsequent substitution of Lyon's name in the deed merely for the purpose of saving recording fees.

The judgment is affirmed, with costs to respondents.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

(34 Idaho, 22)

CLINTON SHEEP CO. v. OGEE et al.
(No. 3308.)

(Supreme Court of Idaho. May 27, 1921.)

1. Contracts ⇨166—Written contract referring to another held to incorporate applicable provisions.

A written contract between two parties which expressly refers to another between one of them and a third party incorporates provisions of the latter which are applicable and necessary to its proper understanding and performance.

2. Sales ⇨202(1)—Title to hay passes when price paid and particular hay designated.

On a contract for sale of hay, when the price is paid, and the particular hay designated, title passes.

3. Sales ⇨202(1)—Attempted repudiation by vendor after title passes of no effect.

An attempted repudiation of the contract by the vendor thereafter is of no effect.

Appeal from District Court, Gooding County; Wm. A. Babcock, Judge.

Action in claim and delivery by the Clinton Sheep Company against C. H. Ogee and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James & Ryan, of Gooding, for appellants. W. T. Stafford, of Gooding, and Frank T. Wyman, of Boise, for respondent.

MCCARTHY, J. May 24, 1912, one Solon Bray, purporting to act for Bray Bros., made a written agreement with respondent to sell and deliver to it, each year for five years, from 200 to 250 tons of hay at \$5 per ton, the hay to be measured on the 1st of each November. December 17, 1912, he leased for five years to appellant Ogee part of his agricultural land for a rental of \$1,000, \$250 payable on June 1st, and \$750 on November 1st of each year. One of the express covenants of the lease, which is signed by Bray and appellant Ogee, is that the latter "will, during the life of this lease, furnish such part of the hay to fill the Clinton contract which Bray Bros. are unable to furnish."

In the years 1913, 1914, and 1915, before the time arrived for the delivery of the hay, Bray asked appellant how much hay he could furnish, and appellant designated certain particular stack or stacks. The amounts so designated varied from 100 tons to 214 tons and seemed to have no particular relation to the amount which the Brays could furnish. The general procedure followed in these years was that Bray and appellant and a representative of respondent would meet at the stacks on November 1st and measure the hay; respondent would pay Bray \$5 per ton; Bray would take out of it the amount of rent owing from appellant, or \$750, and pay him the balance. In the year 1916, about a week before November 1st, appellant told Farmer and Painter, two representatives of respondent, that he would not sell his hay for \$5 per ton that year, but would ask \$8. He did not convey this information to Bray. Farmer testifies that a few days before November, 1916, he notified appellant that they would be down to measure the hay on November 1st. This is denied by appellant. Early in the morning of November 1st Farmer, Painter, and Bray went to the farm for the purpose of measuring the hay. When they arrived appellant was absent, and one of his hired men designated the stacks which should be measured, notifying them that one certain stack was reserved by appellant for himself. Appellant arrived just as the last stack was being measured. He made no objection to the selection of the stacks nor to the measurements. One hundred fifty tons of hay were selected and measured, and the representatives of respondent paid Bray at the rate of \$5 per ton, which would amount to \$750, the amount due from appellant for rent. Bray applied the money on the rent. Then appellant raised the objection that he would not sell his hay for \$5 per ton and demanded \$8. He refused to permit respondent to take the hay or feed it, and attempted to sell it to appellant Hulbert. Respondent brought this action of claim and delivery. Upon the trial verdict and judgment were in favor of respondent, from which appellants appeal.

The first point raised by appellants is that

the covenant in the lease was a contract between Ogee and Bray, that it was not made expressly for the benefit of respondent within the meaning of C. S. § 5662, and that therefore respondent had no right to sue upon it. It is not necessary to pass upon this point because the action is not one for breach of the executory contract. It is an action in claim and delivery on the theory that title passed. The verdict and judgment must be sustained, if at all, on respondent's theory that the title in the hay passed to Bray and from Bray to respondent. If such was the case respondent would have a right to the possession of the hay, to enforce which the action in claim and delivery was brought. In that connection the provisions of the contract and the covenant in the lease become of importance only in assisting us to determine whether title did pass from appellant to Bray and from Bray to respondent.

[1] Appellants contend that the title could not pass because the price was not fixed as between Bray and Ogee. Unless the matter is covered by an express provision of the contract, it is true that, when the intent is to sell for a price to be fixed, and not for the reasonable value, the title will not pass until the price has been fixed. In this case the contract between Bray and respondent fixed the price at \$5. The lease refers to this contract: For three years \$5 was the price paid and accepted. Reading the contract and the lease together and considering the conduct of the parties and all the circumstances, the \$5 provision of the contract and its provisions concerning the time and method of payment were incorporated into the lease by reference. 1 Williston on Contracts, § 581, and cases cited. The instruction of the court that all provisions of the contract were incorporated into the lease was too broad because some of them were not applicable. It appears, however, that this error did not result in any prejudice to appellants.

[2] It is next contended that, in the absence of an agreement to the contrary, the title does not pass unless the purchase price is paid or at least tendered. The lease being silent on that point, reference can be had to the contract and the dealings of the parties in carrying it out. The evidence shows that each year, with one possible exception, they met at the ranch on November 1st, measured the hay, respondent paid Bray, Bray credited appellant Ogee with the rent and paid him the surplus, if any. There is evidence that this was done in November, 1916. Therefore the jury would be justified in concluding that payment was made in accordance with the agreement as construed by the parties. The witness Painter testified that he believed 157 tons were measured. On this ground appellants contend that the hay was not paid for. The complaint alleges that the hay in controversy was 150 tons, and this

is admitted by the answer. For this reason no point can be made of this testimony of Painter.

[3] The next point is that the appellant Ogee refused to pass the title. It is elementary that claim and delivery does not lie for a mere breach of an executory contract. If the vendor breaks his contract and prevents title from passing, the vendee has only his action for damages. In this case all that remained to pass the title was the segregation and designation of the particular hay. The rule applicable is well expressed as follows:

"The principle, however, is * * * that 'the goods must be sufficiently designated that no question can arise as to the thing intended'; that 'the parties do not contemplate an immediate bargain and sale till the specific goods on which their contract is to attach are agreed upon.'" *Barber v. Andrews*, 29 R. I. 51, 69 Atl. 1, 26 L. R. A. (N. S.) 1, and note.

See, also, *Idaho Implement Co. v. Lambach*, 16 Idaho, 497, 101 Pac. 951.

"Whether the sale of the hay was complete or the contract merely executory, under the evidence, was a matter for the jury. Such question is usually one of intent of the parties as gathered from their contract and the situation of the thing sold and the circumstances surrounding the sale." *Idaho Implement Co. v. Lambach*, supra, 16 Idaho, 510, 101 Pac. 955.

See *Byles v. Collier*, 54 Mich. 1, 19 N. W. 565.

"If different minds might reach different conclusions as to whether the contract was a completed sale or merely an executory agreement to sell, then the question became one of fact and should have been left to the jury for determination." *Idaho Implement Co. v. Lambach*, supra.

See *Miller v. Butterfield-Elder Co.*, 32 Idaho, 265, 181 Pac. 703.

Appellant Ogee's contract was with Bray. If he stated to a representative of the company a few days before November 1st, in the absence of Bray, that he would not take \$5 for the hay that year, as he testified, this would not be sufficient to prevent title passing to Bray. If title passed to Bray, then Bray passed it to respondent. Whether a similar statement made by appellant Ogee on November 1, 1916, prevented the passing of title was a question of fact for the jury. There was evidence that he did not make such a statement until after the hay was designated and measured and settlement made in accordance with the custom of former years. If made at such a time it would not prevent the passing of title. There is substantial evidence to support the verdict, and the court did not err in denying appellants' motion for a directed verdict.

There are many other specifications of error relating to rulings on evidence, instructions given, and instructions refused. Over appellants' objection evidence of oral statements and opinion evidence were admitted to show that, while there were two Brays, yet the expression "Bray Bros." meant only Solon Bray. This was error, as the contract and lease were not ambiguous in that regard and it amounted to contradicting a written instrument by parol evidence. Witnesses were permitted to testify to an oral understanding that the hay to be furnished should be grown on the Bray land leased by appellant Ogee. The contract was not ambiguous in that respect. It would have been met by furnishing hay to the amount specified. Such an oral understanding would add to the written agreement. Certainly an oral understanding between respondent and Bray, of which appellant Ogee had no knowledge, would not be binding on him. Yet such errors are not prejudicial for the following reason: The only question in the case was whether title to the 150 tons of hay passed. This depended on what happened November 1, 1916. The only purposes for which the contract was relevant were to show the price and the time and method of payment. The evidence above mentioned, while not relevant, could not prejudice appellants in the determination of the question at issue. Therefore its admission was not reversible error. Appellants requested several instructions as to the meaning of "which Bray Bros. are unable to furnish." If this question had been material, refusal to give some of these instructions would have been reversible error. In view of the evidence it was immaterial.

The law of the case was correctly given in instructions Nos. 8, 9, and 10, in which the court instructed, in substance, that, before title could pass, the 150 tons of hay claimed by the respondent must have been ascertained, designated, and segregated from other hay, and that this must have occurred before the defendant Ogee repudiated his contract. It is argued that instruction No. 18 is error. Read in connection with the others just mentioned, we do not think it could have misled the jury. Other errors are specified in connection with other instructions given or refused. We conclude that the instructions as a whole correctly stated the law applicable to the real issues of the case, and that any erroneous instructions given were not prejudicial.

The judgment is affirmed; costs to respondent.

RICE, C. J., and DUNN and LEE, JJ., concur.

BUDGE, J., did not sit at the hearing in this case and took no part in the opinion.

(34 Idaho, 13)

HAYES v. FLESHER et al. (No. 3324.)

(Supreme Court of Idaho. May 26, 1921.)

1. Pleading \S 236(3)—Permission to amend answer during trial within discretion of court.

Permission to amend an answer during the progress of the trial is within the sound discretion of the trial court.

2. Evidence \S 433(4)—Defendant may allege mutual mistake without praying reformation of deed.

In proper cases, defendant in an action may allege mutual mistake as a defense without praying for reformation of the instrument.

3. Deeds \S 211(2)—Evidence of mutual mistake must be clear.

The evidence to establish a mutual mistake must be satisfactory, clear, and convincing.

4. Deeds \S 90—Evidence \S 450(3)—Instrument should be upheld if possible; parol evidence admissible to explain ambiguity or uncertainty.

Where the grantor in a deed has received the consideration therefor, the instrument should be construed most strongly against him and be upheld, if it can be done, by a reasonable construction of its terms. Parol testimony may be introduced to explain an ambiguity or uncertainty in a deed.

5. Waters and water courses \S 158(1)—Grantees claiming under conveyance of water rights must show the scope of rights conveyed.

Where a contract for conveyance of land contains, as part of the description, "a perpetual right to take sufficient water from the ditches and laterals of the grantors adjacent and near thereto for the irrigation" of the land conveyed, it is incumbent upon the grantees claiming under such conveyance to show exactly what was intended by the provision for a water right, and that they had not exceeded their rights under such contract.

Appeal from District Court, Gem County; Ed. L. Bryan, Judge.

Action by E. K. Hayes against A. A. Flesher and another to enjoin interference with irrigation water. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

J. P. Reed, of Emmett, for appellant.

Finley-Monroe and Geo. C. Huebener, both of Emmett, for respondents.

RICE, C. J. This action was brought by appellant to enjoin respondents from using irrigation water and interfering with irrigation ditches situate upon lands belonging to the wife of appellant and controlled by him. The irrigation water is represented by shares of capital stock of the Last Chance Ditch Company, a corporation, the certificates of stock being held by appellant as his separate property. On March 17, 1917, appellant and

his wife, by warranty deed, conveyed to Sarah C. Flesher, one of the respondents, about an acre of land out of said tract, the deed containing no mention of water or water rights. By agreement of the parties made at the time of the conveyance, appellant removed the ditch connected with his system of laterals from the acre tract so conveyed. Subsequent to the conveyance, the respondents constructed a ditch from the laterals of appellant to the acre of land, and during the irrigation season of 1917, and thereafter, took from appellant's laterals sufficient water to irrigate the acre tract. The testimony showed that they irrigated about once every two weeks, taking a sufficient amount of water to irrigate the tract in about two hours' time. The court found that they exercised due care in conducting their irrigation, and did not permit water to overflow the lands controlled by appellant.

In their answer as originally filed, respondents set up by way of defense that appellant and his wife sold to them, for a valuable consideration, "one acre of land, with the perpetual right to take sufficient water from said ditches and laterals adjacent and near thereto for the irrigation thereof." During the trial, respondents were granted permission by the court to amend their answer by setting up the following additional matter:

"That by mutual mistake of the parties the right to the use of said water for said land was omitted from the deed of conveyance."

A jury was impaneled by the court to advise on special issues of fact. At the conclusion of the trial, the court filed its decision, and entered judgment, denying the prayer of the complaint for an injunction. The appeal is from the judgment.

It appears to be conceded that the deed as originally executed did not carry with it any water right as appurtenant to the land.

[1] Appellant's first specification of error is that the court erred in permitting respondents to amend their answer during the progress of the trial. We think the court did not abuse its discretion in permitting the amendment. *The Mode, Ltd., v. Myers*, 30 Idaho, 159, 164 Pac. 91.

[2, 3] The next specification of error is to the effect that the amendment as made did not justify the introduction of parol testimony for the purpose of proving a mutual mistake in the execution of the deed, for the reason that respondents had not laid a proper foundation, in that they had failed to ask for a reformation of the deed. In proper cases a defendant in an action may allege mutual mistake as a defense without praying for reformation of the instrument. *Udelavitz v. Ketchen*, 33 Idaho, —, 190 Pac. 1029. The evidence necessary to establish mutual mistake in such cases is the same as though a reformation of the instrument were prayed

for. The proof must be satisfactory, clear, and convincing. *Udelavitz v. Ketchen*, supra.

The court instructed the jury that the burden rested upon the respondents to prove their affirmative allegations by a preponderance of the evidence. This instruction may indicate the standard adopted in making the subsequent findings, but, whether it does or not, we cannot say from a review of the proof offered by respondents that the court did not find the proof of mutual mistake to be clear and convincing. This court would not be justified in holding that the evidence was insufficient to sustain the findings of the court in that respect. The court's findings in this matter was to the effect that Elsie Wardell Hayes, wife of appellant, sold respondents a one-acre tract of land, describing it, for \$425, "with a perpetual right to take sufficient water from aforesaid ditches and laterals of the plaintiff adjacent and near thereto for the irrigation of said acre of land."

The fifth finding is as follows:

"That it was the intention of plaintiff and defendants to include in said deed a conveyance of said water right for said land bought by the defendants, but that the same was omitted from the deed."

The court did not find that the omission was occasioned through mutual mistake of the parties. However, if it was the intention of appellant and respondents to include a description of the water right in the deed, and it was omitted therefrom, it seems to follow inevitably that the omission was through the mutual mistake of the parties. Appellant in his brief states:

"If it was the intention of plaintiff and defendant to include the conveyance of water right in the deed, then the failure to include such water right must of necessity have been the result of a mutual mistake."

We conclude that the relationship of the parties to this action is the same as if the deed had, in addition to the description of the land, contained the following:

"With perpetual right to take sufficient water from the ditches and laterals of the grantors adjacent and near thereto for the irrigation of said acre of land."

Having reached this conclusion, several questions immediately arise: First, does this conveyance of a water right carry with it a right of way for a ditch over the lands of appellant leading from his laterals to the one-acre tract of land, and, if so, where is such ditch to be located? Second, what is a sufficient amount of water for the irrigation of the one-acre tract? Third, does the agreement between the parties call for sufficient water to be furnished in a continuous flow, or could respondents take what they considered a reasonable irrigation stream whenever they desired to irrigate?

We make no mention of the matter of main-

tenance of canals, payment of assessments for upkeep and expenses, or the transfer of shares of stock in the company, for it is conceivable that the grantors might have intended to convey a water right without express obligation on the part of the grantees to pay maintenance charges or upkeep.

Numerous authorities may be found holding that in suits to establish priorities of water rights a decree which enjoins interference with a "sufficient amount" to irrigate a tract of land, or providing that the party shall be entitled to a "good irrigation stream," or decrees containing similar provisions, are void for indefiniteness. *Walsh v. Wallace*, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692; *Smith v. Phillips*, 6 Utah, 376, 23 Pac. 932; *Steinberger v. Meyer*, 130 Cal. 156, 62 Pac. 483; *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. 596; *Lee v. Hanford*, 21 Idaho, 327, 121 Pac. 558; *Kinney on Irrigation & Water Rights*, vol. 3, § 1558 et seq.; *Long on Irrigation*, § 228.

[4] However a deed, especially where the grantor has received the consideration, should be construed most strongly against him, and be upheld, if it can be done, by a reasonable construction of its terms. Parol testimony may be introduced to explain an ambiguity or uncertainty in a deed. *Hays v. Buzard*, 31 Mont. 74, 77 Pac. 423; *Bullerdick v. Hermameyer*, 32 Mont. 541, 81 Pac. 334; *Fayter v. North*, 30 Utah, 156, 83 Pac. 742, 6 L. R. A. (N. S.) 410.

[5] The decree as entered has the effect of permitting respondents to enter upon the lands of appellant and construct a ditch wherever they may choose and take from appellant's laterals what they consider a proper irrigation stream whenever they desire to irrigate their land, provided they use reasonable care and do not permit water to overflow the lands of appellant. We do not think such a decree can be permitted to stand. Having alleged that, through mutual mistake, the deed which they accepted failed to represent the contract between the parties, respondents must show exactly what the contract was, and that they had not exceeded their rights under such contract.

This court cannot at this time undertake a construction of the deed, for the proper solution of the questions suggested above requires additional findings. It may be that additional evidence can be adduced in aid of the construction of the deed. When all the evidence has been adduced, unless it is found that the minds of the parties failed to meet upon matters essential to the formation of any contract, the court must make such findings as will result in a determination of the actual rights of the parties.

Appellant also complains of the court's action in refusing to give certain instructions requested by him, and specifies as error the giving of certain instructions. Since, however, the jury was called only in an advisory

capacity, and their findings are not binding upon the court, and cannot relieve the court from the necessity of making its own findings, the action of the court in giving or refusing instructions will not be reviewed. *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442; *Gordon v. Lemp*, 7 Idaho, 677, 65 Pac. 444. When the matter reaches this court on appeal, the question always is whether the evidence is sufficient to justify the findings of the court.

The judgment will be reversed, and the cause remanded for further proceedings. Costs awarded to appellant.

BUDGE, McCARTHY, DUNN, and LEE, JJ., concur.

(33 Idaho, 639)

HATCHER et al. v. FERGUSON.

(Supreme Court of Idaho. April 2, 1921. Rehearing Denied June 27, 1921.)

1. Sales \S 161—Delivery on board cars held compliance with contract for sale of shipment of lambs.

Under the facts of this case, *held*, that delivery of lambs on board cars billed to Shoshone, Idaho, without cost to the appellants, was a compliance with respondent's contract.

2. Sales \S 161—Carrier's refusal to bill lambs to Eastern markets held not to justify purchaser's refusal to receive them.

The refusal of the railroad company to bill lambs to an Eastern market did not justify appellants' refusal to receive such lambs when loaded on cars, even though they could at that time be billed only to Shoshone, Idaho.

3. Sales \S 79—Contract to deliver lambs "f. o. b. cars" held not a guaranty of shipment to a particular market.

Held in this case that respondent's contract to deliver lambs at Ketchum "f. o. b. cars" placed upon him no obligation to guarantee their shipment to a particular market.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

Lee, J., dissenting.

Appeal from District Court, Lincoln County; James R. Bothwell, Judge.

Action by J. S. Hatcher and W. A. Snyder, copartners doing business under the firm name and style of Hatcher & Snyder, against Barlow Ferguson. Judgment for defendant, and plaintiffs appeal. Affirmed.

Pierce, Critchlow & Barrette, of Los Angeles, Cal., and W. G. Bissell, of Gording, for appellants.

Paul S. Haddock, of Shoshone, J. G. Hedrick, of Halley, and Barlow Ferguson, for respondent.

DUNN, J. This action was brought by the plaintiff against the defendant for \$3,979.40, alleged to be the difference, on the 1st day of September, 1916, between the contract price of 4,140 lambs and the market value thereof on said date, and also for the sum of \$2,070, theretofore paid defendant by plaintiffs on the following contract:

"Sheep Bill of Sale.

"June 17, 1916.

"This is to certify that I have this day sold to Hatcher & Snyder not less than 6,400 head of unshorn lambs out of my flocks, 15 days' notice, sellers option at the price of 8¢ per pound to be delivered f. o. b. cars at Ketchum between the 1st day of August, 1916, and the 1st day of September, 1916. Said lambs to be free of body wrinkles, from scab and all other diseases. I further agree that I will not top my herds before making delivery of this contract. At time delivery is made the lambs to be in good merchantable condition, to have dry fleeces and the minimum weight of any lamb on this sale shall not be less than 60 pounds after the same has been in a dry corral without feed and water for at least twelve hours.

"Received on this bill of sale, as part payment, the sum of \$3,200.00 dollars, balance to be paid when delivery is completed. — old ewes (shell to be thrown out) at — per —. — cull lambs, (nothing under forty pounds) at — per —. Both subject to conditions named in contract above.

"Barlow Ferguson."

A similar action was brought at the same time by the same plaintiffs on the same kind of contract against J. W. Newman for \$3,584.10, which plaintiffs alleged to be the difference on September 1, 1916, between the contract price of 4,404 lambs and the market value thereof on said date, and also for the sum of \$2,202, theretofore advanced to defendant Newman by plaintiffs on said lambs. The cases were tried together before the same jury, and separate verdicts returned in favor of the defendants. Judgment was entered thereon, and the plaintiffs have appealed.

The appellants have specified 25 errors, the first and second of which are that the verdict is not sustained by sufficient evidence, or any evidence, and that the verdict and judgment are contrary to the law. All the others are based upon the giving or refusing of certain instructions by the court. It will not be necessary to examine these alleged errors singly, for the issue to be determined by this court is conceded by counsel on both sides to be limited to the question whether or not there was delivery of the lambs as provided for by the contract. Incidental to and bearing upon the question of delivery is the construction of the expression, "f. o. b. cars" as used in the contract, and also the question whether the respondent

had a right under the contract to demand payment in cash, as he is alleged by the appellants to have done.

[3] The sole question to be determined by the jury in this case was whether the respondent had complied with his contract in delivering to the appellants at Ketchum, Idaho, f. o. b. cars, on August 31, 1916, the remaining 4,140 head of lambs covered by the contract set up in the complaint. As to the meaning of the expression "f. o. b. cars," the court instructed the jury as follows:

"The court instructs the jury that the abbreviation 'f. o. b.' as used in the contract dated June 17, 1916, and read to you in evidence in this case, means 'free on board,' and indicates that the property purchased shall be delivered on board the cars without expense to the buyer at the point designated in the contract."

Bouvier's Law Dictionary defines "free on board" as:

"A phrase applied to the sale of goods which denotes that the seller has contracted for their delivery on the vessel, car, etc., without cost to the buyer for packing, portage, cartage, and the like."

The instruction given by the court substantially conforms to the definition last above quoted, and correctly states the law so far as this contract is concerned.

There was little conflict in the evidence, and we are of the opinion that the instructions given by the court sufficiently covered the case to enable the jury to clearly understand the issue, and to decide it according to the evidence, and a careful examination of the record convinces us that their conclusion was correct. We have examined the other instructions given to the jury, as well as those requested by appellants and refused, and we are of the opinion that there was no reversible error committed by the court, either in the giving or refusing of instructions.

Much attention has been paid by counsel in their briefs to a discussion of the question as to whose duty it was under this contract to obtain the cars for the shipment of the lambs, but we are of the opinion that no such question arises in this case. It appears that cars for the shipment of the lambs were furnished at the request of the respondent. No default in that regard is charged, so it is immaterial whose duty it was to furnish them.

The respondent was at Ketchum in person when the lambs were delivered there, and was present at the loading of the cars. The appellants were represented by Otto J. Hatcher and James R. Hatcher, son and nephew, respectively, of one of the appellants. These agents were in communication with the appellants at Denver, Colo., and numerous telegrams passed back and forth be-

tween them and their principals on August 30th and 31st. The only difficulty in the way of an amicable handling of the lambs was the fact that on August 30th, when the lambs were about ready to be loaded, word came to the railroad agent at Ketchum that, owing to an embargo which had that day been placed on shipments east, no live stock would be received by the railroad company for shipment to any point, unless delivery at destination could be made on or before noon September 2d. This embargo was due to a threatened strike of the railroad employees all over the system. The question then arose between the respondent and the agents of the appellants whether the appellants would receive the lambs that were then about to be loaded on the cars. It was the desire of the appellants that shipment should be made to some Eastern market, probably Chicago, and both the respondent and the appellants' agents appear to have made every possible effort to induce the railroad company to accept shipment of the lambs to such Eastern market, but without avail. The appellants' agents assisted in and superintended most of the loading, apparently undecided whether the lambs would finally be accepted or not. It appears from the testimony of some witnesses that at one time the respondent was advised by Otto J. Hatcher, who was in charge of the appellants' interests, that he would accept the lambs notwithstanding the embargo, but later, when they were almost completely loaded on the cars, according to his own testimony he announced to the respondent that he would not accept them.

It is undisputed that at Ketchum there was no supply of feed to be had by which it would be possible to keep the lambs any length of time, so that when it was determined that they could not be shipped to an Eastern market, it became necessary that they should be taken from Ketchum to some point at which feed could be had for them, for at that time it was unknown, either to appellants or respondent, how long the embargo would continue. In making shipment from Ketchum, the only place to which the railroad company would bill the lambs was Shoshone, Idaho, and in order to get the privilege of loading them on the cars respondent was compelled to bill them to that point. We are unable to see, however, how the appellants were prejudiced by this contract made by the respondent with the railroad company. Their agents had apparently exerted every possible effort to have the lambs shipped to some point further east, but without success. If appellants had accepted the lambs, they could have done nothing with them but ship them to Shoshone. Their inability to ship beyond that point could not by any means have been legally charged to respondent.

[1, 2] The aim of appellants in this case has been to show that the contract imposed upon the respondent the burden of billing the lambs to an Eastern market, and that in the absence of such billing delivery according to contract was not possible, but we think on such construction can fairly be placed upon said contract. There is in the contract nothing that would warrant this construction, and the evidence shows no agreement outside of the contract by which the respondent was to become in any sense responsible for the destination of the lambs. When he loaded them on the cars at Ketchum without expense to the buyer he discharged the obligation of his contract, and the fact that the buyers were unable on account of the embargo to ship farther than Shoshone was not sufficient reason for them to refuse to accept the lambs and pay for them.

The appellants also complain because of the refusal of the defendant to accept in payment for said lambs a draft on Hatcher & Snyder at Denver. Their claim is that at the time of the previous shipment of a part of the lambs included in the contract payment was made by means of such a draft, and that if respondent intended at this time to refuse payment in the same manner it was his duty to give them timely notice in order that cash might be provided at the remote point of Ketchum. Under all the circumstances surrounding this transaction we think the appellants have no ground to complain of this action of the respondent. The situation at the time of the delivery of these lambs at Ketchum was quite extraordinary, and it is not strange that after the controversy arose over the acceptance of the lambs the respondent should be somewhat doubtful as to the propriety of delivering 4,000 head of lambs to the appellants, with nothing more certain in the way of payment than a draft on appellants. The evidence shows, however, that the respondent did not stand upon a demand for cash alone.

On the evening of August 30th, J. R. Hatcher, one of appellants' agents, wired W. A. Snyder, one of the appellants, as follows:

"Ferguson requests that you have bank wire him that draft amounting to sixty thousand will be honored."

Instead of having his bank wire Ferguson that it would honor drafts on appellants amounting to \$60,000, Snyder himself on the same day wired this reply to Ferguson:

"I will pay all drafts drawn on me by Otto J. Hatcher, and if you doubt my responsibility kindly wire United States National or Hamilton National Bank of this City."

The request of the defendant that he be given the bank's assurance that the draft on plaintiffs for \$60,000 would be honored was perfectly reasonable under the circumstances, and it is no reflection upon the financial re-

sponsibility of Mr. Snyder to say that the respondent in such a situation had a right to reject Mr. Snyder's personal assurance that he would pay, and to insist upon a guaranty from Mr. Snyder's bank. In the absence of the guaranty that respondent asked as to the payment of the draft on appellants, we think he was fully warranted in refusing to accept anything in payment except cash.

A careful examination of the record in this case convinces us that there was not only sufficient evidence to warrant the verdict and judgment, but that a verdict and judgment in favor of the appellants would have been clearly against the evidence, which abundantly establishes the fact that delivery was made by the respondent to the appellants according to the terms of the contract set out in the complaint, and that appellants refused to accept.

The appellants contend that it was the duty of the respondent on September 2d, after the embargo had been lifted, to deliver these lambs according to the terms of the contract, but the appellants had had their opportunity to accept them; they had defaulted by absolutely refusing to accept them when they were tendered, and they have no right now to complain because the respondent, after having been compelled to take the risk of holding them indefinitely during the existence of the embargo, refused to deliver them after the embargo was lifted. At the time of the refusal of appellants to accept the lambs according to the terms of the contract, they knew that it was easily possible that before these lambs could be shipped to market the respondent might be compelled to expend in their care a sum far in excess of the amount of the deposit that he held. Knowing these facts, appellants refused to perform their part of the contract and to assume the burden of caring for the lambs during the embargo, a burden which clearly belonged to them, and not to the respondent.

The judgment is affirmed, with costs to the respondent.

RICE, C. J., and BUDGE and McCARTHY, JJ., concur.

LEE, J. (dissenting). I cannot concur in the majority opinion. As stated therein, the material facts are not in controversy, and are substantially as follows: On June 17, 1916, respondent contracted to sell to appellants not less than 6,400 head of unshorn lambs out of his flocks, 15 days' notice, seller's option, at 8 cents per pound, to be delivered f. o. b. cars at Hill City or Ketchum, Idaho, between August 1 and September 1, 1916, and received an advance payment on the purchase price of \$3,250, balance to be paid on delivery. On August 24th respondent delivered to appellants 2,260 head of these lambs at Ketchum, and, having notified ap-

pellants that he would deliver the remainder on August 31st, he drove them to the stockyards at Ketchum for that purpose. Appellants, by their agents Otto and James Hatcher, were there to receive these lambs at that time and place. For both shipments respondent had ordered cars from the railroad company, he understanding that the lambs had been purchased for shipment to an Eastern market. However, when this last shipment was ready for delivery on August 31st, the railroad company, because of a threatened strike, refused to accept the shipment or deliver cars to respondent unless he would sign an agreement to unload the lambs at Shoshone, the connecting way station on the main line, a short distance from the point of loading, which agreement he signed, and without which he could not have obtained the cars. Respondent now insists that this was a delivery under the terms of his contract, which gave him the option to deliver f. o. b. at Ketchum at any time during the month of August. That is, respondent contends, and the majority opinion sustains such contention, that he could, under the terms of this agreement, select the only day in the month in which cars could not be obtained for a through shipment of these lambs to market, and that appellants' failure or refusal to accept them under these conditions worked a forfeiture of all of appellants' rights under the contract of purchase, and gave to respondent the right to retain the advance payment made on them in June of \$2,070, and the loss of the advancement in price, amounting in all to approximately \$8,000.

Respondent, when the contract was entered into, and also when the first shipment was made, had accepted checks or drafts drawn upon appellants at Denver; but about the time that these lambs were loaded upon cars he informed the young men representing the appellants that, unless they would immediately accept these lambs, with this conditional bill of lading, which required they be almost immediately unloaded, and pay him in cash, or what he regarded as its equivalent, he would cancel the contract of purchase, forfeit the advance payment, and keep the lambs, and that he had a lawful right to do so. Respondent was a lawyer of many years' experience in active practice. It should also be borne in mind that this transaction took place at a way station in the interior, where there were no banking facilities for handling a transaction of this magnitude, which, together with the Newman purchase of like nature, and which respondent was transacting, required approximately \$80,000. Appellants, through their agents, succeeded in getting this amount placed in a bank at Halley on August 31st. In imposing this condition, respondent may have been within the terms of his contract in demanding payment in cash only, but it is so out of the or-

dinary, in a transaction of this kind, for a seller, who has had previous similar transactions with the buyer, and has accepted his check or drafts, to demand cash under these conditions, that it evinces a purpose to prevent purchasers from carrying out their part of the agreement, so that the seller may claim a forfeiture.

The threatened railroad strike did not occur, and the carrier resumed shipment on September 2d, at which time appellants again endeavored to secure a delivery of these lambs, which had been shipped to and unloaded at Gooding. Respondent refused delivery, retained the advance payment made in June, and deprived the appellants of the profits arising by reason of the advanced prices then prevailing.

The authorities are not in entire harmony as to whether it is the duty of the buyer or seller to furnish cars under a contract of this kind; but this is not material in this case, because in the former shipment and in this one the seller actually did apply for and secure the cars, and all the authorities hold that where an agreement is not definite in this particular, that meaning will be given to it by the courts which the parties themselves have given it. *District of Columbia v. Gallagher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 73 C. C. A. 388; *Church v. Brose*, 104 Ill. 209; *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126.

Respondent claims that because these lambs were cut out of his herds and the remainder had been turned back upon the summer range, and because of the insufficiency of feed for these lambs at Ketchum, he was compelled to accept these cars and agree to remove the lambs from the cars at a station a few miles beyond, and insist on appellants' acceptance of the delivery upon the terms he imposed. This appears to me to be a thinly disguised camouflage to justify his forfeiture of the payments made in June on the purchase price, and the enhanced value of these lambs, which, with his shipment and that of his son-in-law Newman, for whom he was also acting, amounts to approximately \$12,000. They were fully equipped for caring for sheep on the range, and Ketchum is near one of the most fertile irrigated regions in the state, so that respondent was not forced to this arbitrary course of action. The record shows that the appellants were engaged exclusively in buying and shipping f. o. b. cars for Eastern markets, and were not equipped for handling stock of this kind, or feeding or caring for them except in transit to the markets.

Under the facts disclosed by this record, the action of respondent in declaring this contract forfeited, under all the circumstances, is so contrary to my conception of a fair standard of business integrity that I am unable to approve of it, and I do not think that

a correct rule of law applied to these facts would permit him to forfeit this contract. It seems to me that it is a reproach to the law, and a reflection upon the administration of justice, to permit the seller to thus confiscate the property of a purchaser, who has been ready, willing, and able to meet all the conditions of his contract of purchase, and who is prevented from doing so by shipping conditions imposed by the carrier, and which are entirely beyond his control. Neither party to this transaction was at fault for the refusal of the railroad company to accept these lambs for through shipment, and neither should be permitted to take advantage of the other by reason of such refusal on the part of the railroad company.

The majority opinion is to the effect that a vendor of live stock purchased for shipment to the market has complied with his agreement to deliver such stock f. o. b. cars when he delivers it upon cars, under an embargo of the carrier that requires such stock to be almost immediately unloaded and removed from such cars at a nearby way station. The rule is not applicable to the unusual conditions that existed in this case. No authorities are cited in its support, and I think that none can be found.

"The phrase 'f. o. b. cars,' when used in a contract between a buyer and a seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the shipment and consignment of the goods to the buyer, free of expense." *Hurst v. Altamont Mfg. Co.*, 73 Kan. 422, 85 Pac. 551, 6 L. R. A. (N. S.) 928, 117 Am. St. Rep. 525, 9 Ann. Cas. 549; *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Hunter Bros. Milling Co. v. Kramer Bros.*, 71 Kan. 468, 80 Pac. 963; *Culp v. Sandoval*, 22 N. M. 71, 159 Pac. 956, L. R. A. 1917A, 1157; *Vogt v. Schienebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989; 2 Ann. Cas. 814; 2 Words & Phrases, Second Series, 658-660.

For the foregoing reasons and upon the authorities cited, this judgment should be reversed.

On Petition for Rehearing.

RICE, O. J. Under the contract in this case, by which it was agreed that the lambs should be delivered f. o. b. cars at Ketchum, the carrier by which they were to be transported became the agent of the buyer to accept delivery. *Griffin v. Edward Eiler Lumber Co.*, 122 Miss. 265, 84 South. 225. It may be conceded that a reasonable construction of such contract requires the property to be loaded without expense to the buyer upon cars suitable for transportation. The contract, however, did not designate or contain any intimation as to the final destination of the shipment. The most that can be said is

that it is reasonable to assume that it was understood by both parties that the intention was to ship to some eastern market. But where the contract provides for delivery f. o. b. cars, without any further provision as to transportation to a designated destination, the buyer and not the seller fixes the destination, and the buyer assumes the risk of refusal on the part of the carrier to bill the property to the destination which he desires. When the seller enters into a contract with the carrier for shipment to a particular destination, he does so at the request of the buyer, and in designating the destination acts as the buyer's agent. He has done his duty when he demands of the carrier a shipping contract to the destination requested by the buyer. If any loss results from the refusal of the carrier to make a contract to deliver at the desired destination, the loss must be borne by the buyer and not by the seller.

So far as a claim for forfeiture is concerned, we understand the law to be that the buyer cannot recover the price paid, but will forfeit his advance payments if he wrongfully refuses to carry out the contract of sale, or wrongfully refuses to receive the goods when tendered. 35 Cyc. 605.

The petition for rehearing is denied.

BUDGE, McCARTHY, and DUNN, JJ., concur.

(38 Idaho, 653)

HATCHER et al. v. NEWMAN.

(Supreme Court of Idaho. April 2, 1921.)

Appeal from District Court, Lincoln County; James R. Bothwell, Judge.

Action by J. S. Hatcher and W. A. Snyder, copartners doing business under the firm name and style of Hatcher & Snyder, against J. W. Newman. Judgment for defendant, and plaintiffs appeal. Affirmed.

Pierce, Critchlow & Barrette, of Los Angeles, Cal., and W. G. Bissell, of Gooding, for appellants.

Paul S. Haddock, of Shoshone, J. G. Hedrick, of Hailey, and Barlow Ferguson, for respondent.

DUNN, J. The questions involved in this case are identical with those of the case of *J. S. Hatcher & W. A. Snyder, Copartners Doing Business under the Firm Name and Style of Hatcher & Snyder, v. Barlow Ferguson*, 198 Pac. 680.

On the authority of that case the judgment is affirmed, with costs to the respondent.

RICE, O. J., and BUDGE and McCARTHY, JJ., concur.

LEE, J., dissents.

(109 Kan. 303)

COCHRAN v. ATCHISON, T. & S. F. RY. CO.
(No. 22852.)

(Supreme Court of Kansas. June 11, 1921.)

*(Syllabus by the Court.)***1. Master and servant** §258(10)—**Petition for injury in interstate commerce need not refer to federal acts relied on.**

In an action against a common carrier by an employee to recover for injuries, where it appears from the petition that both parties were engaged in interstate commerce at the time the plaintiff received his injuries, it is unnecessary that the petition refer specifically to the acts of Congress upon which the action is predicated. *Railway Co. v. Brinkmeier*, 77 Kan. 16, 93 Pac. 621.

2. Master and servant §264(4)—**Employee suing under federal act may recover for injury from violation of federal Boiler Inspection Act.**

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), the plaintiff may recover for injuries caused by the violation of the federal Boiler Inspection Act, § 2 (section 8631, U. S. Comp. Stat. 1918).

3. Master and servant §281(12)—**Contributory negligence defeating recovery under federal act held not shown.**

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and the federal Boiler Inspection Act (U. S. Comp. St. §§ 8630-8639) to recover for injuries caused by the dropping of the crown sheet of the boiler of a locomotive, causing an explosion which injured the plaintiff, held, that there is no force in the contention that his injuries were caused exclusively by his own negligence, because there was some evidence tending to show that it resulted from the failure of the defendant to furnish safe appliances.

Johnston, C. J., dissenting from the modification.

Appeal from District Court, Neosho County.

Action by J. H. Cochran against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant.

C. S. Denison, and J. L. Kirkpatrick, both of Kansas City, and J. Q. Stratton, of Erie, for appellee.

PORTER, J. [1, 2] The petition alleged that when the accident which caused the plaintiff's injuries occurred both parties were engaged in interstate commerce. It was not necessary, therefore, that the petition refer specially to the acts of Congress upon which the cause of action is predicated. *Railway*

Co. v. Brinkmeier, 77 Kan. 16, 93 Pac. 621. Sections 3 and 4 of the federal Employers' Liability Act of 1908 (sections 8659, 8660, U. S. Comp. Stat. 1918) provide that, where an injury resulting to an employee is caused by the carrier's violation of any statute enacted for the safety of employees, neither contributory negligence nor assumption of risk shall constitute any defense. Therefore two of the defenses pleaded in the answer and referred to in the briefs go out of the case. Section 2 of the federal Boiler Inspection Act of February 17, 1911 (section 8631, U. S. Comp. Stat. 1918) provides in substance that it shall be unlawful for any common carrier to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of such locomotive is in proper condition and safe to operate in the service to which it is put without unnecessary peril to life and limb, and it has been held "that the last-mentioned act is a 'statute enacted for the safety of employees' within the employers' Liability Act." *Great Northern R. Co. v. Donaldson*, 246 U. S. 121, 38 Sup. Ct. 230, 62 L. Ed. 616, Ann. Cas. 1918C, 581. By the amendment to this act of March 4, 1915, it includes all parts of a locomotive used upon a railroad engaged in interstate commerce.

[3] It is contended, however, that the injury was caused by the sole negligence of the plaintiff, and that therefore he cannot recover. This contention seems to be based upon the following facts: When the train stopped at Girard on the return trip the plaintiff, who was the engineer, discovered that the stay bolts supporting the crown sheet were leaking, and he sent a telegram, signed by himself and the conductor, to the trainmaster and master mechanic at Chanute, stating in substance that all the crown sheet bolts were leaking badly and asking for instructions. No reply to the message was received. After waiting 45 minutes, and after the conductor had received orders to go ahead, the train proceeded, and had gone about seven miles when the crown sheet dropped and the explosion occurred. It is insisted that the engineer knew the condition of the boiler and the crown sheet, and that he should not have proceeded further with the engine in that condition. Practically the same contention was urged in *Illinois Central R. R. Co. v. Skaggs*, 240 U. S. 66, 70, 36 Sup. Ct. 249, 250 (60 L. Ed. 528). In the opinion it was said:

"It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents or employees of the employing carrier or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. * * * But, on the other hand, it cannot be said that there

can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act."

Assuming that plaintiff was negligent in not refusing to proceed further with the engine when he discovered the defective condition of the stay bolts, and until he received a reply to his message, his negligence in this respect could not be held the sole cause of his injuries.

[4, 5] The real question in the court below was whether the dropping of the crown sheet and the explosion which resulted was caused by a defective or insufficient condition of the crown sheet, or was due to the lack of water covering the sheet. It may be true, as defendant claims, that the great preponderance of the evidence showed that leaky stay bolts would not cause the crown sheet to drop, and showed that the accident could not have occurred except for the failure of the engineer to keep a sufficient supply of water on the crown sheet. On the other hand, there was the testimony of the engineer, the fireman, and the rear brakeman, who rode on the engine, that just before the explosion the objectors were working properly, and that there was a half glassful of water over the crown sheet. The fireman testified that it had not been more than a minute before the explosion that he looked at the water glass, and that it showed a half glass of water, indicating that the crown sheet was covered to a depth of about four inches; that he looked at the water glass on this trip every five minutes or oftener, and opened the gauge cocks when between stations. This witness also testified that when he received the engine in the morning at the round house he noticed that two or three of the stay bolts were leaking, and that when the engineer sent the telegram two-thirds of the bolts were leaking badly. The jury might have discredited all of the testimony showing that sufficient water was kept upon the crown sheet up to the time it dropped; but the jury did just the contrary, and it must be said that there was sufficient evidence to sustain the finding.

In their answers to special questions the jury say that the negligence of the defendant consisted of sending out a defective engine and also failing to answer the telegram sent by the engineer. It is claimed that these findings are insufficient to sustain the verdict, and, further, that the acts of negligence found are not alleged in the petition. Of course, the failure to answer the telegram was not the proximate cause of the injury, and it had nothing to do with plaintiff's right to recover. But there was so much

said about the matter on the trial that its importance seems to have impressed the jury. That part of the findings may, and we think should be entirely disregarded. Sending out a defective engine is broad enough in its scope to include an engine with a defective boiler and crown sheet.

In view of the evidence as to the plaintiff's injuries, the court is of the opinion that the amount of the verdict and judgment is excessive, and that it should be reduced from \$12,800 to \$8,500. The plaintiff, however, is given the option to accept that amount or a new trial upon that issue. In other respects the judgment is affirmed.

BURCH, MASON, WEST, MARSHALL,
and DAWSON, JJ., concur.

JOHNSTON, C. J., dissents from the modification,

(109 Kan. 375)

STATE ex rel. HOPKINS, Atty. Gen., et al. v.
HOWAT et al. (No. 23505.)*

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Injunction §114(2) — State entitled to restrain coal miners' strike regardless of ownership of property affected.

The defendants, as officers and members of the district board of District No. 14, United Mine Workers of America, were about to call a strike of miners and mine workers in that district which comprises the coal-producing counties of Kansas. The strike, if called, would prevent the carrying on of business, commerce, occupations, and work in the state, would stop production, manufacture and transportation of necessities of life, would inhibit domestic and household activities of the people, would affect the public peace and the public health, would cut off the supply of fuel for the state's educational, penal, charitable, and other institutions, and would otherwise inflict on the public irreparable injury, for which there was no redress. One object of the strike was to defeat the purposes of chapter 29 of the Laws of 1920, creating a tribunal known as the court of industrial relations, to regulate certain industries, including that of coal mining. In an action brought by the state, the defendants were enjoined from calling a strike. Afterwards they violated the injunction, were proceeded against for contempt of court for violating the injunction, and were found guilty, after a trial before the court, without a jury. The conduct of the defendants in calling the strike was punishable as a felony under the statute referred to. *Held*, the state was authorized to apply for, and the court was authorized to grant, the injunction, to avert threatened public calamities, irrespective of the state's ownership of property affected, and without the aid of a statute.

2. Injunction ¶101(1) — Order restraining coal miners' strike held not forbidden by statute.

The injunction order was not forbidden by section 7149 of the General Statutes of 1915, relating to granting injunctions in specified cases of industrial disputes.

3. Injunction ¶101(4) — Order restraining coal miners' strike not invalid as injunction of commission of crime.

The injunction order was not invalid as an attempt to enjoin the commission of crime.

4. Jury ¶21(4) — Defendants in contempt proceedings held not entitled to jury trial.

The defendants were not entitled, in the contempt proceeding, to a trial by jury.

5. Irregularity of proceedings.

The contempt proceeding was otherwise free from irregularity.

6. Constitutional law ¶56, 74—Statutes ¶124(1), 107(10)—Act creating court of industrial relations not void for duality of subject or defect of title; nor as commingling functions of separate departments of government nor as attempting to enlarge original jurisdiction of Supreme Court.

The act creating the court of industrial relations is not void under the Constitution of this state because of duality of subject, or defect of title, or because it commingles functions of separate departments of government, or because it attempts to enlarge the original jurisdiction of this court.

7. Mines and minerals ¶86 — Production of coal may be regulated.

The business of producing coal in this state bears an intimate relation to the public peace, health, and welfare, is affected with a public interest, and may be regulated, to the end that reasonable continuity and efficiency of production may be maintained.

8. Constitutional law ¶83(2), 89(4) — Act creating court of industrial relations does not impair liberty of contract or permit involuntary servitude.

The act creating the court of industrial relations is a reasonable and valid exercise of the police power of the state over the business of producing coal, and does not impair liberty of contract or permit involuntary servitude, contrary to the Constitution of the United States.

Appeal from District Court, Crawford County; Andrew J. Curran, Judge.

Alexander Howat and others were adjudged guilty of contempt, and they appeal. Affirmed.

See, also, 107 Kan. 423, 191 Pac. 585.

Phil H. Callery, of Pittsburg, and Redmond S. Brennan and Thurman L. McCormick, both of Kansas City, Mo., for appellants.

Richard J. Hopkins, Atty. Gen., John G. Egan, Asst. Atty. Gen., Baxter D. McClain, of Iola, C. A. Burnett, Co. Atty., of Girard, and F. S. Jackson, of Topeka, for appellees.

BURCH, J. Alexander Howat and others were adjudged guilty of contempt of the district court, and appeal.

At a special meeting of the Legislature held in January, 1920, an act was passed declaring that the manufacture or preparation of food products, the manufacture of clothing, the mining or production of fuel, and the transportation of food, clothing, and fuel, are industries affected with a public interest; that reasonable continuity and efficiency in the operation of such industries affect the living conditions of the people; and that consequently such industries are subject to state supervision, for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder, and waste, and promoting the general welfare. A supervising body was created, called the court of industrial relations. Persons, firms, corporations, and associations were forbidden willfully to hinder, delay, limit, or suspend continuous and efficient operation of the supervised industries, contrary to the act or for the purpose of evading any of its provisions. The right of any individual worker to quit his employment at any time was expressly recognized; but conspiracy and confederation with others, and inducement and intimidation of others, with intent to cause suspension of operation of supervised industries, or to limit their output, was declared unlawful. The court of industrial relations was given authority to investigate, adjust, settle, and determine controversies between employers and workers, or between groups or crafts of workers, which might endanger continuity or efficiency of service of supervised industries, affect production or transportation of the necessities of life referred to, produce industrial strife, disorder, or waste, or threaten the public health, peace, or welfare. Willful violation of provisions of the act was made punishable as a misdemeanor. Officers of corporations and officers of labor unions and associations who willfully use their power and authority to influence, impel, or compel any other person to violate the act were declared guilty of felony, and punishable accordingly. The full text of the statute (chapter 29 of the Laws of 1920) is appended to this opinion.¹

The United Mine Workers of America is a voluntary association of miners and workers in mines, organized as a labor union, for the purpose of furthering the interests of members in the United States. District No. 14 of the United Mine Workers of America includes the counties of Crawford, Cherokee, and Osage, in which the bulk of the coal mined in Kansas is produced. In April, 1920, the officers of District No. 14 were:

¹ See note at end of case.

President, Alexander Howat; vice president, August Dorchy; secretary-treasurer, Thomas Harvey; all of Pittsburg, Kan. Members of the board of directors or trustees were James McIlwrath, John Fleming, William Jenkins, Amos Standering, and John Billings. Willard Titus had been elected as successor to William Jenkins. Thomas Cunningham was a traveling auditor and agent. On April 5, 1920, the Attorney General commenced an action on behalf of the state against the associations and persons named and other persons who were stated to be officers and members of local unions of District No. 14, to enjoin them from interfering with the operation of coal mines in the counties named and causing the production of coal to be delayed, hindered, and stopped.

The petition alleged that the defendants were conspiring and confederating among themselves and with others to violate the act creating the court of industrial relations. The defendant Howat had publicly announced that he proposed to fight the statute with a force of 12,000 miners in Kansas, regardless of consequences, and the miners had pledged him their support, to the end that the force and effect of the statute might be nullified. The conspiracy was to be executed by calling a general strike of mine workers in the mines in Kansas, thereby causing the production of coal to be stopped. Howat had announced that he was about to call such a strike, and would do so early in April. The result would be to prevent the carrying on of business, commerce, industries, occupations, and work in the state, to hinder, lessen, and stop the production, manufacture, and transportation of the necessities of life, and to inhibit even domestic and household activities of the people of the state. The state of Kansas owns and uses buildings and other property, conducts a variety of institutions, educational, penal, and charitable, and operates certain industries, in the exercise of its governmental functions. To accomplish its ends it purchases and uses more than 100,000 tons of coal yearly, and one of the results of the conspiracy would be to cut off this supply of fuel. Pursuant to the conspiracy, members of labor unions had already simultaneously quit work and caused mines to be shut down, assigning as a reason opposition to the law creating the court of industrial relations, coupled with some cause of minor significance. The court of industrial relations had taken jurisdiction of a controversy between employers and miners, and in the exercise of such jurisdiction had subpoenaed Howat and others to testify as witnesses. They had refused to obey the subpoenas, and subpoenas for like purposes issued by the district court, and had been committed to jail for contempt of court, there to remain until they should submit to the law and give their tes-

timony. The constitution and by-laws of District No. 14 had been amended to impose a fine of \$50 for each offense on any member, committee or local officer who would be privy to referring a controversy to the court of industrial relations, and imposing a fine of \$5,000 on any district officer of District No. 14 who would be a party to the reference of any grievance to the court of industrial relations. These amendments enabled Howat and his associates to impose their will upon mine workers. Without continuous and effective operation of the coal mines, all the loss, suffering, and irreparable injury of the coal strike of December, 1919, fresh in the minds of the people and of the defendants, would be repeated; and the state was without adequate remedy at law. The prayer was for a temporary injunction, and, upon final hearing, for a permanent injunction, enjoining the defendants from further conspiring with each other, and from carrying out any conspiracy to interfere with the operation of coal mines in the counties named, to limit production, to cause the workers to leave employment, to influence them to quit their employment, and to cause the production of coal to be delayed, hindered, and stopped.

A temporary injunction was issued, the petition was amended and supplemented, answers were filed, and upon final hearing the court found all the facts contained in the plaintiff's pleadings to be true, found all the issues joined in favor of the plaintiff and against the defendants, and entered a decree in favor of the state, making the temporary injunction permanent.

In February, 1921, the officers of the district board of District No. 14 called a strike in two mines of the George K. Mackie Fuel Company, one in Crawford county, and one in Cherokee county. The order was transmitted to local unions Nos. 498 and 310, and by their officers communicated to the members, who, obedient to the order, went on strike. An affidavit stating the facts, and charging those concerned in calling the strike with contempt, was presented to the district court on February 7. After a hearing, the court found there was reasonable ground for believing the defendants named in the affidavit had violated the commands of the injunction, and ordered their arrest. They were arrested and brought into court, and were given an opportunity to purge themselves. Harvey, Cunningham, Billings, and Standering were dismissed, on the ground their statements showed they were not guilty of the charge. The court directed the state to file forthwith accusation against the defendants, Howat, Dorchy, McIlwrath, Fleming, Titus, and Maxwell, and fixed a time for answer. The defendants answered, and, after a hearing before the court, without a jury, the court found the facts stated in the

accusation to be true as to the defendants last named, found them to be guilty of violation of the injunction and of contempt of court, and ordered that they be confined in the jail of Crawford county for the period of one year, and pay the costs of the prosecution.

The assignments of error present questions relating to regularity of the contempt proceeding, relating to validity of the violated injunction, relating to validity of the act creating the court of industrial relations under the Constitution of the state of Kansas, and relating to validity of the act under the Constitution of the United States.

It is said the court erred in arraigning the defendants in the absence of counsel, in compelling them to testify against themselves, and afterwards in using the extorted testimony in the trial on the accusation for contempt. There was no "arraignment" of the defendants, in the sense in which that term is used in criminal procedure. The usual course in contempt proceedings was observed. When arrested the defendants were brought into court, and were asked if they desired to make any statements. Howat and Dorchy made voluntary statements, and then freely gave voluntary answers to a few questions propounded to them. They were accompanied by an attorney, who participated in the proceedings, made no objection to what occurred, and secured a postponement until chief counsel for defendants could arrive. Howat having answered that "we called a strike," meaning by "we" a majority of the district board of District No. 14, and Dorchy having said he was guilty, the court directed a formal accusation to be prepared, to which the defendants afterwards pleaded, and on which, in due time, they were tried. At the trial the voluntary statements and answers to questions were read in evidence. At the trial Alexander Howat was called as a witness by the defendants, and, on examination by their counsel, gave a detailed account of the calling of the strike which constituted contempt of the injunction order. Some objections to the proceedings relating to evidence are not deemed to be of sufficient importance to require special consideration.

It is contended the district court erred in refusing to grant the defendants a jury trial. In support of the contention it is said the defendants were charged with a felony, and were convicted of that which under the law constitutes a felony. These assertions are the foundation for an extended argument that the defendants were denied justice in the district court. The entire argument stands or falls with the truth or untruth of the assertions. Neither one has any basis of fact, or any warrant in logic or in the law.

The defendants were charged with contempt of court, for disobedience of an injunc-

tion, and contempt of court for disobedience of an injunction is not punishable as a felony, or as crime of any other degree, by any statute of this state. The purpose of the proceeding was not to enforce any criminal statute of the state, but was to vindicate the authority and integrity of the court as an organ of public justice. It was not of the slightest consequence that the acts committed in violation of the injunction, and constituting contempt, also constituted infractions of the criminal law, and infractions of the criminal law of the grade of felony. In the case of *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265, Id., 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041, and Id., 215 U. S. 580, 30 Sup. Ct. 397, 54 L. Ed. 337, members of the mob which hanged the negro Johnson, committed contempt by committing murder. The distinction between proceedings to punish contempt committed by crime, and proceedings to punish crime as such, is as old as the law of contempt, and the distinction has been observed and acted on by courts, state and federal, including the Supreme Court of the United States. This court, in a series of decisions, has interpreted the provisions of the Constitution of the state cited by counsel for the defendants, in a manner too plain to be misunderstood. It is not necessary to collate authorities. Counsel for the defendants cite no cases from the literature of the law except Kansas cases, and those Kansas cases which apply directly to the subject under discussion are not referred to.

It is to be regretted that the defendants, and particularly the coal miners of South-eastern Kansas, many of whom are foreigners and not familiar with our legal institutions, have not had this subject made clear to them by those in a position to do so. It would not be possible to make the matter plain, to their untrained minds, within the limits of a judicial opinion. Briefly, it may be said that power of a court to punish for contempt is, in the last analysis, on similar footing with a miner's privilege to work—it touches the right to exist. Whatever executive officers, concerned with enforcement of the criminal statutes, may do about bringing and prosecuting criminal actions, and whatever success they may have in that field, the court must possess authority to punish contempt, or it cannot discharge its functions as a court. This was the law when all the modern charters of human liberty were framed. A court established by the Constitution, such as the district court of Crawford county, may not be deprived of this power, except by the Constitution itself, and the Kansas Constitution does not do so. If the power be unwisely reposed, the remedy is by constitutional amendment. Until a change is made to call a contempt proceeding a criminal prose-

cution, in the sense that a jury trial is necessary, is to darken counsel by misuse of well-understood terms. The foregoing sufficiently disposes of a contention that the defendants were denied due process of law because they were tried by the court and not by a jury, but the following quotation from the opinion of the Supreme Court of the United States, in the case of *Ellenbecker v. Plymouth County*, 134 U. S. 31, 39, 10 Sup. Ct. 424, 427 (33 L. Ed. 801) is pertinent:

"Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution."

In an assignment of error that the district court erred in overruling the motion to quash the accusation, a collateral attack is made on the injunction order, contempt of which was the basis of the accusation. It is said the injunction was issued in contravention of section 7149 of the General Statutes of 1915, the general nature of which is indicated by the initial provision:

"That no restraining order or injunction shall be granted by any court of the state of Kansas, or a judge or the judges thereof, in any case between an employer and employee, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law. * * *

[1, 2] Let it be granted for the moment that the Legislature intended this statute to be applicable to the case presented by the petition for injunction. It was within the province of the district court to interpret the statute, and determine whether or not it did apply. The court had jurisdiction to adjudicate upon the subject. If it reached a wrong conclusion, it did not forfeit jurisdiction. The injunction order was simply erroneous, the error was subject to correction by the ordinary method of appeal, and disobedience to the order constituted contempt. *State ex rel. v. Pierce*, 51 Kan. 241, 32 Pac. 924. Conceding again that the Legislature intended the statute to be applicable to the case presented by the petition for injunction, there was ample necessity for issuing the injunction, to prevent irreparable injury to property and property rights of the

party making the application, the state of Kansas. The statute, however, had no application to the case made by the petition for injunction. The petition presented no dispute between employer and employee, or between employers and employees, or between employees, or between persons employed and persons seeking employment, and presented no case of dispute concerning terms or conditions of employment. Whether or not the statute conflicts in any particular with the act creating the court of industrial relations need not be discussed, because the statute has no bearing on this controversy.

Portions of the statute not quoted deal with the subjects of picketing and boycotting, and it is said the Legislature, having in mind the great injustice which might be perpetrated by destroying united action, placed a definite prohibition on the issuing of injunctions in labor disputes. The portion of the defendants' brief stating this conclusion is preceded by the following remarkable paragraph:

"In this connection it must be remembered that the power of a court to grant an injunction for any purpose is statutory, and in the absence of statutory authority no power exists in a court to grant an injunction for any purpose whatever. Again, the power to grant an injunction being statutory and in derogation of the common law, the statute granting said power must be strictly construed. Since this rule is so universally followed and upheld, a citation of authorities in support of the same would be out of place."

The power of a court in any case to grant an injunction for any purpose is not statutory. In the absence of statute, power exists in courts to grant injunctions for numerous purposes. The power not being statutory, and not being in derogation of the common law, is not strictly construed. If the power were statutory, it would be liberally construed, to accomplish just and equitable purposes, because of an express statute of this state which reads as follows:

"The rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object." Gen. Stat. 1915, § 11829.

The rule stated in the quoted paragraph is not universally followed, is not followed at all, and there are no authorities to be cited as sustaining it. This being true, the paragraph must have been intended for some document other than a brief in this court.

[3] It is said the injunction was invalid, as an attempt to enjoin a crime. If so, the injunction order was not void, and the defendants are precluded from attacking it in this proceeding.

[4, 5] In order that the defendants may not feel a rule of procedure has prevented

full consideration of their case, it may be said their argument is cast in the same fallacious form as the argument relating to trial by jury. The purpose of the injunction was not to enjoin crime, and bore no other relation to administration of the criminal law. The purpose was to prevent the irreparable injury which the petition for injunction alleged would occur, and which the court found would occur, unless the defendants were restrained from executing their designs. It might be the defendants would incur sentences to the penitentiary or to jail, but the imposition of those penalties would not fulfill the obligation of the state of Kansas to protect its people from the calamitous consequences of the defendants' wrongdoing, and for which there was no redress. The court found that all the perils to the public welfare which accompanied the coal strike of the winter of 1919-20, would again be incurred. That strike caused industry to stop, caused commerce to be demoralized, caused food supplies to be reduced and cut off, caused schools to close, caused suffering in homes, and if the defendants had been permitted to have their way, would have caused the sick to languish and die in unwarmed hospital beds in the dead of winter. If those consequences were produced in a single village by blocking the highway over which necessities of life were brought in, anybody would say blocking the highway was a public nuisance, and a court of equity could open the road. Multiplicity and magnitude of threatened disaster do not detract from authority of a court of equity over the few determined individuals who propose to wreak the disaster. Ability of the defendants to paralyze the normal activities of a whole commonwealth did not free them from amenability to injunction. The district court was warranted in interfering on principles identical with those applied in abatement of public nuisances, and the court was not shorn of power because the defendants, if they persisted, would incidentally be guilty of crime.

The general finding on which the injunction was allowed included a finding that the state would be prejudiced in the use of property which it held in the capacity of owner. Conviction and incarceration of the defendants would not get coal for the various institutions, educational, charitable, and correctional, which the state maintains in its own buildings, upon its own land. The authorities are in substantial accord that this special interest authorized the state to apply for, and authorized the district court to grant, the injunction; but this court holds that, aside from this indisputable ground, and without aid of the statute expressly authorizing actions of injunction in the name of the state to suppress public nuisances (Gen. Stat. 1915, § 7163, as amended by Laws

of 1917, c. 247, § 1), the district court was possessed of power to grant the injunction.

In support of their contention the defendants cite some cases. The one principally relied on is the case of *State v. Vaughan*, 81 Ark. 117, 126, 98 S. W. 685, 690, 7 L. R. A. (N. S.) 899, 118 Am. St. Rep. 29, 11 Ann. Cas. 277, and a portion of the opinion is quoted as follows:

"It is demonstrably true that it is a sound principle of equity jurisprudence that an injunction will not lie at the instance of the state to restrain a public nuisance where the nuisance is one arising from the illegal, immoral, or pernicious acts of men which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law."

The defendants did not quote the next succeeding sentences of the opinion, which sustain the action of the district court of Crawford county:

"On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery." 81 Ark. 126, 98 S. W. 690, 7 L. R. A. (N. S.) 899, 118 Am. St. Rep. 29, 11 Ann. Cas. 277.

The opinion in the *Vaughan Case* quotes from the opinion in the case of *People v. Condon*, 102 Ill. App. 449; and the defendants make much of the decision in the *Condon Case* because it accuses the Supreme Court of the United States of resorting to dictum in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, and because it undertakes to narrow the scope of the decision in the case of *In re Debs*, Petitioner, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

The law of Illinois respecting the subject of the opinion in the *Condon Case* is declared by the Supreme Court of that state in the case of *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680. The following extracts from the opinion are supported by the citation of numerous authorities:

"A court exercising equitable jurisdiction will not restrain, by injunction, the commission of illegal or immoral acts, and will not enjoin one engaged in the sale of liquor from making sales which are punishable by the criminal law. But that is not the object of this suit. The law has a double purpose—to punish the person committing an illegal act and to prohibit the use of property for illegal purposes—and these are separate and distinct. * * *

"It is one of the most useful functions of a court of equity that it may give complete and adequate relief against acts which will constitute nuisances. * * *

"Want of jurisdiction to enjoin a nuisance which might breed a pestilence or be dangerous to the welfare of the public would be a reproach to the law. * * *

"A court of equity has jurisdiction to abate a public nuisance, although offenders are not only amenable to criminal laws but also where no property rights are involved in the litigation. * * *

"As we have noted above, this court has never regarded a criminal prosecution, which can only dispose of an existing nuisance and cannot prevent a renewal of the nuisance, for which a new prosecution must be brought, as a complete and adequate remedy for a wrong inflicted upon the public. The public authorities have a right to institute the suit where the general public welfare demands it and damages to the public are not susceptible of computation. The maintenance of the public health, morals, safety, and welfare is on a plane above mere pecuniary damage, although not susceptible of measurement in money, and to say that a court of equity may not enjoin a public nuisance because property rights are not involved would be to say that the state is unable to enforce the law or protect its citizens from public wrongs." 255 Ill. 474-477, 99 N. E. 682, 683.

In the case of *Mugler v. Kansas*, 123 U. S. 623, 672, 8 Sup. Ct. 273, 303 (31 L. Ed. 205), one of the questions was whether the equity power to abate liquor nuisances, conferred by a statute of this state, was consistent with the constitutional guaranty of liberty and property. In the opinion the court said:

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story's Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. * * *

The pertinency of this discussion to the subject of the decision may be left to the judgment of the discriminating reader.

Referring to the case of *In re Debs*, Petitioner, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, the opinion in the *Condon Case* says:

"An examination of this whole opinion shows that the court intended to place, and did place, the right to issue this injunction upon the sole and only ground that the property of the United States had been interfered with."

In the *Debs Case* the court first demonstrated the undoubted power of the government of the United States to protect its property in the mails by invoking the equitable remedy of injunction. The court then said:

"We do not care to place our decision upon this ground alone. Every government, intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." 158 U. S. 584, 15 Sup. Ct. 906, 39 L. Ed. 1092.

After reviewing authorities, the opinion proceeded as follows:

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control." 158 U. S. 586, 15 Sup. Ct. 907, 39 L. Ed. 1092.

Concerning the subjects of "injunction against crime" and trial by jury in contempt proceedings, the court said:

"The acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offenses alleged in the bill of complaint, of derauling and wrecking engines and trains, assaulting and disabling employees of the railroad companies, it will be no defense to such prosecution that they disobeyed the orders of injunction served upon them and have been punished for such disobedience.

"Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take; it is vain and ineffectual, and must be so declared by the courts;' and we reaffirm the declaration made for the court by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, that 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.' But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court." 158 U. S. p. 594, 15 Sup. Ct. 910, 39 L. Ed. 1092.

The opinions in the *Mugler* and *Debs* Cases and the opinion in the *Stead* Case have been quoted at some length, not because they need vindication from the criticism of the Illinois Appellate Court, but to respond to the defendants' brief, reveal its method, and render unnecessary further examination of authorities. The conclusions stated in the *Mugler* and *Debs* Cases are binding, so far as they relate to questions arising under the Constitution of the United States. The opinions in the three cases sufficiently present arguments and authorities supporting the conclusions reached. Those conclusions are in harmony with previous utterances of this court, and are accepted and adhered to as sound.

[8] It is contended the act creating the court of industrial relations contravenes section 16 of article 2 of the Constitution of the state, in that it contains more than one subject, and the subjects are not clearly expressed in the title. It is said the method employed to invest the court of industrial relations with the powers and duties of the Public Utilities Commission, which was abolished, was ineffectual, and consequently the public utilities features of the statute lack the force of law. The conclusion has nothing to do with the assignment of error, and relates to a subject which does not concern the defendants. The section of the Constitution referred to does provide that no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended; but it is not ma-

terial to the defendants whether the authority formerly possessed by the Public Utilities Commission was preserved to the court of industrial relations; and if in some public utilities case it should be held that the act under consideration left the state without a public utilities law, the remainder of the act would not be affected. *Laws 1920, c. 29, § 28; State ex rel. v. Howat*, 107 Kan. 423, 191 Pac. 585.

In a certain sense, the act embraces two subjects: regulation of public utilities, and regulation of those industries which have to do with supplying the people with necessities of life. In the same sense, the second subject is doubly triple. It embraces food, clothing, and fuel, and it embraces production, manufacture, and distribution. According to the same method, the act might be conceived as divided into as many subjects as a carefully prepared index of its contents would disclose. That, however, is not the method by which to determine the scope of a statute. The question in any case is, Are the particulars so diverse that they may not be connoted in a single generic concept? In this instance the general concept is enterprise affected with a public interest, and the grouping is not only natural, but consistent and harmonious.

It is said that use of the word "court" impairs clearness in the expression of the subject of the act in its title, and that inclusion of public utilities is not indicated at all. The first contention was sufficiently met in the case of *State v. Scott*, 109 Kan. 166, 197 Pac. 1089, and it was there said the title is at least as comprehensive as though it read, "An act relating to (or concerning) an administrative body for the regulation of industrial relations." The word "industrial" means relating to industry, and industry clearly embraces those departments devoted to public service. When used in the plural, the word "relations" has the meaning of "affairs." Fifty years ago the title of this act would have conveyed little or no information. It is to be read, however, in the light of common knowledge of the science of government, and particularly the regulation of industry by administrative tribunals, in the year 1920; and the court is of the opinion any one whose interests might be affected by the legislation would be directed to details by the title.

An argument that the title is not broad enough to cover substantive provisions of the act is sufficiently disposed of by the reasoning and the citation of authority contained in the opinion in the case of *State v. Scott*, supra.

It is said the act creating the court of industrial relations is void because it commingles functions of the three departments of government. The contention was considered in the case of *State ex rel. v. Howat*, 107 Kan. 423, 191 Pac. 585, and was found

to be unsound. Some additional specifications are made of functions claimed to be separate according to the orthodox theory, but they do no more than raise the question of the legality of all bodies such as the Interstate Commerce Commission, State Public Utilities Commissions, and similar administrative tribunals, "created for carrying into effect the will of the state, as expressed by its legislation." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, syl. par. 1, 14 Sup. Ct. 1047, 38 L. Ed. 1014. A contention that the act is void because it undertakes to usurp control of matters within the jurisdiction of the federal government and regulated by the Lever Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½r) and the Clayton Act, 38 Stat. 730, was likewise disposed of in the *Howat Case* just cited.

It is contended the act creating the court of industrial relations is void because section 12 undertakes to confer on this court original jurisdiction additional to that permitted by section 3 of article 3 of the Constitution, which reads as follows:

"The Supreme Court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law." Gen. Stat. 1915, § 172.

[7] The court of industrial relations is, in fact, a public service commission, the word "court" having been employed merely as a matter of legislative strategy. The production, manufacture, and distribution of food, clothing, and fuel, being industries affected with a public interest, are made subject to regulation in the same manner as those industries which have commonly been designated public utilities. Action by the court of industrial relations would necessarily touch the subjects of liberty and property, and in order to safeguard them from infringement and meet all the requirements of due process of law, a judicial review of orders of the administrative body was provided for by section 12. Resort to this court was authorized in terms which afford opportunity for the determination of issues upon the court's independent judgment, both with respect to the law and the facts. *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908. The appellate jurisdiction of this court not being available because the court of industrial relations is a nonjudicial body, its constitutional jurisdiction in mandamus was utilized. This jurisdiction is precisely the same as that of any court of general jurisdiction in mandamus, that is to say, is plenary, may be exercised to control the action of inferior tribunals (*Bishop v. Fischer*, 94 Kan. 105, 145 Pac. 890, Ann. Cas. 1917B, 450; *In re Pettitt*, 84 Kan. 637, 114 Pac. 1071), and comprehends the power of superintending con-

trol to the full extent of which the writ of mandamus is capable.

Mandamus is indisputably a proper remedy for enforcing lawful orders of a public service commission (*State v. Railway Co.*, 81 Kan. 430, 105 Pac. 704, 28 L. R. A. [N. S.] 1082; *L. R. A. 1918E, 304, Annotation*), and the only matter for debate is its appropriateness as a method of compelling the court of industrial relations to do its duty. The mandamus statute reads as follows:

"The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

"The writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. * * * " Gen. Stat. 1915, §§ 7646, 7647.

The court of industrial relations is clearly a board, within the meaning of this statute. The entering of orders in respect to matters committed to its jurisdiction is a duty resulting from office, trust, or station. The tribunal appointed to make orders in the field of industrial relations having already functioned, application to it no longer affords remedy in the ordinary course of law for such cases. *Telephone Association v. Telephone Co.*, 107 Kan. 169, 190 Pac. 747. Constitutional limitations, state and federal, and express statutory provisions, furnish standards of conduct. Sections 8 and 9 of the Court of Industrial Relations Act require orders to be just and reasonable. Section 12 itself measures the duty which the statute enjoins, and all the prerequisites exist for maintaining an action of mandamus to compel performance of the duty to enter just, reasonable, and lawful orders.

It is contended that if in any case this court should find an order made by the court of industrial relations to be unjust, unreasonable, or unlawful, this court is directed to prescribe definitely what would be a proper order, and then compel the court of industrial relations to enter it. Applying the argument to action by the court of industrial relations on its public utilities side, if this court should find a rate to be confiscatory, it should step over into the field of legislation, fix the correct rate, and then compel the court of industrial relations to put the prescribed rate in force. In order to impose such a meaning upon the phraseology of the statute, the court would be obliged to apply the opposite of the well-known canon of interpretation, and strive to invalidate, instead of strive to uphold, the law. The evident pur-

pose of the legislation was to give equal remedies to and against the court of industrial relations, in order that just, reasonable, and lawful regulations, when established, may prevail, and in order that, in case of contest, just, reasonable, and lawful regulations shall be established. Being a creature of the Legislature, the court of industrial relations may be placed under such superintending control as the Legislature chooses. The discretion which the court of industrial relations exercises is not judicial discretion, and consequently is not within the protection of the mandamus statute quoted above. To accomplish the purpose of the act, the tribunal created is in effect limited in its authority to promulgation of orders of the character described in section 12. Exercise of that authority in case of controversy is, however, the prime object of the act—is the very duty which the law specially enjoins; and the duty is not performed until a just, reasonable, and lawful order has been entered. The remedy of mandamus is made available, as in any other case covered by the mandamus statute, except that application must be made to this court. The court acts according to the common course of judicial procedure in actions of mandamus. Findings showing the particulars in which the contested order falls may serve as a guide in framing a proper order, but the duty to frame a proper order is legislative, and rests with the court of industrial relations. If a peremptory writ be awarded, the mandate is to perform the duty contemplated by the statute. When the mandate is obeyed, the order entered is the order of the court of industrial relations, and not of this court.

It is said the act creating the court of industrial relations is void because it contravenes the Fourteenth Amendment to the Constitution of the United States, in that it destroys liberty of contract and permits involuntary servitude on the part of workingmen.

The question which presented itself to the mind of the Legislature may be indicated.

Employers and employees disagree about how the product of their joint contributions to industry shall be divided. In the last analysis, hours, working conditions, recognition of union, etc., revolve about this fundamental subject of grievance. The subject is of great importance to the employer. It is of even greater importance to the employee, because on wages depend food, clothing, and shelter; recreation, and the details of daily living; the value of the worker to the community in which he lives; and even the length of time he will live. Disagreements become acute, the contestants become hostile to each other, sometimes each one resorts to force, and the public, the great employer of both labor and capital, suffers grievously. In an address before the federation of engi-

neering societies at Washington, D. C., November 20, 1920, Mr. Herbert Hoover, now Secretary of Commerce and Labor, made an appeal for industrial co-operation, in which he said:

"In the question of industrial conflict resulting in lockout and strike one mitigating measure has been agreed upon in principle by all sections of the community. That is collective bargaining, by which, wherever possible, the parties should settle their difficulties before they start a fight. * * *

"Battle and destruction are a poor solution to these problems. The growing strength of national organizations on both sides should not, and must not, be contemplated as an alignment for battle. Battle quickly loses its rules of sportsmanship and adopts the rules of barbarism."

The Legislature understood all this; but if the parties should not succeed in settling their difficulties, why should they be permitted to start a fight, which quickly brings upon the public a recrudescence of barbarism?

In dealing with the subject of the constitutionality of the legislation of 1920, the court can render no service by veiling the harshness of reality. The court of industrial relations is justified by facts, or is not justified at all, and it will be necessary to present a few disagreeable facts which lie naked to astonished gaze in our industrial history.

The accusation against Debs in the case which has been referred to contained the following statements of fact:

"That, as a direct result of the orders to strike upon some of the lines—notably upon the Illinois Central Railroad, the Chicago, Rock Island & Pacific, the Chicago, Burlington & Quincy, the Chicago & Alton, the Chicago & Western Indiana, and upon the Pennsylvania Company's lines—there was exercised upon the part of many of the strikers or ex-employees of the railway companies intimidation and open violence. That employees who refused to join in the strike, and others who had been employed by the railway companies to take the place of strikers, and were in the actual service of the companies, were assaulted and intimidated by the strikers, and driven from their post of duty, either by physical violence or threats of personal injury. That, during the 5th, 6th, and 7th days of July, the strikers, and others acting in sympathy with them, took forcible possession of some of the roads within and adjacent to the city of Chicago, and, by physical force, prevented the passage of trains carrying mails and interstate commerce. That engines and trains of cars were derailed, and passenger trains were assailed with stones and other missiles, as well as the employees in charge of such trains; and in some instances both the passenger cars and engines were fired upon, endangering the lives both of employees and passengers. That these mobs were in many instances led by the strikers or ex-employees of the railway companies, who had gone out of service upon the orders of the de-

defendants as officers of the American Railway Union; and mobs composed of strikers and others were massed at different points, upon the different lines of road, within and adjacent to the city of Chicago, in such numbers as to be beyond the control of the government, state, and municipal authorities. That at least 1,000 freight cars belonging to the railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. Signal towers and other appurtenances of the railways were burned. Employees of the railway companies who refused to obey the orders of the defendants and other officers of the American Railway Union, and remained faithful to the discharge of their duty, were violently assaulted, beaten, and bruised, and in some instances were forcibly arrested, and taken from their engines, and kept for hours in confinement. That many lives were also sacrificed—all of which was a direct result of the numerous strikes ordered as aforesaid." *United States v. Debs* (C. C.) 64 Fed. 724, 728.

During the progress of the strike, Debs addressed a letter to the railway managers, a portion of which reads as follows:

"The strike, small and comparatively unimportant in its inception, has extended in every direction, until now it involves or threatens not only every public interest, but the peace, security, and prosperity of our common country. The contest has waged fiercely. It has extended far beyond the limits of interests originally involved, and has laid hold of a vast number of industries and enterprises in no wise responsible for the differences and disagreements that led to the trouble. Factory, mill, mine, and shop have been silenced; widespread demoralization has sway. The interests of multiplied thousands of people are suffering. The common welfare is seriously menaced. The public peace and tranquility are imperiled. Grave apprehensions for the future prevail." (C. C.) 64 Fed. 729.

In a newspaper interview given during the strike, Debs said:

"We are in condition to keep the strike on for months. Nothing but armed intervention to-day permits the moving of trains. Throughout that great stretch of country which lies west of the Mississippi river our men are steadfast and willing to wait until the bitter end." * * *

"When the command of the so-called 'arteries of commerce' falls into our hands, and the trades' unions which have given us comfort require reciprocation from us, we, and we alone, are in a position to give them material assistance." (C. C.) 64 Fed. 730.

What command of the arteries of commerce means was demonstrated in the circumstances under which the Adamson Act was passed.

Last year the president of the American Federation of Labor told a committee of Congress before which he appeared that limitations on the "right to strike" would not be obeyed, and so made an issue with the government of the United States. Petty ex-

hibitions of arbitrary power are illustrated in the conduct of one Mike Boyle, business agent of an electrical workers' union in Chicago, and known as "Umbrella Mike." He was released from prison, to which he had been committed for criminal conspiracy, on May 8, 1920. Quite promptly he called two strikes against the city, which cut off power at municipal shops, stopped repairs on municipal pumping stations and municipal lighting systems, and stopped city hall elevators. On July 16 he called a strike which stopped operation of surface street car lines of the city of Chicago, and thousands of wage-earners were unable to reach their places of employment.

The Debs pattern has been used as a model for many a subsequent strike. Every section of the country has been made familiar with it. Its ferocity and brutality, and its relation to the public welfare, are portrayed in a recent account of the Alabama coal strike:

"The long drawn out struggle between the coal miners and the coal operators in Alabama has been brought to an end by the agreement of both sides to place the entire case in the hands of Governor Kilby. * * *

"The strike was enormously costly to the state and to the miners, and to the industry in general. * * *

"The strike formally began in September when the union ordered a general stoppage of work in District 20. Much disorder occurred in the strike region, and one miner is alleged to have been lynched. Reports from Alabama announced the suspension of civil rights in the strike zone and the sending of state troops to the field. Miners and their families were evicted from company owned houses. The union reported that it provided food, clothing, and shelter for between 40,000 and 50,000 men, women, and children. Tent villages were erected on the hillsides after the miners were evicted." *The Survey*, March 19, 1921.

Since the conviction of some 30 or more officials and members of the Bridge and Structural Iron Workers' union by a federal jury at Indianapolis in 1912, dynamite and nitroglycerin have not been so freely used as agents of "industrial justice," but the methods still employed are not less stern. In May, 1919, the milk drivers of Chicago struck. Babies in infant asylums and hospitals cried for milk. On May 15, Health Commissioner Robertson said:

"We are going to deliver milk to the quarter of a million babies and the 120 hospitals and homes if we have to press into service every police ambulance and every vehicle controlled by the city of Chicago. We have about 250,000 babies under five years of age in Chicago, and 1,000 patients at the Municipal Tuberculosis Sanitarium."

The next day the vice president of the strikers' organization said:

"Yes; picket the places and don't let any milk be delivered. You know how to stop anybody delivering. I don't have to tell you how."

Between April 6, 1917, and November 11, 1918, the period of our participation in the World War, there were more than 6,000 strikes in the United States, some of which imperiled winning the war. When the whole world was shaken by the earthquake of the World War, and the flower of this country went forward as willingly as a bridegroom goes to his bride, to hurl themselves into the raging pit of hell in Western Europe, their fate there depended on patching up strikes at home.

During the war the various war agencies responded, under direction of the President, to the demands of labor with great liberality; but in his message before Congress of May 20, 1919, the president said:

"We cannot go any further in our present direction. We have already gone too far. We cannot live our right life as a nation or achieve our proper success as an industrial community if capital and labor are to continue to be antagonistic instead of being partners; if they are to continue to distrust one another and contrive how they can get the better of one another, or what perhaps amounts to the same thing, calculate by what form and degree of coercion they can manage to extort on the one hand work enough to make enterprise profitable, on the other justice and fair treatment enough to make life tolerable. That bad road has turned out a blind alley. It is no thoroughfare to real prosperity. We must find another leading in another direction and to a very different destination."

The strike record of the year 1919, however, proved to be the most disheartening one in our industrial history. The statistics are amazing, even to minds accustomed to war figures. Millions of men and women were involved. The following is a partial list of the more important strikes and lockouts shown by the government report for 1919:

"A general strike in Tacoma and Seattle in February in sympathy with the metal-trades strikers, in which 60,000 persons were involved; 65,000 employees in the Chicago stockyards struck in August; 100,000 longshoremen along the Atlantic Coast struck in October; 100,000 employees in the shipyards of New York City and vicinity struck in October; 115,000 members of the building trades were locked out in Chicago in July; 125,000 in the building trades in New York City struck in February; 250,000 railroad shop workers struck in August; 367,000 iron and steel workers struck in September; and 435,000 bituminous coal miners struck in November. The number of persons concerned in these nine strikes and lockouts was upward of 1,600,000, while the total number of persons involved in strikes and lockouts during 1919 was 4,112,507." Monthly Labor Review, June, 1920, p. 200.

The direct losses in money amounted to stupendous sums. William Z. Foster, who

conducted the steel strike, says that struggle alone cost a billion dollars. The indirect losses were beyond computation. The moral effect was such that school children learned to strike; and the unspeakable crime was committed in Boston when the policemen struck. The plain citizen became so sated with news of strikes and threats of strikes that, unless his morning paper contained an account of some especially shocking strike incident, he yawned and turned to the doings of the Gumps.

The portent of the bituminous coal miners' strike was so grave that the President of the United States pleaded for a rescission of the strike order. Among other things, he said:

"From whatever angle the subject may be viewed, it is apparent that such a strike in such circumstances would be the most far-reaching plan ever presented in this country to limit the facilities of production and distribution of a necessity of life, and thus indirectly to restrict the production and distribution of all the necessities of life. A strike under these circumstances is not only unjustifiable; it is unlawful. * * *

"It is time for plain speaking. These matters with which we now deal touch not only the welfare of a class, but vitally concern the well-being, the comfort, and the very life of all the people. I feel it my duty in the public interest to declare that any attempt to carry out the purpose of this strike and thus to paralyze the industry of the country, with the consequent suffering and distress of all our people, must be considered a grave moral and legal wrong against the government and the people of the United States. I can do nothing less than to say that the law will be enforced, and means will be found to protect the interests of the nation in any emergency that may arise out of this unhappy business."

The President was obliged to find means to avert this grave moral and legal wrong, and the means chosen was a mandatory injunction to withdraw the strike order. The injunction was denounced by the executive council of the American Federation of Labor, as follows:

"The autocratic action of our government in these proceedings is of such a nature that it staggers the human mind. In a free country to conceive of a government applying for and obtaining a restraining order prohibiting the officials of a labor organization from contributing their own money for the purpose of procuring food for women and children that might be starving is something that, when known, will shock the sensibilities of man and will cause resentment."

The fact that execution of the strike order would cause tens of thousands of women and children not protected by strike funds to freeze and starve does not appear to have touched any sensibilities of the strike leaders.

District No. 14, the United Mine Workers of America, comprising the coal-producing

counties of Kansas, constitutes a principal-ity, in Kansas but not of it, and ruled by force in medieval fashion. In his testimony given at the trial of this cause, the defendant Howat told of calling the strike which constituted contempt of the injunction granted by the district court. A boy named Mish-mash, employed in the Mackie mines, discovered he was more than 19 years old, and claimed back pay, according to union contract, for full miner's wages accruing after he became 19. The evidence relating to the date of his birth was inconclusive, and controversy over the matter continued between the district board and the mine owners for a considerable period of time. The amount in dispute was about \$225, the boy's mother needed the money, and the district board believed the mine owners were not acting fairly; therefore a strike was called. Portions of Howat's testimony follow:

"Q. Well, don't you know that if this boy had a claim for wages under a contract that you could recover it in court? A. No; I didn't know it. We never have settled any cases that way. * * *

"Q. You think the boy couldn't collect the money in the courts? A. I couldn't say whether he could or not. I never tried it, and, anyway, we have a contract which provides for it, and we wasn't obliged to go to court. * * *

"Q. You don't go into court? A. No, sir; neither here nor in the other districts. * * *

"Q. You didn't read the injunction? A. No; never did. * * *

"Q. You don't recognize courts in the matter of settlement for wages? A. No, sir; we have a contract that covers that. * * *

"Q. You don't recognize that contracts are made to be enforced in courts, then? A. No, sir."

Under this form of civil government there were 705 strikes in the coal mines of Kansas within a period of less than four years ending December 31, 1919. In the winter of 1919-20, the purposes of the national strike were attempted to be carried out in District No. 14. The threatened consequences were so dire that the state took action in this court, under the antitrust statute, and the court appointed receivers for the coal mines. The receivers encountered difficulty in securing competent managing operators, because those who were familiar with the mines and methods of coal production in that district feared they might not survive an attempt to supply the people of the state with fuel. With splendid heroism, ex-service men, college students, and others of patriot mold, volunteered to do the work. Prudence demanded they be given military protection, and a regiment of the Kansas National Guard was sent with them to the mines. Gen. Wood also stationed a troop of regular army soldiers in the vicinity. On the way to Pittsburg, movement of the state troop train was insufferably delayed, until a sharp order to

proceed was given. Then the train was wrecked. After the volunteers and their military escort arrived at Pittsburg some sniping occurred, but without fatality, some mining machinery was disabled, and some hidden stores of dynamite were discovered. The determined character of the coal-producing enterprise seems then to have been appreciated, and further violence was not offered. The sublime cruelty of the strike method, however, was displayed in the treatment of the Pittsburg hospital. It was surrounded with coal mines. There were 15,000 idle miners in the district. The hospital was filled with sick, many of whom were miners, and the winter weather was severely cold. Coal was denied to his hospital by the strikers, although deprivation for a single day meant death to patients.

At the beginning of the year 1920 it had not been demonstrated that the world would escape bankruptcy as a result of the war. The problems of economic and industrial reconstruction were not merely local and national, but were international in character. Early hopes of a speedy and easy transition from war to peace conditions were not realized. Instead of that, the situation, always grave, was complicated and aggravated by continued rise in prices by profiteering, by social unrest fanned by radicalism, and by other ugly influences. The bitterness of the struggle between those who ought to be partners in industry became acute, the only remedy for the high cost of living—joining forces in greater production—was rejected, and economic readjustment promised little but economic turmoil. Under these circumstances, on January 5, 1920, the Legislature met in special session at the call of Gov. Allen to consider what it might do to protect the people of the state of Kansas from dislocations in production and distribution of the necessities of life. The result of its deliberations was the act creating the court of industrial relations.

Recurring to the Alabama coal strike, the fatalistic doctrine of fight in the event of disagreement was acted on, and, after all the disorder and destruction and suffering and death, what happened? An agreement by both sides to place the entire case in the hands of a state officer. If this method of composing disagreements be feasible at all, why fight at all?

Human progress is essentially increase in social well-being, and the primary condition to social well-being is abolition of strife. The Kansas statute provides a permanent board of state officers, sitting all the time, to receive submission of differences and adjust them, without expense to either disputant. Members of the board are not arbitrators. In actual practice, a board of arbitration is too frequently a jury packed on both sides. In any event, its verdict is a compro-

mise, and the public interest is not taken into consideration. The court of industrial relations sits to administer industrial justice, and its facilities for doing so are complete. Its command of data and of aids to sound conclusion includes everything that both business and government are able to supply. It supplants no type of shop committee, no mutual interest department of any business organization, and no principle of voluntary adjustment. Its intention is to prevent strife in case of disagreement, by promulgation of just, reasonable, and lawful regulations, and it must be classified as an instrument of social progress. With a tribunal of this kind to appeal to, disputants have no moral right, and have no economic excuse, for fighting after failing to agree.

Sometimes under stress of genuine emotion, sometimes in rant, and sometimes in misguided ignorance, labor speaks of its "right" to strike as God-given. Right to strike is God-given in the same sense that right indicated by the word "property" is God-given. They both developed naturally out of the relation of man to his environment, including other men. The primitive man claimed the game he killed, because it was necessary to his survival. This ownership extended to the flints he chipped, the arrows he barbed, and other things on which he depended for existence. Consciousness that a fight and probable injury would result induced other men to refrain from interfering with his possession. The practice grew into an overtly admitted claim. The practice became habitual, then customary and general, and finally crystallized into a rule, simply through a feeling that the rule possessed obligatory force. When legal institutions were set up, the sphere of self-help in enforcing the rule was very greatly narrowed. The right to strike grew up in precisely the same way. Quitting work, first permanently, and then with the expectation of resuming, was found by experience to produce a result which served an end. The practice of quitting work grew as the satisfaction was more often desired. The practice so fitted into the scheme of relations that it became recognized as rightful, and was protected by law. It has served as a rude but valuable weapon in the attainment of justice, and has been a positive factor contributing to social progress. As in the case of property, abuse and misuse are not to be tolerated.

In Alabama, the whole controversy which the strike left unsettled was placed in the hands of the Governor by agreement. The government of District No. 14, United Mine Workers of America, fines its officers \$5,000 each, and fines its subjects \$50 each, for recognizing the court of industrial relations. In case of disagreement, there is no remedy but fight. To a fair-minded person standing in the midst of the ruin wrought by a strike

it would seem the state might be interested in the mining business, in the miner, and in the man who needs coal, and might lawfully do something for each, before conflagration is started by the strike torch—the inevitable conflagration, whether the torch be applied by mine owner or by striker. Must Alabama wait until mine owner and miner see fit to go to Gov. Kilby? Must Kansas be driven to operate coal mines by volunteers, under the protection of troops, in order to keep her public institutions going, and in order that her people may have fuel in winter?

It seems to this court to be quite remarkable that public interest in affairs of this kind should now be challenged by anybody—but the challenge is made, and its grounds may be briefly considered.

Strangely enough, this gingham dog and calico cat business of eating each other up is defended under a constitution ordained and established "to insure domestic tranquillity." The mine owner vociferates "Property!" The miner shouts "Liberty!" Meanwhile, riot and bloodshed are rampant. Homeless women and children of District No. 20 watch the battle from tents on the hillside, and the nurse at the Pittsburg hospital feels her own heart freeze as she watches the temperature of her patient's room go down.

It is scarcely necessary to cite decisions to the effect that, in this country, every man holds all his rights and privileges subject to lawful interference by the state. The strike privilege was not conferred by any Constitution or by any statute. It developed in the field of the common law, and normally should be subject to legislative regulation.

The worker tells the story of the intolerable grievances he has suffered, his helplessness in a contest with organized and syndicated capital, the necessity for combining with his fellows, and the desperation which drove them to strike. The story is true in all its details; but there is a final chapter. The public began to take an interest in strikes long ago. Sympathy was likely to be with the under dog, who was likely to be entitled to his bone, and pressure of public opinion became a valuable ally of striking workmen. Then, in many instances, public inconvenience was deliberately contrived, and the relation which the typical strike ultimately bore to public welfare is revealed by the instances cited at the beginning of this discussion. The wailing of children starving for milk fell on deaf ears in Chicago.

It is said that a man is a slave unless he may quit work. The assertion is ambiguous. If it refers to striking, which is not abandonment of the employer's service at all, it is untrue. If it refers to leaving the employer's service, it is still untrue. A train crew may rightfully be forbidden to leave a trainload of passengers between stations. Probably, identification of striking with leaving

the employer's service under circumstances not so exceptional, is intended. In that sense the assertion is an abuse of language, and, if made by a person capable of clarity of thought and clarity of expression, can accomplish no purpose except to obscure the truth.

It is said the worker has a right to leave his employer's service, and what he may rightfully do, he may do with others having the same right. For obvious reasons of public policy, the privilege to discontinue personal service must be unrestrained. Every purpose of the policy is fulfilled by exercise of the privilege. When a worker undertakes to induce others to break their relationship with their employer, he steps outside the limits of the privilege which is essential to selfhood. He interferes in the affairs of others, and in a matter which bears no relation to his own personal privilege to work or quit work. The consequences are not those which follow from exercise of his own privilege, and they are to be appraised without reference to that privilege. When a worker confederates with others to leave service in a body, he steps outside the limits of privilege essential to selfhood. It requires no confederacy to enable him to quit work, and so escape servitude. Confederating being something which is outside of and unrelated to personal privilege to quit work, it is to be judged according to consequence and motive. In case of a strike, the object of the confederacy is not to preserve or to protect the privilege to quit work and be free. That privilege is already unrestrained. The object is to coerce the employer by the multiplied power of combined action, and to coerce him in respect to something which bears no relation to unrestrained privilege to quit work. Conduct of the worker, therefore, has ceased to be individual and personal. It presents a social aspect; and, when conduct becomes social, government takes an interest. If the general welfare be affected, government may take action.

It is said that organized labor is a part of the public, and the public has no rights superior to the toiler's right to live and to defend himself against oppression.

It is gratifying to know that the public has close relation to organized labor. Nobody disputes the toiler's right to live, or right to defend himself against oppression. If the assertion means the public has no rights superior to organized labor's right to strike, it would seem government, as the representative of the unorganized portion of the public, will be obliged to join a labor union, in order to obtain opportunity to work for the general welfare.

Let nobody be deceived concerning the relation of the strike to government. In the opinion in the Debs Case, the court pointed to the attempted exercise by individuals of powers belonging to government alone. Last

year, at the time of the Polish crisis, the Chicago Federation of Labor passed a resolution urging American labor bodies to prevent mobilization of military or naval forces to assist Poland. Congress passed the Adamson Law. The city of Boston must be delivered over to looting by mobs of thugs unless officers, who should have no interest except the public safety, may have the privilege of affiliating with the American Federation of Labor. The great city of Chicago must deal with "Umbrella Mike" in order to discharge its municipal functions. Alexander Howat does not recognize courts.

It is said that mitigation of the barbarity of the strike will be a step backward. In other departments of human interest we adopt measures to prevent misery and woe. The court of industrial relations is an industrial prophylactic, and the use of prophylactics has not heretofore been regarded as reactionary. In no other human relation is public brawling regarded as a public good; in no other human relation is the Higher Law a law of force; and the figure of the head of organized labor in the United States prescribing the limits of obedience to law in the name of unregulated force, calls to mind the figure of the former emperor of Germany, who, on a public occasion said: "There is only one master in this country. I am he, and I will not tolerate another" and who later said, "Those who try to interfere with my tasks I shall crush."

It has seemed necessary to say thus much concerning the so-called "right" to strike, because of the earnestness, and in some instances the extravagance, with which it is defended. Let it be made plain here and now that the court champions no favorite in the so-called industrial conflict. On other occasions the court has spoken frankly of the inhumanity of departments of the modern industrial system, and of the cruelties which have accompanied industrial growth. Waste of human life and limb, and the casting upon society of cripples, human derelicts, and widows and orphans without means of support, were almost a feature of the conduct of some industries; and laws such as the Factory Act, the Workmen's Compensation Act, and other remedial measures, were opposed with the utmost vehemence. The mining industry is not guiltless. Some who have engaged in it had no conception of public service. They mined coal for profit. They were interested in limited production, because it was believed to occasion high prices. They were not greatly concerned about cost, because the public paid the bills. This attitude resulted in chronic mismanagement, and they had no part in what they regarded as sentimental movements for amelioration. Miners were exploited through overwork and underpay, through company stores and oppressive regulations, through

inadequate safeguards and accidents which took the form of holocausts, through bad sanitation and bad housing, and through long and unnecessary periods of enforced idleness. The miner had no capital except his capacity to labor. His situation was such that he was obliged to accept whatever terms and working conditions were offered him. His "liberty" to quit work and go elsewhere if not satisfied with his employer's terms was pure myth and mockery. He could not even get in touch with the superintendent to talk over his grievances. If by some fortuity he did so, and contended too long or too strenuously, he was discharged, and, if an American citizen, it was likely his place was taken by a foreign immigrant. As an individual he was helpless; but he had to live. His only remedy appeared to be to federate with others, and take such drastic action as would extort from his employer some measure of relief from conditions which could not be endured. Other chapters of our industrial history contain nothing which does not deserve praise, and they prompt eulogies of the fine spirit and attitude, the co-operative relationship, and the splendid achievements of American capital and American labor. To indulge the prompting here would serve no purpose, because, as was said in the beginning, the act creating the court of industrial relations was justified, or was not justified, by ominous facts, some of which the court was compelled to state on this record.

The law applicable to the facts may be sketched as briefly as possible. Some centuries ago it was found expedient, in the country from which our legal institutions were derived, to regulate business in the interest of the public welfare. Some regulations were unwise and ineffective. Others served their purpose, and then fell into disuse because of changed conditions. The trend of economic development was such that for a long time regulation of business was practically dormant, and economic theory was framed accordingly; but there never was a time when legal theory forbade regulation, if public inconvenience and public oppression demanded it. Sometimes it was public health which required intervention, and sometimes public safety; but business was frequently regulated simply because it was "affected with a public interest." Our colonial history furnishes instances of such regulation, and it was not unfamiliar to framers of the Constitution of the United States. When it is said, therefore, that the act of 1920 is a discredited and discarded form of interference with private business, brought from the lumber room of the remote past, the essence of the matter is not touched. Organized government has never been without power to make regulations whenever the conduct of business threatened public harm, and the power has been exercised as

occasion required. Reservation to the states, in the Constitution of the United States, of the police power, and limitations on exercise of that power, are subjects of familiar law. In 1876, the decision in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, was rendered. That decision was followed by determined reactionary efforts to limit its application to definite classes of business—business involving use of property, business enjoying a franchise, business enjoying a monopoly. These and other efforts to limit, and even to overthrow, the doctrine of the *Munn Case*, failed, and all the arguments by which they were sustained were refuted in the opinion in the case of *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189—a landmark in the progress of the law almost as noteworthy as the case of *Munn v. Illinois*.

Eminent counsel, representing employers of labor in industries affected by the act of 1920, were invited to file briefs in this case, and the court gratefully acknowledges the benefit of their very candid and very forceful criticisms of the act. Their chief contentions, including the in terrorem argument that constitutional government is jeopardized and all the affairs of life may be regulated if the *Munn Case* be applied to any new subject, are so fully met by the decision in the *Insurance Co. Case* that space will be given to an extended quotation from the opinion:

"In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;' or, as we have said, quoting counsel, 'Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the

assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank v. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated.

"*Munn v. Illinois*, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The Constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern, and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, 'that when private property is "affected with a public interest it ceases to be *juris privati*" only,' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large'; and, so using it, the owner 'grants to the public an interest in that use, and must submit to be controlled by the public for the common good.' And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, 'for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.' The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

"That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private, and had 'no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business.' The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. Against that conservatism of the mind, which

puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government, state and national, has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

"*Munn v. Illinois* was approved in many state decisions, but it was brought to the review of this court in *Budd v. New York*, 143 U. S. 517, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated, and for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good, and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

"In *Brass v. Stoesser*, 153 U. S. 391, *Munn v. Illinois* and *Budd v. New York* were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators, and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases, and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (page 402), 'that the statutes of Illinois and New York [passed on in the *Munn* and *Budd* Cases] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities.' And it was also urged that the method of carrying on business in North Dakota and the eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads, and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented

the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was 'for those who make, not for those who interpret, the laws.' And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws than to their validity, yet it was further said the expressions had their value, because the 'obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law.' Page 404.

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may arise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd*, 117 N. Y. 1, 27, that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected, cannot be supported. 'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.' * * * It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day." *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 406-411, 34 Sup. Ct. 612, 617-619 (58 L. Ed. 1011, L. R. A. 1915C, 1189).

The Legislature was of the opinion the industries specified in section 3 of the act of 1920 are affected with a public interest, and so declared. The declaration did not make them so. Whether they are or not depends on their relation to public interest. Without presenting the facts of which the court takes judicial knowledge concerning the peculiar relation the product of the Kansas coal mines bears to the state's fuel supply, and without discussing further the peculiar conditions under which production is accomplished, the court concludes the business of producing coal bears an intimate relation to the public peace, good order, health, and welfare; that such business is affected with a public interest; and that such business may be regulated, to the end that reasonable continuity and efficiency of production may be maintained.

The mills of Kansas stand to-day "at the gateway of commerce" more prominently than did private elevators 45 years ago. Great packing plants, belonging to what the

Federal Trade Commission calls the "Big Five," are located in Kansas. Many smaller packing companies operate plants within the state, and the meat-packing industry effectively dominates, not only a food supply, but one of the great industries of the state, the live stock industry. There are other reasons for regulation, which need not be specified because the issues in this case involve production of fuel only; but the manufacture of food products is mentioned to show the precarious ground on which the state stands in respect to its supply of the necessities of life in case of emergency.

[8] The business of producing coal being affected with a public interest to an extent authorizing reasonable regulation, is the act of 1920 such a regulation? The defendants contend that it is not, because it destroys liberty of contract.

The offending provision of the act is section 9. The section begins with the recognition of approved general principles which ought to be applied in the regulation of industry. It then makes acknowledgment of the right of free choice of employment and of the right to make and carry out fair, just, and reasonable contracts and agreements of employment. The section concludes as follows:

"If, during the continuance of any such employment, the terms or conditions of any such contract or agreement hereafter entered into, are by said court, in any action or proceeding properly before it under the provisions of this act, found to be unfair, unjust or unreasonable, said court of industrial relations may by proper order so modify the terms and conditions thereof so that they will be and remain fair, just and reasonable and all such orders shall be enforced as in this act provided."

The argument in opposition to validity of the section is marred by the interlarding of imputations to the regulating body of authority to act arbitrarily, to act according to its pleasure, to act according to its will, to act according to its whim. The Legislature granted no such authority, and the fair presumption is that public officers in such an important station will not abuse their trust. The point is made, however, that workmen have the privilege of exercising their own judgment with respect to the fairness, justness and reasonableness of engagements with employers, and that contracts under which they work, satisfactory to themselves and to their employers, are not subject to modification or abrogation by the court of industrial relations. The argument misconceives the meaning of the section; and in order to present the proper interpretation of the section, it will be necessary to relate it to the general scheme of the law.

The Legislature was moved to take action by circumstances and by events which have been narrated. They disclosed the helplessness of the people in an emergency, and the

purpose was to be prepared in the future for any emergency. It would be folly to wait until it is again necessary to call out troops. Measures of preparedness are fair subjects of legislative choice, within the well-understood constitutional limitations. The subjects chosen were the necessities of life. The extent of the regulation, so far as it affects the defendants, was protection of reasonable continuity and efficiency of production. Production is fundamental; there can be no distribution or consumption until there has been production. Continuous production, and production according to the approval of an efficiency expert, are not required at all. Only that continuity and efficiency are required which will secure the people from privation and oppression. Limiting production and withdrawing from production are expressly permitted for any purpose which does not contemplate circumvention of the law. The court of industrial relations, however, has oversight of production all the time. Jurisdiction is not suspended from crisis to crisis. If the court must wait until the evils of a crisis have been suffered, the statute is nugatory. Should authority be too zealously manifested in improper or unwarranted interference, the particular orders are subject to review, and may be annulled. A controversy between employer and workers, or between groups or crafts of workers, which endangers production, creates an emergency, with which the court may deal on its own motion, or on complaint. It may make temporary orders to preserve the peace and to protect private and public interests pending investigation. After investigation, the court makes and serves on the parties to the controversy findings on which orders may be based, settling and adjusting the controversy. The nature of the court's action depends on the result of the investigation, and its determination of the controversy extends no further than the purpose of the act requires. Orders, pursuant to findings, respecting all the common subjects of industrial controversy, are authorized. Every order made is essentially an emergency order, and continues in force only for such reasonable time, to be fixed by the court, as may be necessary to avert danger. If, after experiment, either party to the controversy finds the order unreasonable or impracticable, application may be made for modification. Any order is subject to change by agreement between the parties to the controversy, with approval of the court. This approval extends merely to seeing that a contract shall not be made use of to defeat the policy of the statute. Collective bargaining, by unions or associations of workers, whether incorporated or unincorporated, is expressly recognized. In case of contumacy, the court is authorized to take over the coal mines, by proper proceedings, and control and operate them.

Section 9 does not authorize a general re-

vision of labor contracts. In congruity with other sections, it does no more than provide that contracts shall not thwart achievement of the public purposes of the statute. No contract may be modified except in an action or proceeding properly before the court, that is, an action or proceeding relating to a controversy. If, in dealing with the emergency created by a controversy, the court encounters a contract which would hamper the making of a necessary order, the contract may be treated as any other element of the situation. No contract is to be regarded as unfair, unjust, or unreasonable that is not an impediment to settlement of a controversy, and orders respecting contracts of the obstructive character are merely ancillary to determination of the controversy. The power exercised in making such orders is the same power which takes entire charge of a mine and operates it during an emergency.

Section 17 makes unlawful conspiracy to quit employment and to induce others to quit, picketing, and the bludgeoning of those who want to work, whether employees or not, by abuse, intimidation, and threat, for the purpose of accomplishing that which the statute was designed to prevent. It is said this section destroys collective bargaining. Collective bargaining is bargaining by an organization or group of workmen, on behalf of its members, with the employer. That privilege is not only protected, but may be exercised, and is expected to be exercised, even to the extent of altering orders of the court of industrial relations. What the defendants contend for is license to conspire to injure the public.

It is said the act of 1920 is void because it trenches on personal liberty. The personal liberty contended for is liberty to leave the employer's service. All the leading cases in which the principle involved have been discussed are cited. It is not necessary to review them. The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. As many others as desire may do likewise, and they may do so as the result of mutual interest consultations. No employee may, however, transgress the limits of his personal privilege, as defined earlier in this opinion, for the purpose of limiting or suspending production, contrary to the provisions of the act.

Reference is made to cases discussing an employer's privilege to discharge workmen. The statute contains just one provision touching that subject. In order to protect jurisdiction and authority of the court of industrial relations, it is made unlawful to discharge a workman for complaining to or testifying before the court. In no other respect is the employer's right to "hire and fire" restricted. The defendants are not interested

in the provision referred to. If they were, and if the provision were invalid, it would not vitiate the valid portions of the statute. Understanding the pioneer character of its work, the Legislature framed the statute so that any invalid provision—not section, but provision (section 28)—may be eliminated without affecting others. This rule of interpretation extends to application of the same provision to different subjects.

Heretofore, the industrial relationship has been tacitly regarded as existing between two members, industrial manager and industrial worker. They have joined wholeheartedly in excluding others. The Legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation, and distribution of the necessities of life, the public. The Legislature also proceeded on the theory the public is not a silent partner. Whenever the dissensions of the other two become flagrant, the third member may see to it the business does not stop. The privilege of industrial managers to organize is not disputed. The privilege of industrial workers to organize is expressly recognized. Collective bargaining between the two organizations is not only encouraged, but is in effect placed on the plane of duty. The rights of society as a whole, however, are dominant over industry; and the state is under obligation to intervene to compel settlement of differences whenever failure of manager and laborer to agree endangers the public safety or causes general distress.

The judgment of the district court is affirmed.

All the Justices concurring.

NOTE.

The Kansas Court of Industrial Relations.

Chapter 29, Special Session Laws of 1920.

An act creating the Court of Industrial Relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act.

Be it enacted by the Legislature of the State of Kansas:

Section 1. There is hereby created a tribunal to be known as the Court of Industrial Relations, which shall be composed of three judges who shall be appointed by the Governor, by and with the advice and consent of the Senate. Of such three judges first appointed, one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, said terms to begin simultaneously upon qualification of the persons appointed therefor. Upon the expiration of the term of the three judges first appointed as aforesaid, each succeeding judge shall be appointed and shall hold his office for a term of three years and until his successor shall have been qualified. In case of a vacancy in the office of judge of said Court of Industrial Relations the Governor

shall appoint his successor to fill the vacancy for the unexpired term. The salary of each of said judges shall be five thousand dollars per year, payable monthly. Of the judges first to be appointed, the one appointed for the three-year term shall be the presiding judge, and thereafter the judge whose term of service has been the longest shall be the presiding judge: Provided, that in case two or more of said judges shall have served the same length of time, the presiding judge shall be designated by the Governor.

Sec. 2. The jurisdiction conferred by law upon the Public Utilities Commission of the state of Kansas is hereby conferred upon the Court of Industrial Relations, and the said Court of Industrial Relations is hereby given full power, authority and jurisdiction to supervise and control all public utilities and all common carriers as defined in sections 8329 and 8330 of the General Statutes of Kansas for 1915, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction. All laws relating to the powers, authority, jurisdiction and duties of the Public Utilities Commission of this state are hereby adopted and all powers, authority, jurisdiction and duties by said laws imposed and conferred upon the Public Utilities Commission of this state relating to common carriers and public utilities are hereby imposed and conferred upon the Court of Industrial Relations created under the provisions of this act; and in addition thereto said Court of Industrial Relations shall have such further power, authority and jurisdiction and shall perform such further duties as are in this act set forth, and said Public Utilities Commission is hereby abolished. That all pending actions brought by or against the said Public Utilities Commission of this state shall not be affected, but the same may be prosecuted or defended by and in the name of the Court of Industrial Relations. Any investigation, examination, or proceedings had or undertaken, commenced or instituted by or pending before said Public Utilities Commission at the time of the taking effect of this act are transferred to and shall be continued and heard by the said Court of Industrial Relations hereby created, under the same terms and conditions and with like effect as though said Public Utilities Commission had not been abolished.

Sec. 3. (a) The operation of the following named and indicated employments, industries, public utilities and common carriers is hereby determined and declared to be affected with a public interest and therefore subject to supervision by the state as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state and in the promotion of the general welfare, to wit: (1) The manufacture or preparation of food products whereby, in any stage of the process, substances are being converted, either partially or wholly, from their natural state to a condition to be used as food for human beings; (2) the manufacture of clothing and all manner of wearing apparel in common use by the people of this state whereby, in any stage of the process, natural products are being converted, either partially or

wholly, from their natural state to a condition to be used as such clothing and wearing apparel; (3) the mining or production of any substance or material in common use as fuel either for domestic, manufacturing, or transportation purposes; (4) the transportation of all food products and articles or substances entering into wearing apparel, or fuel, as aforesaid, from the place where produced to the place of manufacture or consumption; (5) all public utilities as defined by section 8329, and all common carriers as defined by section 8330 of the General Statutes of Kansas of 1915.

(b) Any person, firm or corporation engaged in any such industry or employment, or in the operation of such public utility or common carrier, within the state of Kansas, either in the capacity of owner, officer, or worker, shall be subject to the provisions of this act, except as limited by the provisions of this act.

Sec. 4. Said Court of Industrial Relations shall have its office at the capital of said state in the city of Topeka, and shall keep a record of all its proceedings which shall be a public record and subject to inspection the same as other public records of this state. Said court, in addition to the powers and jurisdiction heretofore conferred upon, and exercised by, the Public Utilities Commission, is hereby given full power, authority and jurisdiction to supervise, direct and control the operation of the industries, employments, public utilities, and common carriers in all matters herein specified and in the manner provided herein, and to do all things needful for the proper and expeditious enforcement of all the provisions of this act.

Sec. 5. Said Court of Industrial Relations is hereby granted full power to adopt all reasonable and proper rules and regulations to govern its proceedings, the service of process, to administer oaths, and to regulate the mode and manner of all its investigations, inspections and hearings: Provided, however, that in the taking of testimony the rules of evidence, as recognized by the Supreme Court of the state of Kansas in original proceedings therein, shall be observed by said Court of Industrial Relations; and testimony so taken shall in all cases be transcribed by the reporter for said Court of Industrial Relations in duplicate, one copy of said testimony to be filed among the permanent records of said court, and the other to be submitted to said Supreme Court in case the matter shall be taken to said Supreme Court under the provisions of this act.

Sec. 6. It is hereby declared and determined to be necessary for the public peace, health and general welfare of the people of this state that the industries, employments, public utilities and common carriers herein specified shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and security, and be supplied with the necessities of life. No person, firm, corporation, or association of persons shall in any manner or to any extent, willfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading the purpose and intent of the provisions of this act; nor shall any person, firm, corporation, or association of persons do any act or neglect or refuse to perform any duty herein enjoined with the intent to hinder, delay, limit or suspend such continuous and efficient operation as

aforesaid, except under the terms and conditions provided by this act.

Sec. 7. In case of a controversy arising between employers and workers, or between groups or crafts of workers, engaged in any of said industries, employments, public utilities, or common carriers, if it shall appear to said Court of Industrial Relations that said controversy may endanger the continuity or efficiency of service of any of said industries, employments, public utilities or common carriers, or affect the production or transportation of the necessities of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health, full power, authority and jurisdiction are hereby granted to said Court of Industrial Relations, upon its own initiative, to summon all necessary parties before it and to investigate said controversy, and to make such temporary findings and orders as may be necessary to preserve the public peace and welfare and to preserve and protect the status of the parties, property and public interests involved pending said investigations, and to take evidence and to examine all necessary records, and to investigate conditions surrounding the workers, and to consider the wages paid to labor and the return accruing to capital, and the rights and welfare of the public, and all other matters affecting the conduct of said industries, employments, public utilities or common carriers, and to settle and adjust all such controversies by such findings and orders as provided in this act. It is further made the duty of said Court of Industrial Relations, upon complaint of either party to such controversy, or upon complaint of any ten citizen taxpayers of the community in which such industries, employments, public utilities or common carriers are located, or upon the complaint of the Attorney General of the state of Kansas, if it shall be made to appear to said court that the parties are unable to agree and that such controversy may endanger the continuity or efficiency of service of any of said industries, employments, public utilities or common carriers, or affect the production or transportation of the necessities of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health, to proceed and investigate and determine said controversy in the same manner as though upon its own initiative. After the conclusion of any such hearing and investigation, and as expeditiously as possible, said Court of Industrial Relations shall make and serve upon all interested parties its findings, stating specifically the terms and conditions upon which said industry, employment, utility or common carrier should be thereafter conducted in so far as the matters determined by said court are concerned.

Sec. 8. The Court of Industrial Relations shall order such changes, if any, as are necessary to be made in and about the conduct of said industry, employment, utility or common carrier, in the matters of working and living conditions, hours of labor, rules and practices,

and a reasonable minimum wage, or standard of wages, to conform to the findings of the court in such matters, as provided in this act, and such orders shall be served at the same time and in the same manner as provided for the service of the court's findings in this act: Provided, All such terms, conditions, and wages shall be just and reasonable and such as to enable such industries, employments, utilities or common carriers to continue with reasonable efficiency to produce or transport their products or continue their operations and thus to promote the general welfare. Service of such order shall be made in the same manner as service of notice of any hearing before said court as provided by this act. Such terms, conditions, rules, practices, wages, or standard of wages, so fixed and determined by said court and stated in said order, shall continue for such reasonable time as may be fixed by said court, or until changed by agreement of the parties with the approval of the court. If either party to such controversy shall in good faith comply with any order of said Court of Industrial Relations for a period of sixty days or more, and shall find said order unjust, unreasonable or impracticable, said party may apply to said Court of Industrial Relations for a modification thereof and said Court of Industrial Relations shall hear and determine said application and make findings and orders in like manner and with like effect as originally. In such case the evidence taken and submitted in the original hearing may be considered.

Sec. 9. It is hereby declared necessary for the promotion of the general welfare that workers engaged in any of said industries, employments, utilities or common carriers shall receive at all times a fair wage and have healthful and moral surroundings while engaged in such labor; and that capital invested therein shall receive at all times a fair rate of return to the owners thereof. The right of every person to make his own choice of employment and to make and carry out fair, just and reasonable contracts and agreements of employment, is hereby recognized. If, during the continuance of any such employment, the terms or conditions of any such contract or agreement hereafter entered into, are by said court, in any action or proceeding properly before it under the provisions of this act, found to be unfair, unjust or unreasonable, said Court of Industrial Relations may by proper order so modify the terms and conditions thereof so that they will be and remain fair, just and reasonable and all such orders shall be enforced as in this act provided.

Sec. 10. Before any hearing, trial or investigation shall be held by said court, such notice as the court shall deem necessary shall be given to all parties interested by registered U. S. mail addressed to said parties to the post office of the usual place of residence or business of said interested parties when same is known, or by the publication or notice in some newspaper of general circulation in the county in which said industry or employment, or the principal office of such utility or common carrier is located, and said notice shall fix the time and place of said investigation or hearing. The costs of publication shall be paid by said court out of any funds available therefor. Such notice shall contain the substance of the matter to be investigated, and shall notify all persons

interested in said matter to be present at the time and place named to give such testimony or to take such action as they may deem proper.

Sec. 11. Said Court of Industrial Relations may employ a competent clerk, marshal, shorthand reporter, and such expert accountants, engineers, stenographers, attorneys and other employees as may be necessary to conduct the business of said court; shall provide itself with a proper seal and shall have the power and authority to issue summons and subpoenas and compel the attendance of witnesses and parties and to compel the production of the books, correspondence, files, records, and accounts of any industry, employment, utility or common carrier, or of any person, corporation, association or union of employees affected, and to make any and all investigations necessary to ascertain the truth in regard to said controversy. In case any person shall fail or refuse to obey any summons or subpoena issued by said court after due service then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena. Employees of said court whose salaries are not fixed by law shall be paid such compensation as may be fixed by said court, with the approval of the Governor.

Sec. 12. In case of the failure or refusal of either party to said controversy to obey and be governed by the order of said Court of Industrial Relations, then and in that event said court is hereby authorized to bring proper proceedings in the Supreme Court of the state of Kansas to compel compliance with said order; and in case either party to said controversy should feel aggrieved at any order made and entered by said Court of Industrial Relations, such party is hereby authorized and empowered within ten days after service of such order upon it to bring proper proceedings in the Supreme Court of the state of Kansas to compel said Court of Industrial Relations to make and enter a just, reasonable and lawful order in the premises. In case of such proceedings in the Supreme Court by either party, the evidence produced before said Court of Industrial Relations may be considered by said Supreme Court, but said Supreme Court, if it deem further evidence necessary to enable it to render a just and proper judgment, may admit such additional evidence in open court or order it taken and transcribed by a master or commissioner. In case any controversy shall be taken by either party to the Supreme Court of the state of Kansas under the provisions of this act, said proceedings shall take precedence over other civil cases before said court, and a hearing and determination of the same shall be by said court expedited as fully as may be possible consistent with a careful and thorough trial and consideration of said matter.

Sec. 13. No action or proceeding in law or equity shall be brought by any person, firm or corporation to vacate, set aside, or suspend any order made and served as provided in this act, unless such action or proceeding shall be commenced within thirty days from the time of the service of such order.

Sec. 14. Any union or association of workers engaged in the operation of such industries, employments, public utilities or common carriers, which shall incorporate under the laws

of this state shall be by said Court of Industrial Relations considered and recognized in all its proceedings as a legal entity and may appear before said Court of Industrial Relations through and by its proper officers, attorneys or other representatives. The right of such corporations, and of such unincorporated unions or associations of workers, to bargain collectively for their members is hereby recognized: Provided, that the individual members of such unincorporated unions or associations, who shall desire to avail themselves of such right of collective bargaining, shall appoint in writing some officer or officers of such union or association, or some other person or persons as their agents or trustees with authority to enter into such collective bargains and to represent each and every of said individuals in all matters relating thereto. Such written appointment of agents or trustees shall be made a permanent record of such union or association. All such collective bargains, contracts, or agreements shall be subject to the provisions of section nine of this act.

Sec. 15. It shall be unlawful for any person, firm or corporation to discharge any employee or to discriminate in any way against any employee because of the fact that any such employee may testify as a witness before the Court of Industrial Relations, or shall sign any complaint or shall be in any way instrumental in bringing to the attention of the Court of Industrial Relations any matter of controversy between employers and employees as provided herein. It shall also be unlawful for any two or more persons, by conspiring or confederating together, to injure in any manner any other person or persons, or any corporation, in his, their, or its business, labor, enterprise, or peace and security, by boycott, by discrimination, by picketing, by advertising, by propaganda, or other means, because of any action taken by any such person or persons, or any corporation, under any order of said court, or because of any action or proceeding instituted in said court, or because any such person or persons, or corporation, shall have invoked the jurisdiction of said court in any matter provided for herein.

Sec. 16. It shall be unlawful for any person, firm, or corporation engaged in the operation of any such industry, employment, utility, or common carrier willfully to limit or cease operations for the purpose of limiting production or transportation or to affect prices, for the purpose of avoiding any of the provisions of this act; but any person, firm or corporation so engaged may apply to said Court of Industrial Relations for authority to limit or cease operations, stating the reasons therefor, and said Court of Industrial Relations shall hear said application promptly, and if said application shall be found to be in good faith and meritorious, authority to limit or cease operations shall be granted by order of said court. In all such industries, employments, utilities or common carriers in which operation may be ordinarily affected by changes in season, market conditions, or other reasons or causes inherent in the nature of the business, said Court of Industrial Relations may, upon application and after notice to all interested parties, and investigation, as herein provided, make orders fixing rules, regulations and practices to govern the operation of such industries, employ-

ments, utilities or common carriers for the purpose of securing the best service to the public consistent with the rights of employers and employees engaged in the operation of such industries, employments, utilities or common carriers.

Sec. 17. It shall be unlawful for any person, firm or corporation, or for any association of persons, to do or perform any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to conspire or confederate with others to do or perform any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to induce or intimidate any person, firm or corporation engaged in any of said industries, employments, utilities or common carriers to do any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, for the purpose or with the intent to hinder, delay, limit, or suspend the operation of any of the industries, employments, utilities or common carriers herein specified or indicated, or to delay, limit, or suspend the production or transportation of the products of such industries, or employments, or the service of such utilities or common carriers: Provided, that nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time, but it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as 'picketing,' or to intimidate by threats, abuse, or in any other manner, any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act.

Sec. 18. Any person willfully violating the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction of this state shall be punished by a fine of not to exceed \$1,000, or by imprisonment in the county jail for a period of not to exceed one year, or by both such fine and imprisonment.

Sec. 19. Any officer of any corporation engaged in any of the industries, employments, utilities or common carriers herein named and specified, or any officer of any labor union or association of persons engaged as workers in any such industry, employment, utility or common carrier, or any employer of labor, coming within the provisions of this act, who shall willfully use the power, authority or influence incident to his official position, or to his position as an employer of others, and by such means shall intentionally influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of

said Court of Industrial Relations, shall be deemed guilty of a felony and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not to exceed \$5,000, or by imprisonment in the state penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment.

Sec. 20. In case of the suspension, limitation or cessation of the operation of any of the industries, employments, public utilities or common carriers affected by this act, contrary to the provisions hereof, or to the orders of said court made hereunder, if it shall appear to said court that such suspension, limitation, or cessation shall seriously affect the public welfare by endangering the public peace, or threatening the public health, then said court is hereby authorized, empowered and directed to take proper proceedings in any court of competent jurisdiction of this state to take over, control, direct and operate said industry, employment, public utility or common carrier during such emergency: Provided, that a fair return and compensation shall be paid to the owners of such industry, employment, public utility or common carrier, and also a fair wage to the workers engaged therein, during the time of such operation under the provisions of this section.

Sec. 21. When any controversy shall arise between employer and employee as to wages, hours of employment, or working or living conditions, in any industry not hereinbefore specified, the parties to such controversy may, by mutual agreement, and with the consent of the court, refer the same to the Court of Industrial Relations for its findings and orders. Such agreement of reference shall be in writing, signed by the parties thereto; whereupon said court shall proceed to investigate, hear, and determine said controversy as in other cases, and in such case the findings and orders of the Court of Industrial Relations as to said controversy shall have the same force and effect as though made in any essential industry as herein provided.

Sec. 22. Whenever deemed necessary by the Court of Industrial Relations, the court may appoint such person, or persons, having a technical knowledge of bookkeeping, engineering, or other technical subjects involved in any inquiry in which the court is engaged, as a commissioner for the purpose of taking evidence with relation to such subject. Such commissioner when appointed shall take an oath to well and faithfully perform the duties imposed upon him, and shall thereafter have the same power to administer oaths, compel the production of evidence, and the attendance of witnesses as the said court would have if sitting in the same matter. Said commissioner shall receive such compensation as may be provided by law or by the order of said court, to be approved by the Governor.

Sec. 23. Any order made by said Court of Industrial Relations as to a minimum wage or a standard of wages shall be deemed prima facie reasonable and just, and if said minimum wage or standard of wages shall be in excess of the wages theretofore paid in the industry, employment, utility or common carrier, then and in that event the workers affected thereby shall be entitled to receive said minimum wage or standard of wages from the date of the service of summons or publication of notice insti-

tuting said investigation, and shall have the right individually, or in case of incorporated unions or associations, or unincorporated unions or associations entitled thereto, collectively, to recover in any court of competent jurisdiction the difference between the wages actually paid and said minimum wage or standard of wages so found and determined by said court in such order. It shall be the duty of all employers affected by the provisions of this act, during the pendency of any investigation brought under this act, or any litigation resulting therefrom, to keep an accurate account of all wages paid to all workers interested in said investigation or proceeding: Provided, that in case said order shall fix a wage or standard of wages which is lower than the wages theretofore paid in the industry, employment, utility or common carrier affected, then and in that event the employers shall have the same right to recover in the same manner as provided in this section with reference to the workers.

Sec. 24. With the consent of the Governor, the judges of said Court of Industrial Relations are hereby authorized and empowered to make, or cause to be made, within this state or elsewhere, such investigations and inquiries as to industrial conditions and relations as may be profitable or necessary for the purpose of familiarizing themselves with industrial problems such as may arise under the provisions of this act. All the expenses incurred in the performance of their official duties by the individual members of said court and by the employees and officers of said court, shall be paid by the state out of funds appropriated therefor by the Legislature, but all warrants covering such expenses shall be approved by the Governor of said state.

Sec. 25. The rights and remedies given and provided by this act shall be construed to be cumulative of all other laws in force in said state relating to the same matters, and this act shall not be interpreted as a repeal of any other act now existing in said state with reference to the same matters referred to in this act, except where the same may be inconsistent with the provisions of this act.

Sec. 26. The provisions of this act and all grants of power, authority and jurisdiction herein made to said Court of Industrial Relations shall be liberally construed and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon said Court of Industrial Relations.

Sec. 27. Annually and on or before January first of each year, said Court of Industrial Relations shall formulate and make a report of all its acts and proceedings, including a financial statement of expenses, and shall submit the same to the Governor of this state for his information. All expenses incident to the conduct of the business of said Court of Industrial Relations shall be paid by the said court on warrants signed by its presiding judge and clerk, and countersigned by the Governor and shall be paid out of funds appropriated therefor by the Legislature. The said Court of Industrial Relations shall, on or before the convening of the Legislature, make a detailed estimate of the probable expenses of conducting its business and proceedings for the ensuing two years, and attach thereto a copy of the reports furnished the Governor, all of which

shall be submitted to the Governor of this state and by him submitted to the Legislature.

Sec. 28. If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the Legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.

Sec. 29. All acts and parts of acts in conflict herewith are hereby repealed.

Sec. 30. This act shall take effect and be in force from and after its publication in the official state paper.

(109 Kan. 269)

PENLAND v. BARRETT CO. (No. 23065.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Principal and agent ⇨189(1)—Petition held sufficiently to allege execution of contract with principal.

The petition alleged facts sufficient to show that a contract had been entered into between the plaintiff and the defendant.

2. Principal and agent ⇨193—Evidence to show execution of contract with principal held sufficient to go to jury.

There was sufficient evidence tending to show that a contract had been entered into between the plaintiff and the defendant to warrant the court in overruling the demurrer to the plaintiff's evidence.

3. Principal and agent ⇨124(2)—Agency to enter into contract binding defendant to lay roof on schoolhouse held for jury.

There was evidence sufficient to warrant the court in submitting to the jury the question of the agency of third parties to enter into a contract binding the defendant.

4. Principal and agent ⇨193—Execution of contract with principal held for jury.

There was sufficient evidence to warrant the court in directing the jury to find whether or not there was a contract between the plaintiff and the defendant.

Appeal from District Court, Osborne County.

Action by W. N. Penland against the Barrett Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John N. Davis, of Kansas City, Mo., and J. K. Mitchell, of Osborne, for appellant.

Edgar C. Bennett, of Washington, Kan., and J. L. Travers, of Osborne, for appellee.

MARSHALL, J. The plaintiff recovered judgment for damages on account of a defective roof laid by the defendant, a corporation, on a school building being erected by

the plaintiff for a school district in Osborne county. The defendant appeals.

[1] 1. The defendant complains of an order overruling a demurrer to the plaintiff's petition, which alleged in substance that the defendant contracted with the plaintiff to put a Barrett specification roof on a school building at Natoma, being erected by the plaintiff, and alleged that the offer of the defendant to construct the roof was contained in a letter, and that the offer was accepted by the plaintiff. The letter was as follows:

"W. N. Penland, Osborne, Kansas—Dear Sir: The Barrett Company have requested us to submit a figure on applying a Barrett specification roof on school building you have under contract at Natoma, Kansas.

"We propose to furnish the specification material, pay all freights and other expense, and apply a twenty-year roof over boards for the sum of nine dollars (\$9.00) per square. This would leave you to furnish gravel or Joplin chatts. Either would fulfill specifications.

"Suppose you will be using more or less chatts for cement floors, etc. You would require for the roof about 300 lbs. to the square.

"We would be pleased to hear from you.

"Resp., A. J. Shirk Roofing Co.,
"Geo. F. Moeller, Prest."

The defendant argues that the petition alleged that the contract was made with the defendant, but that in contradiction thereto the letter showed that the contract was made with A. J. Shirk Roofing Company. An examination of the letter reveals that it states that the proposition contained therein was submitted at the request of the defendant. There was no allegation in the petition that the Shirk Roofing Company was the agent of the defendant, but a reasonable interpretation of the letter is that the Shirk Roofing Company was acting for the defendant when the offer contained in the letter was made. If the letter and the allegations of the petition are construed together, as they should be, it will be seen that they are not contradictory to, but are harmonious with, each other. It must be held that the petition alleged a contract with the defendant, and stated a cause of action.

[2] 2. At the close of the plaintiff's evidence the defendant's demurrer thereto was overruled. To support this demurrer the defendant argues that there was no evidence to show that the defendant had contracted with the plaintiff to put on a roof on the school building. The evidence of the plaintiff tended to prove that the proposition contained in the letter, which has been set out, was accepted by him; that when the roof was first laid the defendant had a representative present who directed the work; that the roof proved defective and caused the damage for the recovery of which the plaintiff commenced this action; that the defendant put

a new roof on the building; that when the first roof was completed the A. J. Shirk Roofing Company reported to the defendant the amount of material that had been received from it for the purpose of laying the roof, the amount that had been used, and the amount that was returned; that after the first roof had been laid, and it had been discovered that it was defective, correspondence took place between the plaintiff and the defendant, which resulted in a new roof being put on by the defendant; that when the first roof was completed the defendant gave a surety bond to the school district, guaranteeing the roof for a period of 20 years; and that in the bond the defendant agreed that it would at its own expense make any repairs which might become necessary to maintain the roof for that period. The evidence was sufficient to compel the court to submit to the jury all matters that were in issue, and the demurrer to the evidence was properly overruled.

[3] 3. The defendant contends that the court erroneously instructed the jury concerning the agency of the A. J. Shirk Roofing Company. Those instructions were as follows:

"An agent who acts without authority from his principal does not bind the principal, unless the principal after full knowledge of what the agent did accepts or approves the acts of the agent, or accepts the benefit of the unauthorized act, and in this case, if you find by the greater weight of all the evidence that the defendant accepted the acts or things done, if any, by A. J. Shirk & Co., or accepted and received the fruits of the acts of the said A. J. Shirk & Co. in its (defendant's) behalf, if any, then the defendant would be bound by the acts or doings of A. J. Shirk & Co., the same as if it had authorized A. J. Shirk & Co. to act as its agent or representative before A. J. Shirk & Co. acted in behalf of defendant, if it did so act.

"Unless you find by the greater weight of all the evidence in this case that A. J. Shirk & Co. were authorized by defendant to sell and put in place the Barrett specification roof on the school building at Natoma, Kan., or that the defendant accepted or ratified the acts, if any, of A. J. Shirk & Co. in its behalf your verdict should be for the defendant, notwithstanding you should also find said roof was negligently constructed and the material furnished was defective."

The evidence has been summarized and need not here be repeated. It is sufficient to say that the evidence warranted the instructions that were given concerning agency.

[4] 4. The defendant says that—

"The trial court erred in its instructions in submitting to the jury the question as to whether there was a contract between plaintiff and defendant, when the only evidence they have is in the shape of a letter passing between the parties."

The difficulty with the defendant's statement is that the evidence, which has been outlined, other than the letter, tended to show that there was a contract between the plaintiff and the defendant. That evidence showed various acts, and was contained in the bond and in other letters. It was proper for the court to submit to the jury the evidence, for the purpose of determining whether or not a contract had been made.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 262)

KANSAS HARDWARE CO. v. FREEMAN.*
(No. 23036.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Damages \S 18—Injury to piano from overheating furnace in attempting to make it fulfill guaranty held to result proximately from breach of contract.

The proceedings in an action for breach of a contract to install a heating plant of guaranteed capacity examined, and held, injury to a player piano, occasioned by overheating the furnace in an unsuccessful effort to make it fulfill the guaranty, resulted proximately from breach of the contract.

2. Damages \S 62(4) — Rule as to minimizing damages held not to preclude recovery for failure to furnish heating plant of guaranteed capacity.

Under circumstances disclosed by the evidence, the rule relating to minimizing damages did not preclude recovery.

3. Contracts \S 198(1) — Contractor held not liable for settling of house due to installation of heating plant sold.

The contract required the contractor to install the heating plant, but did not require him to replace a portion of a foundation wall which it was necessary to remove in order to install the plant, and the work was not negligently done. Held, the contractor was not liable in damages for settling of the house caused by removal of the wall.

Appeal from District Court, Mitchell County.

Action by the Kansas Hardware Company against Mrs. Mary Freeman, with counterclaim by defendant. From the judgment plaintiff appeals; and from a disallowance of certain items of the counterclaim, defendant appeals. Affirmed.

Kagey & Smith and R. L. Hamilton, all of Beloit, for appellant.

R. M. Anderson, of Beloit, for appellee.

BURCH, J. The action was one to recover the balance due on a contract for installation of a heating plant in the defendant's house. The defendant counterclaimed damages, and

Judgment was rendered in her favor. The plaintiff appeals. The defendant also appeals from disallowance of certain items of her counterclaim.

[1, 2] The contract contained a guaranty that the heating plant would meet certain requirements. In an unsuccessful effort to demonstrate efficiency of the plant, the plaintiff caused the furnace to be heated intensely. In an unsuccessful effort to make the plant warm the house, the defendant also caused the furnace to be heated intensely. It was then discovered that a player piano, standing in a room above the furnace room and at a place directly over the furnace, had been injured by the overheating. The defendant was allowed damages for injury to the instrument, and it is said the damages were too remote. The court is of the opinion the damages resulted proximately from breach of the contract. It is said, further, the defendant might have prevented injury to the piano by removing it to another place. The defendant was not obliged to anticipate that the furnace could not be made to fulfill the purpose for which it was installed without injury to the instrument. As soon as the injury suffered was discovered, further damage was prevented by employing a man to overhaul the plant.

[3] The contract provided that the plaintiff would do certain excavating in the furnace room, and would furnish the labor and material necessary to install the plant. In order to install the plant, it was necessary to remove several feet of basement wall, which furnished support for the building to be heated. The plaintiff removed the wall, but did not restore it. Afterwards the building settled, and the defendant claimed damages for injury to the building. The contract did not require the plaintiff to restore the wall. It is not claimed the plaintiff was guilty of any negligence, and, if the defendant desired the wall replaced, she should have rebuilt it at her own expense.

The court properly disallowed an item of the counterclaim relating to extra coal used in trying to make the plant heat the house, because definite evidence was not produced from which the quantity of extra coal could be computed.

The judgment of the district court is affirmed.

All the Justices concurring.

(22 Ariz. 461)

PASS v. STEPHENS. (No. 1902.)

(Supreme Court of Arizona. June 16, 1921.)

1. Wills §88(1)—Deed and will distinguished.

Deeds once executed are irrevocable unless such power is reserved in the instrument, while wills are always revocable so long as the testator lives and retains testamentary capacity,

and deeds take effect by delivery and are operative and binding during the life of the grantor, while wills have no effect until the testator's death.

2. Deeds §93—Wills §470—Intention governs in construing deeds and wills.

It is the fundamental rule in the construction of both wills and deeds to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language as found by the entire writing.

3. Deeds §90—Wills §450—Meaning should be given to every word.

Every clause, and even every word, in a deed or will, should, when possible, have assigned to it some meaning.

4. Evidence §448—Wills §488—Collateral evidence admissible only when the terms of the writing are not clear.

It is only when the terms of a deed or will are not clear that collateral evidence may be received to ascertain its intent; otherwise the intention must be gathered from the instrument itself.

5. Wills §88(1)—Deed intended as testamentary disposition invalid.

Where a testatrix in making testamentary disposition adopted the form of a deed for the purpose of evading the statute of wills, the instrument will be void because not executed as a will; but, if the grantor intended a present disposition of property, the instrument is valid.

6. Wills §88(1)—In determining whether instrument is deed or will, its form should have weight.

In determining whether an instrument was a deed or will, its form as a deed should have weight.

7. Wills §88(1)—Instrument held deed and not testamentary disposition.

An instrument whereby the grantor made a present disposition of her property in trust held a deed and not a will, though the trustee was required to maintain the grantor and to pay her debts and the expenses of her last illness, etc.

8. Deeds §21—Wills §88(2)—No livery of seisin required; failure to take possession does not affect validity.

There is no livery of seisin in Arizona, and the fact that the grantee failed to take possession does not change the instrument from a deed into a will.

9. Trusts §13—Deed to trustee supported by consideration.

Where a deed to a trustee provided for the maintenance of the grantor during life, etc., such consideration is adequate where the instrument was attacked only by the administratrix.

10. Trusts §13—Confidence placed in trustee sufficient consideration.

Where the grantor conveyed property in trust, providing that the grantee should main-

tain grantor during her life and at her death pay her debts and make gifts to specified persons, the confidence placed in the grantee, who was trustee, and his undertaking to execute the trust, was a sufficient consideration.

11. Deeds ⇨58(1)—No special form necessary for delivery.

No particular form or ceremony is necessary to constitute delivery of a deed; the simplest form being by mere manual transfer of the instrument by the grantor to the grantee, with the intention of relinquishing control over it and to pass title to the property.

12. Deeds ⇨208(1)—Evidence held sufficient to establish delivery.

Evidence held sufficient to establish delivery of a deed.

13. Acknowledgment ⇨15—Notary held a de facto officer so that acknowledgment was valid.

Though a notary at the time he took an acknowledgment, which was after reappointment, had not filed with the clerk of the court the oath and bond required by Civ. Code 1913, par. 138, he must be deemed a de facto officer and the acknowledgment valid.

14. Deeds ⇨68(1/2)—Mere mental weakness will not invalidate deed, but grantor must be incapable of understanding the instrument.

Mere mental weakness in the grantor does not invalidate a deed, and to have that effect the mental power must be so far deteriorated or destroyed that the grantor is incapable of understanding in a reasonable degree and knowing the consequences of the instrument he executes.

15. Deeds ⇨68(3)—Sickness and old age do not amount to incapacity.

Sickness and old age do not, in and of themselves, amount to incapacity to execute a deed.

16. Deeds ⇨68(1/2)—Peculiarities of grantor do not render deed invalid.

Mere peculiarities or eccentricities of the grantor do not, of themselves, make a deed invalid.

17. Deeds ⇨211(1)—Evidence insufficient to establish grantor's incapacity.

In an action where a deed was attacked by the grantor's administratrix, evidence held insufficient to establish the grantor's incapacity.

18. Deeds ⇨68(1/2)—Grantor's condition at time of execution is decisive of capacity.

The time of the execution of a deed is the material point of time to be considered on an inquiry as to the grantor's capacity to make it.

19. Deeds ⇨72(1)—To invalidate, undue influence must have deprived grantor of free agency.

Undue influence which will justify the setting aside of an executed deed must have been of such a nature as to deprive the grantor of his free agency and render the act more the offspring of the will of another than of the grantor's own will, but it is not sufficient that

the execution of the deed was procured by honest argument or persuasion untainted with fraud.

20. Deeds ⇨211(4)—Evidence insufficient to show that a deed was the result of undue influence.

Evidence held insufficient to show that a deed was the result of undue influence.

21. Deeds ⇨72(4) — Relationship between brother and sister not fiduciary.

Where an aged woman executed a deed to her brother as trustee, the relations between the two cannot be deemed fiduciary, only the ordinary relations between brother and sister appearing; for a fiduciary relation ordinarily grows out of the relation of administrator and heir, guardian and ward, attorney and client, principal and agent.

Appeal from Superior Court, Yavapai County; John J. Sweeney, Judge.

Action by Blossom Pass, personally and as special administratrix of the estate of Martina S. Kelly, deceased, against John C. Stephens, personally and as trustee. From a judgment for defendant, plaintiff appeals. Affirmed.

O'Sullivan & Morgan and R. B. Westervelt, all of Prescott, for appellant.

Anderson, Gale & Nilsson, of Prescott, for appellee.

BAKER, J. The appellant brought this suit in the superior court of Yavapai county, as the special administratrix of the estate of Martina S. Kelly, deceased, and personally, as the adopted daughter and sole heir at law of said deceased and her predeceased husband, William N. Kelly, to cancel and set aside a deed executed by Martina S. Kelly on her deathbed, and to recover certain real and personal property described in said instrument.

One of the inquiries much contested in the case is whether the paper executed by the deceased; Martina S. Kelly, is a deed or an attempted testamentary disposition of property. The solution of the question involves the proper construction of the instrument. The superior court held it was a deed.

The instrument executed by the deceased had the caption "Deed." It contains apt words of conveyance. It purports to be made to the appellee, John C. Stephens as trustee, in consideration of \$10, and in the further consideration of certain trusts therein named. It contains this clause:

"This conveyance being made by the grantor and accepted by the grantee, upon the following trusts:

"That the grantor shall be provided and cared for and maintained in suitable condition during her natural life; and the debts, costs, charges and expenses of her last sickness and

funeral shall be paid, and an appropriate granite monument erected at her grave.

"That Charles Lauby shall be paid the sum of three thousand dollars (\$3,000.00) in full for his past faithful services.

"That the remaining property shall be divided as follows: John C. Stephens to receive an undivided one-half thereof; Josephine S. Potts to receive an undivided sixth thereof; Edith W. Baehr to receive an undivided sixth thereof, and Pearl W. Wilson to receive an undivided one-sixth thereof."

It contains two other clauses as follows:

"In order to carry out the terms of the trust hereby imposed, the said grantee shall have full and complete charge of and authority over all of the property hereby conveyed, with absolute power to sell and dispose of or to mortgage the same in order to procure the necessary funds, or to pay and satisfy existing liens and taxes against any of the property hereby conveyed, and to preserve the same, all such matters to be determined by him according to his own best judgment.

"Within a reasonable time after the death of the grantor the grantee shall settle all outstanding indebtedness imposed by the above trustee and shall sell and dispose of all remaining property and divide the proceeds of sale among the parties entitled thereto in proportion to their several interests as hereinabove stated."

It purports to have been signed by the deceased on the 4th day of March, 1920. In the appropriate place for acknowledgment of the paper is this:

"State of Arizona, County of Yavapai--ss:

"This instrument was acknowledged before me this 4th day of March, A. D. 1920, by Martina S. Kelly.

"My commission expires Feb. 28, 1924.

"[Notarial Seal.]

"Ziba O. Brown, Notary Public."

[1] In *Sharp et al. v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28, the distinction between wills and deeds is tersely stated as follows:

"Deeds, once executed, are irrevocable unless such power is reserved in the instrument. Wills are always revocable, so long as the testator lives, and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death."

See, also, monographic note to *Burlington University v. Barrett*, 92 Am. Dec. 383-389.

[2-4] The fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used, as found in the entire writing. Bishop, Cont. par. 380. Every clause, and even every word, should, when possible, have assigned to it some meaning. Bishop, Cont. par. 384. It is only when the terms of the writing are not clear that col-

lateral evidence may be received to ascertain its intent. In *re Longer*, 108 Iowa, 34, 78 N. W. 834, 75 Am. St. Rep. 206. Otherwise the intent will be gathered from the instrument itself. *Wilson v. Carter*, 132 Iowa, 442, 109 N. W. 886; *Abbott v. Parker*, 103 Ark. 425, 147 S. W. 70.

[5-7] We think the law undoubtedly is that if the deceased intended the instrument in question as a testamentary disposition, to take effect only upon her death, and adopted the form of a deed for the purpose of evading the statute of wills, then doubtless it would be void, because not executed as a will, but if she, in good faith, intended it as a present disposition of the property, it is valid. Now the instrument is in form a trust deed. While an instrument in form a deed may nevertheless be construed as a will, that it is in form a deed should receive some weight. It must be assumed that the maker had some understanding of the nature of the instrument. The instrument, in this case, clearly shows on its face that the grantor intended to convey to the grantee the property described, impressed with a trust, the terms of which are plainly stated and set out. It has but one reading. It contains no terms indicating an intention to postpone its operation until after the death of the grantor, nor are there any reservations made. It is plainly a deed. The intention of the grantor to divest herself of all title to the property is apparent on the face of the instrument.

But it is insisted by counsel for the appellant that the instrument is not a deed, but is testamentary in character. The contention is based upon the provision in the instrument:

"Within a reasonable time after the death of the grantor, the grantee shall settle all outstanding indebtedness imposed by the above trusts and shall sell and dispose of all remaining property and divide the proceeds of sale among the parties entitled thereto in proportion to their several interests as hereinabove stated."

It is obvious that this clause has no reference to the time when the instrument should take effect and become operative to pass title, and it affords no room for any inference of an intent to evade the statute of wills. It is but one of the terms of the trust, one of the duties imposed upon the trustee, thus deferred or postponed. The same observation is true as to the clause providing for the payment of the grantor's debts and the expenses of her last illness and placing a monument at her grave. These are only superadded duties of the trustee.

[8] It is argued that the grantee did not take possession of the property until after the death of the grantor. This did not affect the title. We have no livery of seisin in this state. Even though possession of the prop-

erty was dependent upon the event of the death of the grantor, the instrument would remain a deed and not a will. *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533; *Griffis v. Payne*, 92 Tex. 293, 47 S. W. 973.

[9, 10] As to want of consideration, this is no contest by creditors. It is an attack on a transfer made by a sister to a brother, in which she transferred what she no longer needed, providing by the transfer what, in her judgment she wished the grantee should receive direct to himself and what he should take in trust for the use and benefit of other relatives and a certain faithful employee. The covenant in the deed to care for and maintain the grantor in suitable condition during her natural life was a valuable consideration and not merely a nominal one. It was adequate if the grantor was satisfied with it, which she appears to have been. 13 C. J. 322. The confidence placed by the grantor in the grantee, and his undertaking to execute the trust, was sufficient consideration. 39 Cyc. 41.

[11, 12] It is insisted that there was no delivery of the deed. That is a question of fact. The superior court found there was a delivery of the instrument.

"No particular form or ceremony is necessary to constitute a 'delivery' of a deed. It may be by acts without words, or by words without acts, or both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, and that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient 'delivery.' *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351, 353; *Webster v. Sherman*, 33 Mont. 448, 84 Pac. 878, 881 (quoting *Cady v. Zimmerman*, 20 Mont. 225, 50 Pac. 553).

"The simplest mode of delivering a deed is by manual transfer of it by the grantor to the grantee, with the intention of relinquishing all control over the instrument and of passing title to the property. This delivery is defined an 'absolute delivery,' and undoubtedly it constitutes a consummation of the deed."

8 R. C. L. 983.

The clause in the paper, "in order to carry out the terms of the trust hereby imposed, the said grantee shall have full and complete charge of and authority over all of the property hereby conveyed, with absolute power to sell and dispose of, or to mortgage the same, etc.," clearly expresses the intention of the grantor to give the grantee complete dominion and control over the property and to invest him with absolute power to sell or dispose of the same in furtherance of the trust. The evidence tends to show that at the time the grantor executed the instrument she gave it unconditionally to the grantee, who took it, and in turn delivered it to the scrivener to keep for him. Thereafter the grantor exercised no dominion or control over the instrument. The evidence abundantly sup-

ports the finding that there was a delivery of the deed.

[13] It is insisted that the deed was not acknowledged before an officer authorized to take acknowledgments, and was therefore void. The evidence shows that the notary who took the acknowledgment, Mr. Brown, had been duly commissioned and had taken an oath and had been acting as notary for several years, but that he had failed, on his reappointment as such notary, to take and subscribe the oath prescribed by law and file a bond to the state to be approved by the chairman of the board of supervisors, and that he had not filed such oath and bond with the clerk of the court at the time the acknowledgment was taken, all as required by paragraph 136, Revised Statutes of Arizona 1913. Within a few days after taking the acknowledgment he did, however, take such oath and file the bond required by law, whereupon a new commission was issued to him. We think that Brown was an officer *de facto*, and that the acknowledgment was sufficient.

"There is no distinction in law between the official acts of an officer *de jure* and those of an officer *de facto*. * * * Accordingly an acknowledgment is valid if taken by a *de facto* officer. * * * The rule applies generally to acknowledgments taken by officials who have lost the legal right to exercise the powers of office by reason of resignation, expiration of their terms, or the like." 1 R. C. L. 268, 269, and cases cited in footnote.

The appellant furiously, insistently, attacks the deed as void, because obtained through fraud and undue influence, and because the grantor lacked the requisite necessary mental capacity to execute the instrument.

[14] It is well settled that mere mental weakness in the grantor does not invalidate a deed. To have that effect the mental power must be so far deteriorated or destroyed that the grantor is incapable of understanding in a reasonable degree and knowing the consequences of the instrument he executes. This, we take it, is a fair statement of the rule of law, without citing the numerous cases applying the rule. 18 C. J. 218, 219, and cases found in footnotes.

"As to deeds, it may be stated in a general way that senility, eccentricity, or even partial impairment of mental faculties is not necessarily sufficient to incapacitate the grantor, if he has sufficient mental capacity to comprehend the nature of the transaction and protect his own interest." 8 R. C. L. 946.

[15-18] The legal evidence, while conflicting, falls very far short of satisfying us that the grantor did not have sufficient mental capacity to fairly understand the nature and consequences of her act in executing the deed. Mrs. Kelly was a widow at the time; her husband, William N. Kelly, having died

some three years prior to her death. She was about 67 years of age. The deed was executed on March 4, 1920, two days prior to her death. She had been ill for several months, and for two or three weeks prior to her death she had been bedridden. She was in such a feeble state that she had to be raised and held in a sitting position in her bed while she signed the deed. For several days prior thereto, and on the day when the instrument was executed, two doses of morphine daily were administered to her to relieve her from physical suffering. Notwithstanding these conditions, the evidence tends to show that she was mentally alert, understood her surroundings, and knew what she was doing. Her mental condition at the time is best shown by her insisting that the conditions of trust, as she stated them, should be embodied in the deed, so that the grantee would be compelled to carry them out. This was certainly a rational act. She stated the purposes of the instrument to the scrivener and he was required to redraw the deed so as to conform to her express purposes and conditions. Mr. Brown, the scrivener, who had been attending to her legal business for some 15 years, and was intimately acquainted with her, testified:

"I prepared a deed, took it down, and went over the matter with her. I wanted to make sure that she knew absolutely what she was doing. Her mind appeared to be just as clear and unclouded as it was at any other time. I satisfied myself at the time that her mind was absolutely clear."

The attending physician, Dr. Southworth, testified:

"I think Mrs. Kelly realized she was on her deathbed. From my observation of Mrs. Kelly during the last 10 days of her life I would say she was sane."

Only acts tending to show some degree of childishness, eccentricity, and petulance on the part of Mrs. Kelly, upon several occasions long prior to her death, were shown for the purpose of invalidating the deed. There is some evidence that at times, in a fit of passion or uncontrolled temper, she would threaten to commit suicide or destroy her property to prevent her relatives from inheriting it. But it does not appear therefrom that her mental faculties were impaired. Sickness and old age do not, in and of themselves, amount to incapacity to execute a deed. *Lee v. Lee*, 258 Mo. 599, 167 S. W. 1030; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228. Mere peculiarities or eccentricities of a grantor do not, of themselves, make a deed invalid. *Ellis v. McNally* (Mo.) 177 S. W. 654. The statements of several of the witnesses for the appellant that Mrs. Kelly was often hysterical and flew into violent passion, and that in their opinion she was crazy, were of but little value in the judicial inquiry as to her competency to

make the instrument. The references are to past incidents in her life. The time of the execution of a deed is the material point of time to be considered on an inquiry as to the grantor's capacity to make it. *Armstrong v. Burt* (Tex. Civ. App.) 138 S. W. 172; *Wampler v. Harrell*, 112 Va. 635, 72 S. E. 135; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140.

[19] It is important to understand what constitutes undue influence as will vitiate a deed procured by its exercise over the grantor. Undue influence which will justify the setting aside of an executed deed must have been of such a nature as to deprive the grantor of his free agency, and thus to render his act more the offspring of the will of another than of his own will. *Kline v. Kline*, 14 Ariz. 369, 128 Pac. 805. It is not sufficient to avoid a deed that its execution was procured by honest argument or persuasion untainted with fraud. In *Dickie v. Carter*, 42 Ill. 376, the court said:

"If all is fair, and the result of honest argument and persuasion, or of such influence as one may properly obtain over another, the will [deed] must stand."

In the case of *Yoe v. McCord*, 74 Ill. 44, the same court said:

"To avoid a will [deed] the influence which is exercised must be undue, and this, in a legal sense, is something wrongful—a species of fraud."

In *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 408, it is said:

"Mere advice, argument, or persuasion, if the grantor's mind acts freely thereunder, does not constitute undue influence, though it may lead to the making of the instrument when it would not otherwise have been made."

[20] Now the evidence mainly relied upon to prove undue influence is that of the witnesses Henry Hartin and Mrs. Scott, who testified in behalf of the appellant at the trial. Hartin testified:

"She (Mrs. Wilson) said when she got here she found her aunt had made a will, and that she saw a letter from a niece of Mr. Kelly's to Mrs. Kelly and on the back of this letter was a draft which Mr. Z. O. Brown had made of the distribution of her property. There was a dollar each to her relations here, and mentioned that Mrs. Stone got some birds and buggy, I believe, and a few other articles, and mentioned Charles Lauby and all those nieces of Mr. Kelly's. She said that after she saw how things were going with the property, she asked her why she done as she did and why she hadn't remembered Johnny Stephens, her uncle. She told what she thought of Johnny Stephens, and after some time Mrs. Wilson said, 'I persuaded her she ought to make a change in this,' and she said Mrs. Kelly gave an order for the will which she had made, and the will was destroyed, and that she had consulted Judge Wells and Judge Wells had advised her making it in the way of a deed, or a trust, as I remember. It

was a trust deed and did away with the probating of a will."

Mrs. Scott testified:

"I know Mrs. Pearl Wilson. I had a talk with Mrs. Wilson the day after Mrs. Kelly passed away, in the library of the Kelly house. Pearl Wilson said she had coaxed her aunt to make up with her Uncle John. She said she didn't approve of the will that Mrs. Kelly had made and she persuaded her to make another one, and she persuaded her aunt to send for her Uncle John, and then they made another will, and instead of excluding the family, why, they made it in favor of her sister and uncle and the family."

The most that can be said of this testimony is that Mrs. Wilson persuaded Mrs. Kelly to "make up" with her brother, and execute the deed to him and revoke a former will made by her. The will was made in favor of a niece of her deceased husband. The niece lived in a distant state, and Mrs. Kelly had never seen her and did not know her except through a very limited correspondence. In this will Mrs. Kelly made no provision for the appellant other than devising her \$1. The beneficiary in the deed of trust Josephine S. Potts, was a sister of Mrs. Kelly, and the beneficiaries Edith W. Baehr and Pearl W. Wilson were her own nieces. We fail to see anything vicious or reprehensible in the conduct of Mrs. Wilson. For aught that appears in the record the arguments used by her were fair, reasonable, and well founded. There is an entire absence of any evidence tending to show that any trick, artifice, device, misrepresentation, or other fraud was practiced. It does not appear that there was any effort to prejudice Mrs. Kelly against the appellant. The will was destroyed in the presence of Mrs. Kelly and at her request. There is not, so far as we have been able to find, a particle of evidence to the effect that the appellee, Stephens, ever requested, much less unduly influenced, Mrs. Kelly to make the deed. To hold that the act was not her own voluntary one would be but an inference, from the testimony of Henry Hartin and Mrs. Scott, which we think is wholly unjustifiable. We discover nothing in the testimony to indicate that the deceased was under any such control, or that she was overpersuaded or unduly influenced, as that she was not able to act freely and according to her own judgment. No rule of law required that Mrs. Kelly should make the appellant one of the beneficiaries under the deed of trust. She had the legal right to prefer one relative and cut off another, with or without a reason, or she might have made an entire stranger the sole beneficiary under the deed. It was her property to do with as she saw fit. In the absence of proof of unsoundness of mind or of undue influence by others, no court

would be justified in transgressing her wishes or setting aside her action.

[21] We are at a loss to perceive upon what theory a fiduciary relation between the parties can be said to exist. Nothing more than the ordinary and usual relation of brother and sister seemed to have existed between the appellee and Mrs. Kelly during her life. A fiduciary relation, which brings the parties within the rule contended for by counsel for the appellant, is one growing out of the relation of administrator and heir, guardian and ward, attorney and client, principal and agent; in other words, where the business of one is intrusted to another in such a way as to render the principal liable to be imposed upon by the agent. It is sometimes defined to be:

"That relation existing between parties, where one holds the character of a trustee or a character analogous thereto, such as agent, guardian, and the like and the person stands in such a position that he has rights and powers which he is bound to exercise for the benefit of the other person." 13 Am. & Eng. Ency. of Law (2d Ed.) 10.

We have not overlooked other points raised and discussed by counsel for the appellant in their brief. We regard these points as insufficient to affect the result.

From what has been said, it follows that the judgment of the superior court must be, and is, affirmed.

ROSS, C. J., and McALISTER, J., concur.

(22 Ariz. 476)

HARTMAN v. OATMAN GOLD MINING & MILLING CO. (No. 1816.)

(Supreme Court of Arizona. June 16, 1921.)

1. Corporations \S 398(1) — Stockholder does not represent corporation.

A stockholder, as such, does not represent the corporation, and only under exceptional circumstances may he act in its behalf.

2. Corporations \S 177 — If stockholder expends money on behalf of corporation, his right of recovery depends on the existence of some contractual relation.

If a stockholder do anything or expend money on behalf of the corporation, his right of recovery depends on the existence of some contractual relation with respect to the act or expenditure, and without some agreement on the subject, express or implied, he stands in the same position as a stranger.

3. Corporations \S 426(1) — Where stockholder assumes to act as agent, corporation is liable on ratification of his unauthorized act.

A stockholder, like any one else, may assume to act on behalf of or as agent of the cor-

poration, and if the corporation subsequently, either expressly or by conduct, ratifies his unauthorized act, liability follows to the same extent as though authority had originally existed.

4. Corporations — 426(10) — Acceptance of benefit of unauthorized act amounts to a ratification.

Accepting the benefit of an unauthorized act of one purporting to act as agent without authority, when with knowledge of the material facts, amounts to a ratification.

5. Corporations — 426(10) — Where stockholder compelled restoration of shares and corporation accepted, it is liable for expenses.

Where a stockholder, acting without authority of the corporate officers, expended money in prosecuting a proceeding before the Corporation Commission to compel the return to the company of 50,000 shares of its capital stock appropriated by the president and secretary, and the company accepted return of such shares, it is liable, on principles of ratification, for the expenditures thus incurred by the stockholder.

6. Corporations — 189(11) — Defendant corporation, merely denying liability, cannot question reasonableness of shareholder's expenditures sued for.

In an action by a shareholder to recover expenses incurred in compelling restoration to the corporation of shares of stock appropriated by its president and secretary, the corporation, where it merely denied liability, but did not question the amount, *held* precluded from questioning the reasonableness of the sums expended.

7. Mines and minerals — 104 — Shareholder of company opposing application for patent to adjacent land not entitled to recover expenditures.

Where a shareholder in a corporation without authority prepared an adverse claim against an application for a patent to adjacent mineral lands, he is not entitled to recover expenditures; it appearing the corporation did not request any such service, and that it made a settlement with the adjoining owner by which the area in conflict was secured.

8. Corporations — 189(14) — Shareholder suing to recover for expenses in prosecuting action for corporation not entitled to attorney's fees.

A shareholder, suing a corporation to recover expenses incurred in proceeding to compel restoration of shares to the corporation, etc., is not entitled to attorney's fees in his action against the corporation; the action being purely adversary.

Appeal from Superior Court, Mohave County; W. A. O'Connor, Judge.

Action by George Hartman against the Oatman Gold Mining & Milling Company. From a judgment on directed verdict for only part of the amount claimed, plaintiff appeals. Reversed and remanded, with directions.

Robert E. Morrison and Emmet T. Morrison, both of Prescott, for appellant.

Charles W. Herndon, of Kingman, for appellee.

PATTEE, Superior Judge. George Hartman, plaintiff below and so here designated, sued the Oatman Gold Mining & Milling Company, hereinafter styled the company, to recover the amount of a claimed indebtedness for moneys advanced to and expended on behalf of the company, and for services performed for the benefit of the company. The items of the plaintiff's claim, as set forth in his complaint, may be divided into three classes. The first is for money advanced and expended for work done upon the mining claims of the company, the plaintiff claiming a balance of \$277.66. This claim was admitted by the company to be due from it to the plaintiff. The second class of items is for money expended by the plaintiff in prosecuting a proceeding before the Arizona Corporation Commission to compel the return to the company of 50,000 shares of its capital stock, claimed to have been wrongfully appropriated by the president and secretary of the company to their own use. The items of the third class relate to money expended for a survey and other proceedings in connection with the preparation and filing of an adverse claim against an application for patent made by an adjoining mineral claimant, and for services performed in connection with the survey, it being asserted that the claim of the applicant for patent included certain ground belonging to the company. At the trial the court held that the plaintiff was entitled to recover only the sum of \$277.66, the amount admitted to be due him, and directed a verdict for that amount. From the judgment entered upon the verdict so directed, the plaintiff appeals.

[1-4] With respect to the right to recover the amount expended in the proceeding before the Corporation Commission, the question discussed by counsel is whether the plaintiff was authorized to bring such a proceeding on behalf of the corporation without first applying to the board of directors to bring the proceeding, or showing such a situation as would render such an application useless or unnecessary. The plaintiff, conceding that he made no such application to the corporate authorities, contends that the facts shown by the evidence relieve him from the necessity of so doing, within the rules governing the right of minority stockholders to bring an action to enforce the rights or to redress the grievances of the corporation. It is also contended that the proceeding before the Corporation Commission was not an action, and that the rules relating to the right of minority stockholders to

bring suit on behalf of the corporation are strictly limited in the application to proceedings in courts of equity. If the right of the plaintiff to recover these items depended upon the question discussed by counsel, it might be seriously doubted whether the facts bring the case within the rule authorizing the stockholder to bring an action on behalf of the corporation. But the evidence is undisputed, and, under it, the right of recovery turns rather upon the law of agency, and the rules governing the rights and liabilities of principal and agent, than upon the application of the rule discussed in the briefs. A stockholder does not, as such, represent the corporation, and, only under exceptional circumstances, may he act in its behalf. If he do anything or expend money on behalf of the corporation, his right of recovery depends upon the existence of some contractual relation with respect to the act or expenditure. Without some agreement on the subject, express or implied, he stands in the same position as a stranger to the corporation. But, like any one else, he may assume to act on behalf of or as an agent of the corporation, and if the corporation subsequently, either expressly or by conduct, ratify his unauthorized act, liability follows to the same extent as though authority had originally existed. Accepting the benefits of an unauthorized act, with knowledge of the material facts, amounts to such ratification. 1 Elliott on Contracts, § 459.

[5] As to the expenditures made by the plaintiff in the presentation of the matter considered by the Corporation Commission, a case is presented calling for the application of this rule. The wrong which the plaintiff sought to have righted was done to the corporation. The proceeding was brought for its benefit. The sums claimed were expended by the plaintiff for the purpose of restoring to the corporation property wrongfully taken from it. Whether the Corporation Commission has jurisdiction to entertain and determine such a matter need not be considered. The proceeding was entertained and determined with the result that the stock claimed to have been misappropriated was returned to the company's treasury. The company received and retained the restored property. The evidence warrants no other conclusion than that the company accepted and retained the benefits of the action taken by the plaintiff, with knowledge of all the material facts. Ratification must necessarily be in toto, and by accepting the benefits of the plaintiff's act, the company accepted the burdens. 1 Elliott on Contracts, § 455.

[6] In such a situation, the reasonable expenditures made by the plaintiff in securing to the company the benefits which it accepted may be recovered. The right of recovery, however, extends only to the expenditures

which were reasonably necessary to secure the result, and not to amounts paid out beyond those reasonably necessary. Ordinarily, the question of reasonableness and necessity for the claimed expenditures would be one of fact, but in this case any objection that any of the items claimed were unnecessary in character or excessive in amount was waived. At the trial, counsel for the respective parties agreed upon a statement of certain matters of fact in order to dispense with proof of such matters. It was admitted that the plaintiff had expended the several amounts claimed by him for the purposes stated in his complaint, but it was stated by counsel for the defendant that he did not "want it considered that these expenditures were made at the instance and request of the defendant." Counsel for the plaintiff acquiesced in this suggestion, and stated that the question of the liability of the company for the expenditures made by the plaintiff was left for determination. It is obvious, from the statements of counsel and their subsequent conduct during the trial, that it was understood that no question with respect to the amount of the expenditures was intended to be raised, but that the only questions to be litigated were with respect to the liability of the company for the amounts admitted to have been paid. The company is therefore precluded, by the course taken at the trial, from raising any question with respect to the reasonableness or necessity of the expenditures. There is therefore no issue of fact to be determined as to the right to recover the amounts expended in the proceeding before the Corporation Commission, and as a matter of law the plaintiff is entitled to judgment for such amounts.

[7] The application of the law of agency determines the question respecting the expenditures made by the plaintiff in seeking to protect the property of the company against the application for patent made by the adjoining owner. As to this claim the facts are undisputed. The plaintiff was a mere stockholder of the corporation. He was not an officer, and had nothing to do with the management of its affairs. He knew that the application for patent was pending, and that the notice required by law was in course of publication. Seeing that the company was apparently taking no steps to protect its property, and fearing that the area in conflict might be lost, he took up the matter of filing an adverse claim with a director of the company, who resided in a distant state. He did not communicate with the officers of the company, other than the one director, though some of them lived in the same county as himself. He gives as reason for not taking the matter up with the president and secretary of the company that they were the same officers who had misappropriated the

stock of the company, which he had compelled them to return, and he had no confidence in them. He received from the director with whom he communicated only a request for further information. Thereupon, as the time within which an adverse could be filed was drawing to a close, and he had no time to continue his correspondence with the director, he caused a survey to be made, employed counsel to prepare an adverse claim, and filed in the United States Land Office. He brought no suit for the reason that after the filing of the adverse claim he learned that the officers of the company had made a settlement with the adjoining owner by which the area in conflict had been secured to the company.

Whether a stockholder has such an interest in the corporation and its property as to authorize him to file an adverse claim and maintain a suit in support of it need not be discussed. If he has, he would be deemed to be merely protecting his interest as a stockholder, in the absence of some request or agreement, express or implied, on the part of the corporation. His position as a stockholder does not, in itself, authorize him to act for or bind the corporation, or render the corporation liable to reimburse him for such expenditures. Only a pre-existing agreement, or a subsequent ratification of his acts, can create such a liability. In this case there was neither. The plaintiff was not requested by the company, or any one acting for it, to do what he did. It does not appear that the company had any knowledge of what he had done. It never received or accepted any benefit from the plaintiff's acts, and never, in any manner, ratified them. On

the contrary, it attended to the adjustment of the controversy with satisfactory results. The company is therefore not liable to the plaintiff for the amounts expended in the adverse proceedings.

[8] One of the items for which the plaintiff sues is for the value of the services of his attorney in this action. The rule frequently applied, in suits brought by minority stockholders for the benefit of the corporation, that a reasonable attorney's fee may be allowed to the successful plaintiff, has no application to a case like this. This action is in no sense for the benefit of the company. The position of the parties is strictly adversary. It is elementary that, except when authorized by statute or agreement of the parties, attorney's fees cannot be recovered in such a case.

There was no issue of fact to be submitted to the jury, and it was the duty of the court to direct a verdict. It was error, however, to direct it for only \$277.66. The plaintiff was entitled to recover in addition the sum of \$657.60, the expenditures paid in the proceeding to recover the stock. The judgment is therefore reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff for the sum of \$935.26, with interest from the dates the above sums became due, and costs.

ROSS, C. J., and BAKER, J., concur.

NOTE.—Judge McALISTER presided in the trial of this case in the lower court once, and for that reason Hon. SAMUEL L. PATTER, Judge of the Superior Court of Pima County, was called in to sit in his place.

(116 Wash. 190)

IN RE WATKINS' ESTATE. (No. 15844.)

(Supreme Court of Washington. June 22, 1921.)

1. Wills \S 81—Will made as part of initiation into secret society not necessarily invalid.

That a will was executed as part of ritualistic work at a time when testator was taking a degree in a secret order is not alone sufficient ground for rejecting it as a valid testamentary disposition of property.

2. Wills \S 302(1)—Evidence held to show that will executed as part of initiation ritual was intended to be a will.

Evidence held to show that a will at the time testator was taking a degree in a secret order and in connection with the initiation was executed with testamentary intent.

Bridges and Mackintosh, JJ., dissenting.

Department 1.

Appeal from Superior Court, Adams County; Sam Hill, Judge.

In the matter of the estate of William H. Watkins, deceased. An alleged will of decedent was admitted to probate, and in contest proceedings the will was sustained and the contest proceedings dismissed, and contestants appeal. Affirmed.

Lee & Kimball, of Spokane, and W. O. Lewis, of Ritzville, for appellants.

Adams & Miller, of Ritzville, and Miles F. Egbers, of Rathdrum, Idaho, for respondent.

FULLERTON, J. William Henry Watkins died in Adams county in this state on December 10, 1916, leaving estate therein consisting of real and personal property. He left as his heirs at law four children, two sons and two daughters, each of whom had reached the age of majority. At the time of his death no will was found, and one John C. Allen was appointed administrator of the estate. The administrator proceeded with the administration and in due time reported the estate as ready for distribution. At this time one of the daughters appeared by petition, producing what she alleged to be a will of the decedent, and asked that the instrument be admitted to probate as his last will and testament, and that the property of the estate be distributed according to the terms thereof. A time was fixed by the court for hearing the petition, at which time proofs were submitted of its due execution and an order entered admitting it to probate. This was done over the protest of certain of the other heirs of the estate, and proceedings were immediately instituted by them in contest of the will. The contest was subsequently heard, resulting in an order sustaining the will and a dismissal of the contest proceedings.

The purported will was found in the archives of a secret society known generally as the Masonic Order. As presented here, it is a sheet of paper folded so as to form four pages. Heading the first page were printed instructions in these words:

"Write, now, in good faith, your last will and testament precisely as if you were about immediately to be engaged in battle and expected to fall in the action."

Following this were the printed words:

"In the name of God, Amen! I, —, being of sound mind and memory, but knowing the uncertainty of human life, do now make and publish this, my last will and testament, that is to say."

The instrument was completed so as to take the form of a will by Mr. Watkins himself. He wrote his name in the blank space left in the printed form, and wrote underneath it the following:

"I wish my property, whatever it may be, divided into five parts and my youngest daughter to receive two parts, and the other to the other three children. W. H. Watkins."

The instrument bears the names of two persons, signing in the place usually accorded witnesses. The second page was blank. On the third page there was printed certain admonitory directions, followed by a series of questions to which answers were required. These were followed by an obligation, signed by Watkins, in which he promised, among other things, that he would "never improperly make known the mode of my admission into this degree." The fourth page was blank. The matter on the third page does not purport to have relation to the part comprising the will. In form the instrument was sufficient to constitute a duly executed will, provable as such under the laws of this state.

It developed in the testimony that the instrument was executed on November 16, 1903, some 13 years prior to the death of Mr. Watkins, at a time when there was being conferred on him a degree of the secret order mentioned. It was testified by members of the order that the making of a will was a part of the ceremony of the particular degree, required of all candidates who had not theretofore made a will. The members of the order testifying did not, however, altogether agree as to the purpose of the requirement. One testified that it was ceremonial only, a part of the ritualistic work, and not intended as a testamentary disposition of property. Two others testified to a contrary view; the substance of their testimony being that all members of the order who had taken this degree were expected to die testate, and that, while the will executed on the particular occasion, like all other wills, was

subject to modification by subsequent codicils or revocation by subsequently executed wills, it is intended and regarded as testamentary.

[1] There would seem to be no legal objection to regarding a will so executed as a valid will. The time, place, or circumstances of the execution of an instrument in form testamentary are material only as they bear upon the question of intent. It is well settled, of course, that an instrument offered for probate as a will, however formal may have been its execution, will not be admitted to probate as such unless it was executed by the testator with testamentary intent. If it is executed under compulsion, undue influence, as a part of a ceremonial, for the purpose of deception, or for the purpose of perpetrating a jest, it is not a will, but the fact that it was executed at a time when the testator was taking a degree in a secret order is not alone sufficient to reject it as a valid testamentary disposition of property. A valid will may be made under these circumstances as well as under any other. The question being one of intent, if it fairly appears that the testator intended it as his will, there is no valid legal reason because of the place of its execution why the courts should not give it effect as such.

[2] It remains to inquire whether the testator intended the instrument to be his will and testament. The evidence on the question is somewhat meager, but we think the decided weight of the evidence is that he so regarded it. The surviving witness to the will testified that it was executed with testamentary intent, and that the testator at the time of its execution declared it to be his last will and testament. His evidence was taken by deposition to which were attached cross-interrogatories. To one of these, inquiring whether the testator talked with him about it or to any one else in his presence concerning it, the witness answered:

"All he said was that if he never made another will that one would do. I can't remember that he said anything else."

It appeared, however, from the testimony of another witness that at the close of the ceremony Mr. Watkins remarked, "That is quite a josh." It is argued that this shows that Mr. Watkins himself did not regard the making of the will to be anything more than a ceremonial. But we think the witness' testimony as a whole shows that the remark was made with reference to the requirement that a will be executed rather than to the instrument executed as a will; a part of the witness' further testimony being the following:

"Q. Was there anything said by Mr. Watkins as to whether or not he was executing a will? A. Yes, sir; it was expressly understood that he was executing a will.

"Q. What, if anything, did he say with rela-

tion to having made a will? A. Well, he said that that was his will; that he signed that as his will, his last will and testament. * * * As I say, it is the custom that the request be made and complied with by every candidate. He is asked if he has made a will, and, if he has not, he is requested to do so, and he has to do so before he can proceed any further."

The disagreement among the members of the order as to the purport of the requirement is not of moment. The question in each case must necessarily be, What was the intent of the particular individual? and here, we think, the trial judge correctly determined that the deceased executed this instrument intending it to be his last will and testament.

The judgment is affirmed.

PARKER, C. J., and HOLCOMB, J., concur.

BRIDGES, J. (dissenting). I am unable to concur in the foregoing opinion. I readily agree with the correctness of the statement therein that no instrument should be held to be a last will and testament unless the proof shows the intent of the maker that it should be such. But mere preponderance of evidence should not be sufficient; the evidence should be such as to clearly, convincingly, and satisfactorily establish the intention. I do not think the testimony in this case is of the class indicated. It fails to convince me that the maker of the purported will intended it to be a final disposition of property. The making of a will is an important and solemn business. The testator usually deliberates the subject, and when the will is made he keeps it in his possession or under his control. He generally chooses his own time to make it and his witnesses to it. It seems to me that all of the conditions and circumstances surrounding the making of this instrument argue with great force against the idea that it was made with that seriousness and solemnity with which wills are customarily made. As pointed out by the court's opinion, it was made as a part of the ritualistic work of a secret society into which the deceased was being initiated. One witness testified that the deceased, at the time of making the instrument, said he thought it was "quite a josh." The testimony also conclusively shows that at least some of the members of the society who had previously been initiated into it, and who probably had been required to make similar purported wills, believed that it was not intended that the instrument so made was to be considered a final will and testament. The deceased here may have been of like mind. This purported will was made some 13 years prior to decedent's death, during all of which time it was lodged in the secret archives of the society.

I greatly fear that the holding of the court in this case will lead to the presentation and probaton of many instruments in the form of wills which were never intended to be such. I frankly concede that a valid will might be made under the circumstances this instrument was made, but certainly the testimony of the intention of the testator should be much stronger than is shown in this case, to authorize the probaton of it as a final disposition of property. I think the judgment ought to be reversed.

MACKINTOSH, J., concurs in this dissent.

(116 Wash. 90)

HAYS v. SUMPTER LUMBER CO. et al.
(No. 16316.)

(Supreme Court of Washington. June 10, 1921.)

Continuance ⇨10—Application on ground of litigation of issues in another pending suit held properly denied.

In action for damages for failure to prosecute and aid an appeal of a quieting title action in which both plaintiff and defendants were interested, *held* that plaintiff's application for continuance because of a pending appeal in the quieting title action was properly denied, as the result of the appeal would not determine any issue in the instant action.

Department 1.

Appeal from Superior Court, Pierce County; John D. Fletcher, Judge.

Action by W. F. Hays against the Sumpter Lumber Company and others. From judgment of dismissal, plaintiff appeals. Affirmed.

W. F. Hays, of Seattle, for appellant.

E. R. York, of Tacoma, and Peters & Powell, of Seattle, for respondents.

FULLERTON, J. The appellant Hays instituted this action against the respondents, Sumpter Lumber Company, a corporation, and J. J. Hewitt, and Henry Hewitt as administrators of the estate of Henry Hewitt, Jr., deceased, to recover the sum of \$2,602,500. The claim was based upon a contract entered into between the appellant and Henry Hewitt, Jr., whereby the appellant contracted to sell to Hewitt his interests in certain timber lands. At the time of the execution of the contract the interests of the appellant in the lands were represented by sheriff's certificates of sales issued on the sales of the lands under execution. In the contract it was provided that Hewitt should pay to the appellant a certain fixed

sum in the case the lands were redeemed from the sales by the judgment debtors, and should pay another fixed sum, and deed to the appellant an undivided one-half interest in the land in the case the sales should pass to deeds. The lands were not redeemed from the sales, and sheriff's deeds were subsequently executed to Hewitt. Hewitt thereafter, with the written consent of the appellant, conveyed the lands to the respondent, Sumpter Lumber Company, although neither the payment nor the deed agreed to be made to Hays was made. The lands were at all times adversely claimed by a corporation known as the Sound Timber Company. This corporation held the legal title to the property at the time of the execution sales, and was neither a judgment debtor in nor a party to the action in which the judgment was entered on which the sales were had. With the matters in this condition the respondent Sumpter Lumber Company began a suit in equity in the United States District Court against the Sound Timber Company to quiet its title to the lands. The Sound Timber Company answered in the suit, in which it denied title in the plaintiff, averred title in itself, and prayed that its title be quieted as against the plaintiff. On a trial had on the merits the Sound Lumber Company prevailed, and the present appellant, who is an attorney at law and who represented the Sumpter Lumber Company in the suit, gave notice of appeal to the United States Circuit Court of Appeals. Before the appeal was perfected Henry Hewitt, Jr., died, and the Sumpter Timber Company, as well as the representatives of Henry Hewitt, Jr., refused to proceed further with the appeal. The present appellant thereupon had himself substituted as party appellant, and prosecuted the appeal on his own behalf and at his own cost. The appeal resulted in an affirmance of the decree of the district court. *Hays v. Sound Timber Co.* (C. O. A.) 261 Fed. 571.

To charge the respondents in the present action, the appellant alleged that Henry Hewitt, Jr., was the president of the Sumpter Lumber Company, and as such caused the suit to quiet title to be instituted, and promised on behalf of himself and on behalf of that company to advance the costs necessary for the prosecution of the appeal, and further alleged:

"That plaintiff as attorney for the said Sumpter Lumber Company, about the time of said appointment of said defendants as such administrators, duly applied to them to take and prosecute the required appeal to the Circuit Court of Appeals aforesaid from the said decree of April 29, 1918, both in their capacity as administrators of said estate and as the successors in interest of the said Henry Hewitt, Jr., to the said Sumpter Lumber Company, but said defendants neglected and did not take any step toward the prosecution of said appeal, but

thereafter and without the knowledge or consent of this plaintiff and for the purpose of defrauding, cheating, and swindling this plaintiff out of all his rights and interests in and to said lands, fraudulently conspired and confederated with the defendants the said Sound Timber Company, its officers, agents, and attorneys, for the purpose of preventing an appeal to be taken from said decree of April 29, 1918, and as a part of said conspiracy and fraud wrongfully equipped the defendant the Sound Timber Company, its officers, agents, attorneys and servants with affidavits and papers in substance declaring it to be the purpose of said Sumpter Lumber Company and its said officers and successors in interest not to appeal from said order of April 29, 1918, and to enable the said Sound Timber Company and themselves to wrongfully and fraudulently defeat this plaintiff, both in his capacity as the attorney for the said Sumpter Lumber Company in making and perfecting said appeal, and in his own individual capacity as the beneficial owner in and to all the interests of said lands in pursuance of said contract of sale of November 19, 1908, by which the said defendants in pursuance of said conspiracy have so interfered with this plaintiff in the prosecution of said appeal, both as said attorney and in his individual capacity aforesaid, involving an unnecessary and additional cost and expense to him in and about the premises of at least \$10,000 and by which the said Hays has been required to advance out of his own means all of the expenses in the preparation of records, transcripts, and expenses necessary in the premises in the sum of at least \$5,000, all of which the said Henry Hewitt, Jr., by the terms of his agreement with this plaintiff, was to have paid and advanced out of his own funds.

"That by the terms of said contract of November 19, 1908, the said Henry Hewitt, Jr., was to pay plaintiff for an undivided one-half interest in the lands covered by said sheriff's certificates to the said Hays, at the time of the 'vesting' of title under said certificates in the said Henry Hewitt, Jr., in the sum of \$90,000, less \$2,500, which was paid down at the time of making said purchase and obtaining the assignment of said certificates to him.

"That said title thereafter duly vested in the said Henry Hewitt, according to the terms of said writing, by virtue of the sheriff's deeds thereunder, and the failure and refusal of said Henry Hewitt, Jr., as the president of said corporation and his successors in interest and the said corporation itself, and the said heirs of the said Henry Hewitt, Jr., and each of them, to duly prosecute an appeal from the decree aforesaid, all in violation of the terms of said agreement of November 19, 1908, by which plaintiff has been made to lose the undivided one-half interest in and to all of said lands, and may yet be forced to lose it, also the title thereto so to be given, to this plaintiff, to said lands, of the reasonable value of \$2,500,000, also the further sum of \$87,500 aforesaid, all of which the defendants, and each of them, well knew would flow as a consequence of their said acts."

The respondents put in issue the allegations of the complaint, and thereafter noted the cause for trial. At the time the cause

was called for trial the appellant moved for a continuance. On this motion the statement of facts shows the following:

"Be it remembered that on the 25th day of February, 1920, the case of W. F. Hays, Plaintiff, v. Sumpter Lumber Company and the Henry Hewitt Estate was duly called for trial before Hon. John D. Fletcher, one of the judges of said court, presiding in department No. 8, plaintiff appearing in person and the defendants being represented by their counsel, Messrs. Peters & Powell and E. R. York, Esq., and the oral application of the plaintiff for a continuance of the case being made upon the ground: First, that the subject-matter of this action out of which this action has grown is now pending in the United States Circuit Court of Appeals, with notice to said court of the purpose and intention of suing out a writ of certiorari from a judgment entered in that court to the Supreme Court of the United States, directing the Circuit Court of Appeals to transmit the record in said case for a final hearing of said case upon merits.

"That upon further representation to the court that a final determination in the United States Supreme Court in favor of the appellant would determine the rights of the plaintiff in this case in so far as his claim goes to the money judgment sought herein, and would give to the defendant in this suit an interest of one-half the entire lands involved in that suit if judgment is favorable under the decision of the Supreme Court, the purpose of said suit being to quiet title to some 25,000 acres of timber lands, which was the subject-matter of the contract sued upon in this action.

"That suit being undetermined by the United States Supreme Court, it is impossible for this court to proceed with the trial of this case upon the merits, and grant full and complete relief to the plaintiff and to the defendant, and that a trial at this time would be premature and ineffectual for any purpose.

"The subject-matter of the litigation being the title to said timber lands, if determined in said court favorably to the petitioner and appellant, then his rights now sought in this action will have been satisfied and adjudicated, and this action would be at an end in so far as such incidental expenses or costs as might be incurred by a natural appellant or litigant in the case were concerned. This is in view of the necessary substitution in said Sumpter Lumber Company case of this plaintiff in the present action.

"The said case in the United States Circuit Court of Appeals being entitled: United States Circuit Court of Appeals for the Ninth Circuit. W. F. Hays, Substituted as Appellant for Sumpter Lumber Company, a Corporation, Pursuant to Order Entered April 8, 1919, Appellant, v. Sound Timber Lumber Company, a Corporation, Appellee. Upon Appeal from the United States District Court for Washington.

"That upon these facts being stated, the court found that the application for continuance of this present action is without merit, and is denied. To which denial the plaintiff then and there excepted, and exception was allowed by the court.

"The Court: Let the record show that the above statement is taken in lieu of an affidavit, such proceedings being consented to by the

attorneys for the defendant. You may proceed with the trial on the merits.

"Mr. Hays: The plaintiff refuses to proceed or submit further to the jurisdiction of this court, upon the ground that it is without jurisdiction of the subject-matter, and therefore any judgment it might render in this case would be void.

"The Court: On that statement, let an order be entered dismissing the action.

"Mr. Hays: Your honor will allow exception.

"The Court: Exception allowed."

○ The appellant argues in support of his claim of error that, while an emergency existed for instituting the action (the emergency being to avoid the short statute of limitations), no emergency existed for the immediate trial of the action; and since a favorable decision by the Supreme Court of the United States on the writ of error will vest title to the lands mentioned in him, and render it unnecessary to litigate further many of the questions he here seeks to litigate, justice required that the cause be continued to await the outcome of the proceedings in that court, as to do so might save him from the burden and cost of litigating matters which a favorable decision would render it unnecessary to litigate. The reference is here to that part of the complaint which seeks to charge the respondents with the value of the lands in case it should finally be determined that they have been lost to the parties. But we are clear that no cause of action is stated in this regard. As we held in *Vanasse Land Co. v. Hewitt*, 95 Wash. 643, 164 Pac. 196, construing the very contract here relied upon, the subject-matter of the contract was the sale and purchase of land, and no action would lie to recover the purchase price if the title to the land did not pass by the execution sale. It must follow that this action in no way hinges on the result of the proceedings in the United States Supreme Court. Whether the proceedings result favorably or unfavorably to the appellant, he is equally prohibited from recovering the value of the lands from the respondents. If the complaint states a cause of action at all, it states a cause of action because of the breach of the contract to prosecute and pay the costs of the appeal from the judgment of the district court to the Court of Appeals. But as this issue was in no way dependent on the outcome of the pending proceedings, it could have been tried at the time the defendant sought to try it, as well as at any other time.

There was therefore no showing authorizing a continuance, and it follows as of course that no error was committed by denying the application.

The judgment will be affirmed.

PARKER, C. J., HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

(116 Wash. 143)

IN RE SHERRILL. (No. 327.)

(Supreme Court of Washington. June 21. 1921.)

1. Attorney and client \S 52 — Additional charges may be filed pending disbarment hearing.

A proceeding before the board of law examiners on charges against an attorney is not strictly judicial in its nature, and where the complaint was definite and certain in its charges, and accused was given ample time and full opportunity to present his defense, the board had authority to permit additional charges to be filed after the hearing had been entered upon, and the proceedings were not void because of the filing of such additional charges.

2. Attorney and client \S 53(1)—No presumption of unfairness because charges against attorney verified by member of board of examiners.

In a proceeding before the board of law examiners for the disbarment of an attorney, no presumption of unfairness or partiality arises from the fact that the complaint was verified by a member of the board to the effect that he believed it to be true, as the power of instituting proceedings is expressly conferred on the board.

Department 1.

Proceeding instituted before the state board of law examiners for the disbarment of Rufus L. Sherrill, an attorney at law. The board filed a transcript of its proceedings with a report recommending the disbarment of accused. Accused disbarred.

L. L. Thompson and John H. Dunbar, both of Olympia, for State Board of Law Examiners.

Leo & Flasket, of Tacoma, for respondent.

FULLERTON, J. This is a proceeding for the disbarment of Rufus L. Sherrill, an attorney at law, duly licensed to practice in the courts of this state.

The complaint against Mr. Sherrill, as originally filed with the state board of law examiners, contained two charges; the substance of the first being that he had wrongfully appropriated to his own use money sent him in his capacity as an attorney by a judgment debtor for the purpose of satisfying a judgment, and the second that he was of immoral and dissolute habits, a habitual drunkard, and had been guilty of violating the liquor laws of the state, and had paid fines and served jail sentences upon convictions for such offenses. On the filing of the complaint, the board appointed a time and place for hearing the same, and caused notice thereof to be served on Mr. Sherrill. At the time and place appointed Mr. Sherrill appeared and filed a written answer to the charges; the answer being in substance a general denial of the charges,

save that he expressly admitted that he had been found guilty and had paid fines and had served jail sentences for unlawfully having in his possession intoxicating liquors. The hearing then proceeded upon the charges on which issue was taken, in which hearing evidence was introduced both in support and in disproof of the charges. On the conclusion of the testimony the attorney representing the prosecution announced to the board that since the filing of the complaint on the pending charges additional charges against the accused had been brought to his attention which he desired to investigate, and moved the board for a continuance of the hearing to some future day certain with leave to file a supplemental complaint in case he found sufficient substantiation of the charges. To this Mr. Sherrill, who was then appearing on his own behalf, made no objection, and on the suggestion of a date by the chairman of the board answered that it was satisfactory. The hearing was then adjourned until Wednesday, November 10, 1920, the chairman directing that any complaint containing additional charges be served upon the accused at least 10 days prior to the time to which the hearing was adjourned.

On October 22, 1920, an amended and supplemental complaint was filed with the secretary of the board. This complaint contained the charges set forth in the original complaint in substantially the language there pursued, and contained in addition two further charges, the first of which is that he aided and abetted one Julia B. Smith in the practice of criminal abortion, and the second that after the conviction of Mrs. Smith for the crime of criminal abortion, and after her sentence to a term in the penitentiary, he sought to persuade certain witnesses, who testified for the state at her trial, to make false affidavits for use in an application which he contemplated making to the Governor of the state for her pardon.

The amended and supplemental complaint was served on Mr. Sherrill more than 10 days prior to the adjourned hearing. At that time Mr. Sherrill appeared in person and by counsel, and filed certain written objections to any further proceedings. These objections were overruled by the board, whereupon evidence was introduced on behalf of the prosecution in support of the additional charges. An adjournment was then taken to a later day, at which time counsel alone appeared; Mr. Sherrill personally making no further appearance. At this hearing the proceedings were conducted to a close, and later on the board returned into this court a transcript of the proceedings together with their report, finding the charges sustained and recommending that the accused be disbarred.

[1] In this court it is contended on behalf of the accused that the board exceeded its powers in permitting the amended and sup-

plemental complaint to be filed and in retrying the cause upon the additional charges set forth therein. It is argued that amendments to complaints in proceedings of this sort are governed by the statute permitting amendments to complaints in ordinary civil actions, and that there was no sufficient cause shown for allowing the amendment in this instance. But we think this a special proceeding to which the statutes referred to are inapplicable. The hearing before the board is not in its nature strictly judicial. By the statute creating the board, they are empowered only to entertain the complaint, hear and take evidence thereon, and report the evidence with their recommendations to this court, where the final judgment is entered. It is essential, of course, that the complaint against the accused state definitely and clearly the grounds of the charges against him, and that he be given full and ample opportunity to make his defense thereto, but it is not a requirement that the proceedings take any particular course, or that they comply with the practice governing the proceedings in the superior or other courts. Here the complaint was definite and certain in its charges, the accused was given ample time and a full opportunity to present his defense, and we cannot think that, because the board allowed additional charges to be filed after the hearing had been entered upon, it in any way acted irregularly or without authority, much less that it so far exceeded its powers as to render the proceedings void.

[2] The complaint was verified by a member of the board to the effect that he believed it to be true. It is argued that this is to make the board both the accuser and the judge, and that the proceedings are void for this reason. But this is a power expressly conferred on the board by the statute, and no presumption of unfairness or partiality arises from the fact. A similar objection was made to the act establishing a railroad commission (Laws 1905, p. 145), which permitted the commission created thereby to institute proceedings "upon its own motion" against public carriers. But we held this not fatal to the act, or as rendering void proceedings instituted on a complaint verified by one of the commissioners. *State ex rel. Oregon R., etc., Co. v. R. R. Com.*, 52 Wash. 17, 100 Pac. 179.

The merits of the controversy we shall not discuss. Recognizing the serious consequences of the proceedings to the accused, and the rule of law that the accusations should be proven by a clear preponderance of the evidence, we have no hesitancy in saying that the evidence justifies the conclusion that the accused has been guilty of conduct demonstrating his unfitness to practice as an attorney at law.

It will therefore be the judgment of the court that the license heretofore granted the accused to practice law in this state be re-

voked, that he be disbarred, and that his name be stricken from the roll of attorneys.

PARKER, C. J., and HOLCOMB, MACKINTOSH, and BRIDGES, JJ., concur.

1116 - Wash. 196)

CORUM et ux. v. BLOMQUIST et ux.
(No. 16387.)

(Supreme Court of Washington. June 22, 1921.)

1. Negligence — 136(19)—Negligence as to child drowned in swimming pool held for jury.

In parents' action for drowning of their son in a swimming pool operated by defendants, on testimony that the son was missing for from 10 to 15 minutes without his absence being noted, the failure of the employee in charge to be reasonably attentive held for the jury.

2. Negligence — 125—Previous accidents in swimming pool held inadmissible.

In parents' action for drowning of their son in a swimming pool operated by defendants, where the plaintiffs produced no testimony of any negligence in the construction or operation of the pool other than that relating to the failure of the employee in charge to be reasonably attentive, evidence relative to previous accidents in the pool was inadmissible.

Department 1.

Appeal from Superior Court, Grays Harbor County; W. A. Reynolds, Judge.

Action by George A. Corum and wife against Gust Blomquist and wife. Verdict for plaintiffs for \$1, and, from order granting plaintiffs' motion for new trial, defendants appeal. Affirmed.

William E. Campbell and Martin F. Smith, both of Hoquiam, for appellants.

W. H. Abel, of Montesano, John D. Ehrhart, of Hoquiam, for respondents.

MACKINTOSH, J. The appellants operate a swimming pool in a building owned by them at Hoquiam, and on July 10, 1919, the respondents' 11 year old boy was there drowned. The complaint charges that the bed of the pool slopes from a few inches to eight feet in depth, and was a dangerous yet attractive place for small children, and that such children were likely to be injured or drowned, and that, with knowledge of these conditions, the appellants operated the pool without placing a responsible person in charge, and negligently committed the care of the pool to their daughter, a girl lacking in judgment, experience, skill, or ability to safeguard the children who frequented the pool. The case was tried to a jury and re-

sulted in a verdict for the respondents, who moved for a new trial, which was granted, and from that order the appellants bring the case here.

[1] Appellants allege that the court committed error in granting the new trial and committed error in refusing to grant appellants' motion for a nonsuit. Upon the respondents' suggestion in their brief that the abstract of the testimony furnished by the appellants is inadequate, we have read the statement of facts, which discloses that the respondents produced no testimony of any negligence in the construction or operation of the swimming pool other than that relating to the failure of the employee in charge to be reasonably attentive. The testimony upon this point which would entitle the respondents' case to be considered by a jury was that the respondents' son was missing for from 10 to 15 minutes without his absence being noted. This presented a question of fact for the jury to determine whether, if that statement is true (and it is open to some doubt, for the boy, after being brought out of the water, breathed a few times under manual manipulation), a competent attendant, exercising reasonable care, should have discovered the boy's disappearance earlier than was actually done. There is no other element of negligence in the case, for there is no question that after the discovery of the boy everything that could be done by any one was done, and as speedily and efficiently as was humanly possible. Upon this attenuated string the respondents rely to hold the liability of the appellants, which the jury tied with as attenuated a knot, having returned a verdict in the sum of \$1. There being the evidence to which we have referred in the case, the court was not in error in refusing to grant the appellants' motion for nonsuit.

The grounds upon which the court granted respondents' motion for a new trial do not appear in the record, and, under our rule which provides that the granting of a new trial will not be reversed under such conditions, we cannot do other than affirm the lower court.

[2] Although it is not necessary for the decision of this case, in order to obviate the necessity for a further appeal in the event of a new trial, it may be said the evidence which was admitted relative to previous accidents in this swimming pool was improper, for the reason that the only question of negligence, as we have seen, in this case, is the failure of appellants' daughter to reasonably observe the movements and whereabouts of those using the pool.

The judgment is affirmed.

PARKER, C. J., and BRIDGES, FULLERTON, and HOLCOMB, JJ., concur.

(116 Wash. 118)

WILCOX v. MOBLEY et al. (No. 16246.)

(Supreme Court of Washington. June 14, 1921.)

Ballment ¶18(2)—No lien as against seller under conditional sale contract who did not request labor or materials or ratify performance of furnishing.

Under Laws 1917, p. 229, giving a lien on chattels for labor performed or material furnished at the request of the owner, one performing labor and furnishing material on a truck had no lien thereon as against the seller of the truck under a conditional sale contract, where the labor was not performed or the material furnished at its request, or at the request of any one acting for, or on its behalf, and it did not order, sanction, or authorize, have notice of, or ratify such performance or furnishing.

Department 1.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by F. B. Wilcox against V. B. Mobley and others. From a judgment for plaintiff, defendant Mobley appeals. Reversed.

Geo. L. Spirk, of Seattle, for appellant.

MACKINTOSH, J. The appellant, on October 31, 1919, sold a truck and delivered possession thereof to the defendant Mobley under a conditional sale contract, which was filed on November 4, in the office of the auditor of Lewis county. The respondent, in December, began this action to foreclose a chattel lien, alleging that he had performed labor and furnished material on the truck on November 3. The lien notice made no mention of the appellant. By answer, the appellant denied its liability for the claim, and alleged that it was the owner of the truck, and that at no time had it ordered, sanctioned, or authorized any repairs, and had no notice that they were being made, and alleged that no authority existed on the part of any one to order any repairs on appellant's behalf. Judgment was entered against the appellant for the amount of the lien, and foreclosure and sale were ordered. From this judgment the appellant has prosecuted an appeal.

Chapter 68, Laws of 1917, limits the right of a lien of one who has performed labor or furnished material to one who has performed the labor or furnished the material "at the request of the owner." It being indisputable from the evidence that the appellant was the owner of the truck at the time the labor was performed and the material furnished, and there being no evidence that these things were done at the appellant's request, or at the request of any one acting for or on its behalf, and it appearing that the appellant had not ordered, sanctioned, or authorized, or had notice of or rat-

fied the performance of the labor and the furnishing of the material, the judgment was erroneous in so far as it affects the appellant, and is reversed.

PARKER, C. J., and BRIDGES, HOLCOMB, and FULLERTON, JJ., concur.

(116 Wash. 32)

DANIEL v. DANIEL. (No. 16166.)

(Supreme Court of Washington. June 10, 1921.)

1. Reference ¶2—Constitution does not prevent provision for appointment of referees.

Const. art. 4, §§ 1, 6, and 23, creating the courts and defining their jurisdiction, does not prevent the Legislature from providing for the appointment of referees to take an accounting.

2. Courts ¶28—Manner of exercising jurisdiction not regulated by Constitution.

The Constitution does not purport to regulate or control the manner in which the courts shall exercise their jurisdiction, and this is left as a prerogative of the courts themselves, and of the lawmaking power, and can be lawfully exercised in any manner which the Constitution does not directly prohibit.

3. Reference ¶2—Territorial statute providing compulsory reference on long account not repugnant to Constitution.

Rem. Code 1915, § 369 et seq., providing for a compulsory reference where the issues involve a long account on either side, is not repugnant to the Constitution within the meaning of article 27, § 2, continuing in force laws of the territory not repugnant to the Constitution.

4. Tenancy in common ¶37—Accounting of profits not denied because tenant in possession leased property for immoral purposes.

The principle that a division of profits from an illegal or immoral transaction will not be enforced between the participants therein had no application where defendant, who was holding and managing as his own, without any recognition of plaintiff's right, property in which plaintiff had an undivided interest leased the property for an immoral use, as plaintiff was not a party or privy to the illegal transaction, and to refuse an accounting would punish the innocent rather than the guilty party.

5. Tenancy in common ¶37—Tenant not keeping accounts cannot complain that evidence on accounting is indirect and circumstantial.

Where defendant, who was managing property in which plaintiff had an interest as his own, without recognition of any right in plaintiff, kept no books of account, showing either gross earnings or the cost of the upkeep, he cannot complain because the evidence on the accounting is more or less indirect and circumstantial.

6. Tenancy in common \Leftrightarrow 37—Tenant conducting property as his own held liable for interest on moneys collected and not accounted for.

Where defendant, who was holding and managing as his own property in which plaintiff had an undivided interest, without any recognition of plaintiff's right, actually collected definite sums for a share of which he should have accounted to plaintiff, he is liable for interest on such sums as can be ascertained to have been wrongfully withheld under Rem. Code 1915, § 8250, providing for interest on every loan or forbearance of money, as there was a forbearance of money.

7. Reference \Leftrightarrow 76(1) — Statute providing for payment of fees as costs not unconstitutional.

The statute providing for the allowance of referee's fees to be paid as costs is not unconstitutional, as costs are a part of the burden of litigation, and no litigant is deprived of a constitutional right by statutes imposing such costs upon him.

Department 1.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Hazel Daniel against J. I. Daniel. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 194 Pac. 376.

Cyrus Happy and O. O. Moore, both of Spokane, for appellant.

Geo. W. Belt and Fred M. Williams, both of Spokane, for respondent.

FULLERTON, J. This is an appeal from a judgment entered upon an accounting. The case prior hereto was before us on another aspect, and will be found reported in *Daniel v. Daniel*, 106 Wash. 659, 181 Pac. 215. In the cited case we affirmed the trial court, which adjudged that the respondent was the owner of an undivided one-twelfth interest in certain real property situated in the city of Spokane, and was entitled to an accounting for a one-twelfth interest in the rents, issues, and profits thereof during the time her interests were withheld from her by the appellant. The amount found to be due was the sum of \$24,530, and for this sum the judgment appealed from was entered.

After the cause had been remanded on the first appeal, the trial court appointed a referee to take the accounting. It is contended that this was beyond the power of the trial court, and that, in consequence, all proceedings had thereunder are null and void. In the language of the appellant's learned counsel:

"Our Constitution does not provide for the appointment of a referee, but clearly contemplates that all judicial proceedings shall be either in one of the courts provided by the Constitution or before a court commissioner, for

the appointment of which provision is made by the Constitution. We therefore contend that the order of reference, made without consent of appellant, and all proceedings thereunder are illegal and without judicial force or effect."

[1, 2] The provisions of the Constitution cited as the foundation for the contention are sections 1, 6, and 23, of article 4 of that instrument. The first of these sections vests the judicial power of the state in a Supreme Court, superior courts, justices of the peace, and such inferior courts as the Legislature may provide. The second of the sections defines the jurisdiction of the superior courts, and the third empowers the superior court to appoint court commissioners, and defines their powers and duties when so appointed. We cannot think these sections have a bearing upon the question suggested. They but create the courts and define their jurisdiction; in no way do they purport to regulate or control the manner in which the courts shall exercise jurisdiction. The latter is left as a prerogative of the courts themselves, and of the lawmaking power, and can be lawfully exercised in any manner which the Constitution does not directly prohibit. The Legislature has acted on the matter.

[3] By the Code (Rem. § 869 et seq.) it is expressly provided that a compulsory reference may be had where the issues involve a long account on either side. It is true the statute was actually enacted prior to the formation and adoption of the Constitution, but that instrument itself provided (section 2, art. 27) that—

"All laws now in force in the territory of Washington which are not repugnant to this Constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the Legislature."

The law has not expired by any limitation, nor has it been altered or repealed by the state Legislature. We are clear also that the statute is not repugnant to the Constitution. To refer a cause involving the taking of an account to a master has from the earliest times been the recognized practice of the courts of chancery, and in all of the American states to which our attention has been directed, where the legal and chancery powers are exercised by the same tribunal, statutes have been enacted authorizing such a reference. These statutes, with substantial uniformity, have been upheld by the courts. In this state the practice has been repeatedly exercised since the adoption of the Constitution, and in at least two instances we have held a compulsory exercise of the power within the province of the court. *Lindley v. McGlauffin*, 57 Wash. 581, 107 Pac. 355; *Poultry Producers' Union v. Williams*,

58 Wash. 64, 107 Pac. 1040, 137 Am. St. Rep. 1041. In neither of these cases, it may be conceded, was the precise question suggested, but we cannot think that this fact destroys the cases as authority. We cannot conclude, therefore, that the court acted without its powers in directing a compulsory reference.

[4] In the early part of the period over which the appellant was compelled to account for the profits of the premises, and the period during which the greater gains therefrom were derived, the premises were leased to women engaged in the practice of prostitution, to be used for such practices. It is urged that this use of the premises was contrary to public morals, and in consequence the court should not compel an accounting for profits so derived, as to do so would be in effect to recognize and enforce an illegal transaction. There are courts which maintain the principle that a division of profits arising from an illegal or immoral transaction will not be enforced between participants therein, even though the transaction has been completed and closed, and nothing is asserted but the title to money which has arisen from the transaction. But this conclusion is opposed by some courts, if not a majority, and we have heretofore aligned ourselves with the opposing courts. *McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499, 72 Pac. 119; *Stirtan v. Blethen*, 79 Wash. 10, 139 Pac. 618, 51 L. R. A. (N. S.) 623.

We cannot, however, concede that the present case falls within the rule sought to be invoked. The respondent was in this instance in no sense a party or privy to the illegal transaction through which the profits she seeks to recover were gained. At the time they were gained the appellant was holding and managing the property as his own, without recognition of any right therein in the respondent, and it was wholly because of his individual act that the property was put to an immoral use. To require him to account for the profits gained is not, therefore, to enforce an illegal transaction to which the respondent was at one time a party; it is but to require him to account for money acquired by the wrongful use of her property. To refuse to require the accounting would be to punish the innocent, rather than the guilty party, and this is not the purpose of the rule relied upon. Its purpose is to discourage illegal transactions, and, when this purpose is better subserved by recognizing and enforcing the transaction than it is by ignoring it, courts have never hesitated so to do.

[5] The appellant next questions the amount of the recovery recommended by the referee and confirmed by the court, contending that the recovery is too large. He also objects to much of the evidence introduced by the respondent to establish the amount of the

recovery, contending that it is remote, and of a hearsay nature. But neither of these contentions requires extended discussion. The evidence as we read it tends reasonably to support the amount of the recovery, and the evidence by which the amount of the recovery was sought to be established was the best evidence of which the case from its nature was susceptible. The appellant kept no books of account showing either the gross earnings of the property or the cost of its upkeep during the period of the accounting, and he is not in a position to complain because the evidence of the respondent was more or less indirect and circumstantial. Since it was his duty to account, and since his withholding of the respondent's share of the earnings was wrongful, courts of equity do not, in such cases (in the language of Mr. Justice Story)—

"proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of the principal."

[6] The report of the referee states the account by yearly periods, and allows interest to the respondent on the balances found, at the legal rate, from the end of each yearly period down to the time of the accounting. It is contended that the allowance of interest is unauthorized; the argument being that the demand was unliquidated and that interest is not recoverable on unliquidated demands. But the case falls within the principle of the case of *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458, in which we held the rule contended for inapplicable. There the plaintiff had made the defendant its exclusive sales agent for the sale of certain of its land. During the continuance of the contract sales were made aggregating large sums which were received by the defendant. No regular accountings were had, the defendant, at first frequently, but latterly at long intervals, turning over to the plaintiff sums which he claimed balanced the account. The action was begun at the close of the relationship, the plaintiff contending that the defendant had retained moneys which properly belonged to it. The trial court found there was a large sum due the plaintiff, and in casting the account struck quarterly balances, and allowed interest on such balances from each quarterly period down to the time of the entry of the judgment. On the appeal it was contended, as it is contended here, that the demand was unliquidated, and that interest is not allowable on unliquidated demands. Answering the objection, we said:

"It is true, of course, * * * as a general rule, interest is not allowed on unliquidated de-

mands. This rule, however, like all general rules, has its exceptions. Courts will not hesitate to make it yield to the equities of a given case. * * * The evidence was conflicting upon these points, but a consideration of the entire record convinces us that the whole difficulty arose from the remissness of the defendants in the matter of accounting at reasonable intervals. In such a case, it would be most inequitable to deny interest on balances cast at reasonable intervals, the means for determining such balances being always at hand."

So in this case there was a definite sum actually collected by the appellant, of which the respondent was entitled on its collection to a certain share. It was the appellant's duty to account to her for this share. He failed to so account and failed even to keep a definite record of the amounts collected. Manifestly it would be inequitable to say that he has, by his breach of duty, relieved himself from paying interest on such sums as can now be ascertained he has wrongfully withheld.

It is also argued that interest is not a creation of the common law, but is purely of statutory origin, and that we have no statute authorizing the recovery of interest in cases of this sort. But, if it be true that the asserted principle is the now applicable rule, we think there is such statutory authority. By the Code (Rem. § 6250) it is provided that every loan or forbearance of money shall bear interest at a fixed rate, and there was here, clearly, a forbearance of money.

[7] The court allowed the referee fees based on the rate fixed by statute. Objection is made to this on the ground that the statute is unconstitutional. The argument made in support of the contention is ingenious, but we cannot regard it as tenable. The case of *State ex rel. Rochford v. Superior Court*, 4 Wash. 33, 29 Pac. 764, on which the principal reliance is placed, is not in point. There the trial court sought to charge to the county the fees of a stenographer appointed to take the testimony on a trial held before it, and the right was denied because of want of statutory authority. It was not denied that the Legislature could provide for a stenographer and make his fees payable from county funds. Costs are a part of the burden of litigation, and no litigant is deprived of a constitutional right by statutes which impose such costs upon him.

Other questions are raised and discussed in the briefs, but these, as we view them, were foreclosed by the judgment in the principal case, and cannot again be considered.

The judgment is affirmed.

PARKER, O. J., and BRIDGES, MACKINTOSH, and HOLCOMB, JJ., concur.

(116 Wash. 120)

POLLEY et ux. v. PEABODY et ux.
(No. 16402.)

(Supreme Court of Washington. June 14, 1921.)

Evidence ~~427~~—Parol evidence held admissible to establish agency.

In an action against an alleged agent for the purchase of land to recover the amount paid him in excess of the price of the land, less reasonable compensation, parol evidence which did not vary or alter a written escrow memorandum, but was introduced to establish the fact that defendant had been employed as plaintiff's agent, and was so acting at the time of the transaction in question, and concealed and misrepresented the price, held admissible for that purpose.

Department 1.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by P. A. Polley and wife against F. W. Peabody and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Earl W. Husted, of Everett, for appellants.
D. W. Locke and C. T. Roscoe, both of Everett, for respondents.

MACKINTOSH, J. The Polleys prosecuted this action to recover from the Peabodys certain sums of money alleged to have been given to F. W. Peabody in pursuance of a verbal agreement whereby he was employed as the Polleys agent to purchase for them certain property in Snohomish county, and to advance for them a portion of the purchase price by way of a loan. They allege they paid to Peabody the sum of \$1,013.75, but that he used only the sum of \$771.50 in making payment for the premises, and that he had retained the balance, less reasonable compensation for his services, and this action is for the sum of such balance, to wit, \$204.75. By affirmative defense the appellants allege that the property was purchased by the respondents under a written memorandum. In their reply the respondents admit the memorandum, but deny that the memorandum amounted to a contract.

The essential question in the case is whether the appellant was the agent of the respondents. Although the appellants allege many errors, the only one they have seen fit to argue is whether the trial court was in error in admitting parol evidence to establish the agency. The evidence is amply sufficient to sustain the respondents' position if it was properly admitted. The written evidence consists of four instruments: First, a receipt signed by Peabody for \$50 as earnest money to be returned if the property was not secured; second, a receipt signed by Peabody for \$50, to be applied on the purchase price of \$950; third, a receipt signed by one

Otto for \$50 upon the purchase price of \$850; and, fourth, an escrow memorandum between respondents and appellants showing the price to be \$750. The parol evidence was not introduced for the purpose of varying or altering the escrow agreement, but merely to establish the fact that Peabody had been employed as the respondents' agent, and while acting as such agent had purchased the premises in question with their money, concealing from them the true price at which he had made the purchase, and falsely and fraudulently representing to them that the price paid was in excess of the price for which he had actually secured the property. The escrow agreement does not state the contract whereby the respondents employed the appellant, and, moreover, there was sufficient evidence to show that the signature of the respondents to it had been secured by fraud and misrepresentation.

Examination of the case discloses no error, and the judgment is affirmed.

PARKER, C. J., and BRIDGES, HOLCOMB, and FULLERTON, JJ., concur.

(116 Wash. 108)

SMITH v. FRATES. (No. 16434.)

(Supreme Court of Washington. June 10, 1921.)

1. Divorce \Rightarrow 312—Husband admitting divorced wife's right to modification of custody decree cannot urge same as error on appeal.

Where an attorney conceded in open court his client's divorced wife's right to a modification of a decree allowing the husband the custody of the children, so as to permit her to visit them, the husband could not urge such modification as error, since a litigant cannot be allowed to adopt one position in the trial court and the opposite on appeal.

2. Divorce \Rightarrow 303(3)—Divorced wife's removal from county not ground for requiring security for costs on petition for modification of custody decree.

The removal of a divorced wife from the county in which the divorce was granted is not a ground for requiring security for costs, under Rem. Code 1915, § 495, on petition for modification of a decree for custody of the children; such petition being merely an ancillary proceeding to the original action.

3. Divorce \Rightarrow 303(3)—Stay of proceedings on wife's petition for modification of decree regarding children's custody not warranted by her nonpayment of costs in former appeal.

On wife's petition for modification of decree as to children's custody, stay of proceedings would not be granted until such time as she should pay a judgment against her in the action for costs on a former appeal, where, by affidavits, it was reasonably shown that she was wholly unable to satisfy the costs.

Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Petition by Martha Smith for modification of a decree as to the custody of her minor children by her divorced husband, Louis Frates. From an order modifying the decree, the husband appeals. Affirmed.

Howard O. Durk, of Seattle, for appellant. Elias A. Wright and Sam A. Wright, both of Seattle, for respondent.

HOLCOMB, J. Upon a former appeal in this case an adjudication as to the custody of the children was made by this court and a history of the case given. *Smith v. Frates*, 107 Wash. 13, 180 Pac. 880.

Respondent filed her petition for a modification of the decree so as to permit her to visit her minor children. Appellant thereupon moved the court for a stay of proceedings, upon two grounds: First, until respondent should furnish security for costs; and, second, until such time as she should pay the judgment against her in this action for costs on the former appeal, amounting to \$108.55.

[1] When the petition came on for hearing upon the merits, the attorney for appellant, in open court, made the following concession:

"As to the right of this woman to see her own children, I suppose there is no doubt that the court will grant that right, but the contention that Mr. Frates has ever denied that right, according to his own testimony, is absolutely false."

There was no testimony taken in the case after counsel for appellant conceded the right of respondent to have the decree modified to the extent prayed, and there was only one proposition of law upon which the trial court was called to pass by the appellant, and that was the question of the stay of proceedings. The court entered an order modifying the previous decree as to the custody of the children, so as to give respondent the right to visit the children at certain stated times after notice to appellant, and at certain places, and under certain restrictions imposed by the court.

Appellant, in this state of the record, is in no position to urge as error the modification by the court of the original decree of divorce as well as the judgment of this court in the case of *Smith v. Frates*, supra. A litigant cannot be allowed to adopt one position in the trial court and the opposite position in this court.

[2] As to the first ground for the motion for stay of proceedings, namely, that respondent was a nonresident of King county, which, under the statute and decisions of this court, entitles appellant to the bond demanded (Rem. Code, § 495), it cannot be sub-

tained. Respondent's petition was not an original proceeding, but merely an ancillary proceeding to the original action which had been brought in King county, where the parties at that time resided. Although respondent has since removed to Yakima county, the original action, being for divorce, brought in the county where plaintiff resided, her subsequent removal does not give grounds for requiring security for costs, under section 496, supra.

[3] Nor is the second ground for the motion for stay of proceedings tenable. The costs arose out of the same case and not out of an independent former action. Affidavits were presented to the trial court by both parties as to the ability or inability of the respondent to first satisfy the costs before she could be heard upon her petition, and it was reasonably shown that respondent was wholly unable to satisfy the costs. In *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831, a stay of proceedings was ordered by the lower court until the plaintiff therein paid the costs of a former case, which had been dismissed. This court held that the lower court abused its discretion under the showing made by the party that she was absolutely without means, and reversed the order.

The trial court properly exercised its discretion on this case in refusing to stay the proceedings.

The order is affirmed.

PARKER, C. J., and BRIDGES and MACKINTOSH, JJ., concur.

FULLERTON, J., concurs in the result.

(116 Wash. 131)

SNYDER et ux. v. STRINGER, Sheriff, et al.
(No. 16494.)

(Supreme Court of Washington. June 15, 1921.)

1. Husband and wife §=268(1)—Community property cannot be seized and sold to satisfy separate debts of the husband.

Community property cannot be seized and sold to satisfy the separate debts of the husband.

2. Husband and wife §=246—Property bought after marriage in a foreign state held community property in Washington.

Where a husband whose business was partly in foreign state after marriage purchased an automobile in a foreign state, the machine must be deemed community property when brought into the state of Washington, and as such not subject to seizure and sale to satisfy judgment against the husband on account of his individual debt; for the situs of the automobile must be deemed to be that of the domicile of the spouses.

Department 2.

Appeal from Superior Court, King County; Marion Edwards, Judge pro tem.

Proceedings by George E. Snyder and wife against John Stringer, as Sheriff, and John Merkel, under Rem. Code 1915, §§ 573-577, to determine adverse claims to property levied on. From a judgment for plaintiffs, defendants appeal. Affirmed.

F. W. Girard and Fred M. Williams, both of Spokane (Attwood A. Kirby, of Spokane, of counsel), for appellants.

Gates & Helsell, of Seattle, and Harry L. Cohn and Robt. Weinstein, both of Spokane, for respondents.

PARKER, C. J. This was a proceeding in the superior court for King county under sections 573-577, Rem. Code, relating to adverse claims to property levied upon. The plaintiffs, Snyder and wife, as a community, sought recovery of an automobile, claimed by them as their community property, which had been levied upon by the defendant sheriff under a writ of execution issued upon a judgment rendered against the plaintiff Snyder in favor of the defendant Merkel. Proper affidavit and bond having been furnished to the defendant sheriff, he delivered the automobile to the plaintiffs, and thereafter the cause came regularly on for trial upon the merits as to the ownership of the automobile and its liability to seizure and sale in satisfaction of the judgment rendered against Snyder in favor of the defendant Merkel. Findings and judgment were made and rendered by the superior court, adjudging the automobile to be community property of the plaintiffs, and not subject to seizure and sale in satisfaction of the judgment rendered against Snyder. From this disposition of the cause the defendants have appealed to this court.

We think there is no room for serious controversy as to what the controlling facts of the case are. They may be summarized as follows: Respondents, Snyder and wife, were married in July, 1917, and ever since then have been residents of the state of Washington. In February, 1919, there was duly rendered in the superior court for Spokane county a money judgment against respondent Snyder and in favor of appellant Merkel for the sum of \$2,500, upon an obligation incurred by Snyder long before his marriage, which obligation and judgment were not, and never became, a debt or obligation of the community composed of respondents. The business of respondent Snyder, consisting wholly of the business of the community, called him frequently, and for periods of considerable duration, out of this state, and particularly into the states of Montana and Iowa. While in Iowa in May, 1920, he purchased there the automobile here in question,

with funds which for present purposes we may regard as having been earned by him in his business in that state and in Montana. He brought the automobile to this state, and thereafter it was seized by appellant as sheriff under an execution issued upon the judgment rendered against Snyder in favor of appellant Merkel. This proceeding was thereupon commenced by respondents, seeking recovery of the automobile, and resulted as above noticed. It was proven upon the trial that by the laws of both Montana and Iowa the earnings of a husband during coverture become his separate property and become liable to levy and sale in satisfaction of his individual debts.

[1, 2] Counsel for appellant, while conceding that community property cannot in this state during coverture be seized and sold to satisfy the separate debts of the husband, invoke the general rule that the ownership of property brought into this state from another state remains unchanged; so that, if such property be separate property of the husband when brought here, it so remains, and becomes subject to seizure and sale to satisfy his separate debts, notwithstanding it may have been earned during coverture—citing *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732; *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914, 12 L. R. A. (N. S.) 921, 123 Am. St. Rep. 944, 13 Ann. Cas. 839; and *Meyers v. Albert*, 76 Wash. 218, 135 Pac. 1003. The *Freeburger* decision seems to assume, rather than decide, that the property acquired in Kansas was there the separate property of the wife. The real point decided seems to be that the property did not change its character as to ownership by being brought into this state; that is, that it did not thereby become community property, though acquired during coverture. The place of the actual domicile of the husband and wife seems not to have been noticed in that decision. The *Brookman* and *Meyers* decisions render it plain that the properties there involved were acquired in states other than Washington, while the husband and wife were actually domiciled in those states, and became under the laws of those states the separate property of one or the other, and so remained when brought into this state.

Our decision in *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634, we think, is in principle decisive here in favor of the respondents. The property there involved was in this state, having been purchased by the husband with moneys earned by him in Alaska during coverture. Holding that the property was community property, Judge Gose, speaking for the court, said:

"The appellants urge that the interest of the appellant Dawson on the premises was his separate property. The evidence which forms

the basis for the contention is that the money which Dawson put into the property was earned by him at Nome, Alaska, and that, under the laws of that place, his earnings were his separate estate. The record discloses that both the husband and wife were at Nome, he working at different things, as she expressed it, and she keeping house. The wife further testified that the marriage occurred at Phoenix, Ariz., about 17 years before the trial. We have not been able to discover from the record whether Nome was their domicile or merely their temporary abode. As we have stated, in this state the presumption is that all property acquired by either spouse after marriage is community property. This rule is so well established that the citation of authority is not necessary. The law of the domicile controls as to personal property acquired during coverture. *Thayer v. Clarke* (Tex. Civ. App.) 77 S. W. 1050. In the absence of evidence as to the domicile of the parties at the time the money was earned, the presumption will be indulged that the domiciliary law is the same as our own. *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736."

It seems to be argued by counsel for the appellants that by this language the court had in mind the presumption that the laws of Alaska were the same as our own in the absence of proof; but clearly, we think, this is not what the court meant; for near the beginning of the quoted language it is said, "Under the laws of that place [Alaska], his earnings were his separate estate." We think it clear that, since the court was unable from the record to determine where the domicile of the husband and wife was at the time of earning the money which purchased the property, it would be presumed that in whatever state or territory that domicile was the laws of such state or territory were the same as our own, manifestly proceeding upon the theory that the husband and wife were not domiciled in Alaska, but were only there temporarily.

We are of the opinion that, for the purpose of determining by the courts of this state the ownership of this automobile, that is, as to whether it is community or separate property, both spouses being domiciled in this state when the automobile was acquired in the manner we have noticed, the situs of the property, to wit, the automobile, must be deemed to be that of the domicile of respondents, whatever may be said as to its situs for the purpose of determining its liability to seizure and sale, to satisfy the individual debts of respondent Snyder, while it was in Montana or Iowa, by the courts of those states.

The judgment is affirmed.

MITCHELL, MAIN, MACKINTOSH, and
TOLMAN, JJ., concur.

(116 Wash. 102)

TIMEWELL INV. CO. v. BECKWITH et al.
(No. 16248.)(Supreme Court of Washington. June 10,
1921.)**1. Principal and agent ⇨18—Burden rests on plaintiff to establish agency by a preponderance of the evidence.**

In an action to establish a trust on the part of a defendant in procuring the assignment of a judgment, and show that he acted as plaintiff's agent in the matter, the burden rested on plaintiff to establish the agency by a preponderance of the evidence, both in the lower court and in the trial de novo in the appellate court.

2. Evidence ⇨121(10) — Acts, part of same transaction, held part of res gestæ.

Where H., having procured the assignment of a judgment against plaintiff to B., at once gave a check in payment therefor, and entered the same in his books, in an action by plaintiff to establish a trust on the part of H. in securing the assignment, these several acts, being all part of the same transaction, were all part of the "res gestæ," and admissible in evidence as such.

3. Evidence ⇨121(3)—Book entries, part of res gestæ, held admissible.

Book entries, which were part of the res gestæ, and tended to corroborate the testimony of one of the witnesses testifying to the transaction, held admissible for that purpose, either for or against the party making them, to rebut inferences that might be drawn if they were not produced, and to show the capacity in which the party acted.

4. Principal and agent ⇨23(1) — Evidence held not to establish agency.

In an action to establish defendant's agency for plaintiff in a certain transaction, evidence held not to establish an agency.

Department 1.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the Timewell Investment Company against Ernestine S. Beckwith and another. From a judgment dismissing the case, plaintiff appeals. Affirmed.

Jesse Thomas, of Tacoma, for appellant.

F. H. Murray and Burkey, O'Brien & Burkey, all of Tacoma, for respondents.

HOLCOMB, J. By this appeal the appellant endeavors to reverse a judgment of dismissal by the trial court upon conflicting evidence. The pleadings are voluminous, and not necessary to set forth here. The object of the action, as stated in the appellant's notice of lis pendens, was to "establish a trust, or to vacate certain execution sales of real property, or to compel the assignment of the sheriff's certificate of sale of real property, and for general relief." The real property to be affected by the action is described as

follows: Lots 1 and 2, block 821; lots 11 and 12, block 1016; lots 11 and 12, block 1420, map of New Tacoma, Washington Territory.

[1] Appellant admits that although the decision of the lower court was, as it believes, based upon untenable ground, yet, the case being of equitable cognizance, its trial here is de novo, and the burden rests upon the appellant to show that it proved the agency by a preponderance of the evidence.

The burden also rested upon the appellant in the lower court to prove the agency by a preponderance of the evidence. The lower court saw and heard the witnesses, and was much better able to judge of the credibility than are we.

The evidence on behalf of appellant was to the effect that about the latter part of April, 1919, J. C. Heitman, president, general manager, and principal stockholder of the Fidelity Rent & Collection Company, went to W. R. Sturley, assistant treasurer and general manager of appellant at his place of employment in the Bank of California, in Tacoma, and interviewed him in regard to lots 11 and 12, block 1016, map of New Tacoma, situated at South Eleventh street and Yakima avenue; that Heitman represented to him that appellant had lost certain other property in Tacoma by foreclosure, when Heitman could have sold its equity and saved something for it, had it been placed in Heitman's hands for sale, and that the Eleventh street and Yakima avenue property would go the same way unless steps were taken to realize on the equity before it was too late; that Sturley stated to him that there were two judgments which were liens against the property, one held by Blanche B. Parker of Seattle, for about \$10,000, and one by the National Bank of Tacoma for a deficiency of more than \$1,500. Sturley told Heitman that Mrs. Parker's attorney had intimated to him that Mrs. Parker would give him a release of her judgment for \$200 cash; that it was then agreed between them that Heitman would see Mrs. Parker, and ascertain what he could get a release or assignment of the Parker judgment for, and report back to Sturley, and Sturley would arrange with the National Bank of Tacoma for a release from the judgment held by that bank, and as soon as the lots were relieved from the judgment liens Heitman would find a purchaser for them. Sturley testifies that Heitman first said he thought he could sell them for \$12,000, and that he (Sturley) told him to "go to it"; that Heitman never reported back, and he supposed he had not been able to make any deal with Mrs. Parker, and that the matter had fallen through. On September 13, 1919, he learned that the Eleventh street and Yakima avenue property had been levied upon under an execution, and he approached

Mr. Murray, the attorney for Mrs. Parker, and was told by Murray that he did not know anything about it, that he was not then handling the affairs of Mrs. Parker, and that he had better see Heitman. He then saw his own attorney, and he and a Mr. Young went and called upon Heitman, and offered to reimburse him for the amount he had paid for the judgment, and his expenses, which Heitman refused. The assignment of the judgment from Mrs. Parker to Mrs. Beckwith is dated May 1, 1919, and was acknowledged before a notary public on that day. The property was sold on execution on the judgment assigned to Mrs. Beckwith on October 25, 1919, who purchased all three properties subject to the other existing prior incumbrances. On November 24, 1919, this suit was commenced, and the lis pendens filed in the auditor's office.

On the other hand, Heitman testifies that he was for some time authorized by Mrs. Beckwith, a woman of some means, residing in Rochester, N. Y., to invest some money for her in Tacoma property such as Heitman would recommend; that prior to his calling upon Sturley he had discovered the condition of the three parcels of property involved herein, and had an attorney investigate the judgment liens against them, who investigated and reported the same prior to April 17, 1919; that he then went to Sturley, and offered \$1,000 to \$1,500 for a quitclaim deed "on behalf of a client of his," which Sturley refused. Heitman had also, prior to going to Sturley, inquired of Mr. Hellar, a representative of the National Bank of Tacoma, to learn for what price the bank would release or assign its deficiency judgment, but had not yet received the information from the bank, and after Heitman's interview with Sturley, Sturley was notified by Mr. Hellar the next day that Heitman had tried to buy the judgment, and that the bank had declined. At about the same time—just prior to or just after, his visit to Sturley—Heitman went to Seattle and interviewed Mrs. Parker relative to the purchase of her judgment. She asked \$250, but within three or four days she went to Tacoma and visited Heitman, when he offered her \$225 for an assignment of the judgment, which she accepted. This assignment was drawn up, but the name of the purchaser left blank. Mrs. Parker, before executing the assignment, asked the name of the purchaser, and was thereupon told that it was Ernestine S. Beckwith, and that name was written into the instrument. The money was paid to Mrs. Parker by check of the Fidelity Rent & Collection Company, and the amount was immediately charged on the books of the Fidelity Rent & Collection Company to the respondent Beckwith, the entry being made in the books by the bookkeeper of the Fidelity Rent & Collection Company on the same day and in the regular course of business. All subsequent disbursements in connection with

the levy and sale were likewise charged to the respondent Beckwith on the company's books as soon as the disbursements were made.

Respondent Beckwith's brother had expected to be in Tacoma in time for the sale, but did not arrive until early in December following, when he repaid the Fidelity Rent & Collection Company the money advanced in the purchase of the judgment and making the sale, amounting to \$520.80. The notice of the levy and sale, showing respondent Beckwith as owner of the judgment, was published in the Tacoma Daily Index, a paper of very general circulation among banks and business houses in Tacoma. Heitman was the active manager of the Fidelity Rent & Collection Company, and had been for about 16 years, and had never operated individually as a real estate broker.

Appellant first complains that the court erred in permitting the respondents to show that an account was opened upon the books of the Fidelity Rent & Collection Company between it and Ernestine S. Beckwith on May 1, 1919, charging the latter with the \$225 paid for the assignment of the Parker judgment.

[2, 3] The closing of the negotiations with Mrs. Parker, the execution of the assignment, the payment of the purchase price, and the entry of that payment in the company's cash-book and ledger, were all parts of the same transaction, and were all parts of the *res gestæ*. The claim of Sturley that Heitman was his agent in buying the judgment, was denied by Heitman, who testified that he was not acting in his individual capacity, but only as manager of the Fidelity Rent & Collection Company, and that it was acting solely as the buying agent of respondent Beckwith. Book entries made by one party at the time of the transaction are competent evidence as a part of the *res gestæ*. 11 Enc. of Ev. 416. They are admissible in favor of the party making them as well as against such party. 10 R. C. L. 182. They are admissible also to rebut inferences that might be drawn, or attempted to be drawn, if the books were not produced, and to corroborate the testimony of the persons testifying to the transaction (22 C. J. 892), and to show the capacity, whether as owner, trustee, agent, etc., in which the party acted. 10 R. C. L. 166.

[4] The book entries were therefore properly admitted, and were clearly competent, and tended to corroborate the testimony of Heitman that he individually did not attempt to act as agent; that the agent in the transaction was the Fidelity Rent & Collection Company, and that it was the agent of Ernestine S. Beckwith, at the time appellant alleged Heitman to be its agent. Heitman was also corroborated by the attorney employed to investigate the deficiency judgment and liens against the property, as being in April, 1919, prior to the 17th. Such evidence all tends to

controvert the testimony of appellant to show that Heitman was the agent of appellant. The burden of proof being upon appellant to establish the agency by a fair preponderance of the evidence, we agree with the lower court that it failed to do so. We should be inclined to so hold had the trial court found otherwise. This being our view of the evidence, the other errors assigned by appellant are immaterial.

The judgment is affirmed.

PARKER, C. J., and BRIDGES, MACK-INTOSH, and FULLERTON, JJ., concur.

(116 Wash. 140)

STATE v. WOODS et ux. (No. 16227.)

(Supreme Court of Washington. June 21, 1921.)

1. Criminal law §200(4)—Acquittal of maintaining place for sale of liquors will not bar conviction for unlawful possession.

The offense of opening up, conducting, and maintaining a place for sale of intoxicating liquors does not necessarily include the offense of unlawfully having intoxicating liquors in possession, and there is no necessary connection between them, so that an acquittal of one offense will not bar a conviction of the other.

2. Intoxicating liquors §139—In prosecution for unlawful possession, refusal of instruction excusing defendant, if he lawfully obtained possession, was proper.

In a prosecution for unlawful possession of intoxicating liquors, it was not error to refuse defendant's instruction, relieving him if he came into lawful possession at a time when the law permitted its possession.

3. Intoxicating liquors §132—State statute prohibiting possession held not superseded by National Prohibition Act.

The state statute making unlawful the possession of intoxicating liquors other than alcohol is not superseded by the Volstead Act, enacted pursuant to Const. U. S. Amend. 18.

Department 1.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Fred E. Woods and his wife, Nora Woods, were convicted of unlawfully having in their possession intoxicating liquor other than alcohol, and they appeal. Affirmed.

O. T. Webb and Coleman & Fogarty, all of Everett, for appellants.

Thos. A. Stiger and Q. A. Kaune, both of Everett, for the State.

FULLERTON, J. The defendants, Wood and wife, were convicted in the superior court of Snohomish county upon an information charging them with the offense of unlawfully having in their possession intoxicating liquor

other than alcohol, and appeal from the judgment and sentence pronounced against them.

[1] At the time of their arraignment upon the information, the defendants, in addition to a plea of not guilty, interposed a plea of former acquittal of the offense charged. At the trial, in substantiation of the latter plea, they offered in evidence the record of a cause in the superior court of Snohomish county, in which they had been tried for and acquitted of the crime of being jointists; that is, of the crime of opening up, conducting, and maintaining a place for the unlawful sale of intoxicating liquor—offering in the same connection to show that the evidence introduced on behalf of the state to secure a conviction in that case was substantially the same evidence as the evidence on which the state relied for conviction in the instant case. The trial court excluded the proffered evidence, and its action in so doing forms the basis of the first error assigned. But we find no error in the ruling. The acquittal in the one case could operate as a bar to a conviction in the other only on the principle of included offenses, and we think it manifest that the offense of opening up, conducting, and maintaining a place for the sale of intoxicating liquor does not necessarily include the offense of unlawfully having intoxicating liquor in possession. There is no necessary connection between the two offenses. A person may open up, conduct or maintain a place for the sale of intoxicating liquor, without himself engaging in such sale; he may do so for the purpose of furnishing a place for the sale of such liquor by others. An information for the one offense therefore would not inform a defendant that he must meet the other, and it must follow that on a charge of the one he could not be legally convicted of the other. The converse of the proposition must also follow, namely, that an acquittal of the one offense will not bar a conviction of the other.

The case of State v. Burgess, 191 Pac. 635, cited and relied upon by the defendants, rather supports than militates against the conclusion here reached. The precise question was not there presented, but it was recognized that a person might be guilty of a violation of this particular section of the statute without himself having unlawful possession of intoxicating liquor. Nor does the case of State v. Spillman, 110 Wash. 662, 188 Pac. 915, support a contrary view. We were there considering the clause of the statute relating to bootleggers—persons who carry about with them intoxicating liquor for the purpose of unlawful sale—and held that the offense of unlawful possession of intoxicating liquor was necessarily included in the offense of bootlegging, as a person could not well carry about with him intoxicating liquor for the purpose of unlawful sale

without having unlawful possession of such liquor. But the holding does not require the further holding that the offense of unlawful possession is necessarily included in the offense of being a jointist.

[2] The appellants requested the court to give to the jury the following instruction:

"You are further instructed that, even though you should be convinced beyond a reasonable doubt that the defendants did, at the time and place set forth in the information, have in their possession intoxicating liquor, yet I instruct you that if you believe that said defendants came into lawful possession of said liquor during the time when, under the laws of this state, it was lawful to have possession of intoxicating liquor, or should you have a reasonable doubt as to such fact, then you must acquit the defendants."

This instruction the court refused, and the second error assigned is predicated thereon. But the question suggested does not require extended discussion. It was before us in the case of *State v. Glaudrone*, 109 Wash. 397, 186 Pac. 870, where we determined, in harmony with the view here taken by the trial court, that the manner of the acquisition of intoxicating liquor did not affect the question of rightfulness of possession.

[3] Finally, it is contended that the statute under which the appellants were convicted is superseded by the federal statute, commonly known as the Volstead Act, enacted pursuant to the Eighteenth Amendment to the federal Constitution (see 41 U. S. Statutes at Large, p. 305). But this question was likewise before us in *State v. Turner*, 196 Pac. 638, where a conclusion contrary to the contention was reached. The question there involved, it is true, related to the other provisions of our act—the provisions relating to "jointists" and "bootleggers"—but the principle announced is determinative here.

The judgment is affirmed.

PARKER, C. J., and HOLCOMB, MACK INTOSH, and BRIDGES, JJ., concur.

(116 Wash. 111)

NORTH END WORKERS' SUPPLY CO-OP. ASS'N v. SABLICH et ux. (No. 16386.)

(Supreme Court of Washington. June 10, 1921.)

1. Principal and agent §96—Existence of written contract tends to limit authority of the agent.

The existence of a written instrument given by a principal to his agent tends to establish the authority of the agent as that contained therein, and none other.

2. Will §91—Instrument held will, not power of sale.

An instrument reciting "Leaving all my estate, * * * these two lots, * * * leaving to J. Z., and he out of that must pay," etc., and that when the amounts specified were paid the two lots remained his, held intended as a will, and not to authorize Z. to sell and account to the maker of the instrument for the proceeds.

3. Principal and agent §23(1), 123(6)—Agency not established by agent's declarations.

One's designation of himself as agent of the owner of certain lots in a notice to the purchaser after the sale, of his lack of authority to sell, is not proof of his agency at the time of the sale, since neither agency nor the scope thereof can be established by declarations of the alleged agent.

4. Specific performance §128(3)—One suing to compel execution of deed cannot recover value of improvements.

An action for specific performance of a contract not being possessory, one suing to compel the execution of a deed cannot recover the value of improvements made by him while in possession of the premises, the betterment statutes (Rem. Code 1915, §§ 797-799) allowing such recovery only in actions for the recovery of real property upon which permanent improvements have been made by one holding in good faith under color of title adversely to plaintiff's claim.

Department 1.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the North End Workers' Supply Co-operative Association, a corporation, against Rudolph Sablich and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

P. L. Pendleton, of Tacoma, for appellant.
Remann & Gordon, of Tacoma, for respondents.

HOLCOMB, J. Rudolph Sablich, respondent, came to America about the year 1906. He in time acquired title to two lots in Tacoma. In November, 1913, being about to depart for his old home on a visit, he made provision for the disposal of his estate, should anything happen or befall him. This instrument was dated November 28, 1913, and, being in a foreign tongue, was translated by an interpreter, as follows:

"Tacoma, Washington, 26th November, 1913.

"Last writing or testament. Leaving all my estate, Rudolph Sablich, these two lots located on 49th street, leaving to J. Zatkovich, and he out of that must pay Brother Matt Sablich \$100, his two children \$50 each and to the sisters each \$50, and he also to sister's girl Tortal \$50, and when John Zatkovich pays all of these, which amount to \$350, and then these two lots remain his, and the same must be paid within one year; and now there, these two lots is all

done, three witnesses, Witness M. Lucic, Winko Lucic, also Winko Zardas; owner Sablich, Rudolph."

Respondent left very shortly for Europe, leaving the above instrument and his deed and abstract with his friend John Zatkovich, to whom his affairs had been intrusted in that instrument. While he was abroad, the European war came on, and he could not return to America. He returned to America at the first opportunity with his wife, whom he married while abroad, and came direct to Tacoma, about August or September, 1920.

In May, 1919, appellant company, desiring the property in question, lots 3 and 4, block 24, Seaview Addition, entered into negotiations with John Zatkovich for their purchase. Appellants and Zatkovich executed a writing as follows:

"Received of North End Workers' Supply Co-operative Association, a corporation, the sum of \$250.00 as earnest money and part payment of lots 3 and 4, block 24, Seaview Addition to Tacoma, Washington, the agreed purchase price is \$500.00, there being a balance owing of \$250.00. It is agreed that the owner of the lots, Rudolph Sablich, has gone abroad and left a signed statement to John Zatkovich to sell the lots, but said signed statement is not a full power of attorney, and the deed of conveyance will be sent to the owner abroad for signature, and in the meantime the buyers may have peaceable possession of said lots, and work on the same. On return of the deed, if the title is good, the North End Workers' Supply Association shall pay the remaining \$250.00. If the title is not good and cannot be made good, the \$250.00 shall be returned to the company as soon as ascertained that the title is not good. If after five months the owner does not be found and sign a deed, the seller or agent agrees to give the company a bond for a deed, to protect the company from loss in case the owner after the company improves the property refuses to sign.

"Dated May 23, 1919.

"Rudolph Sablich,

"By John Zatkovich.

"Accepted:

"North End Workers' Supply Association,

"By Albert Luisch, President.

"Attest: Frank Cvitanovich, Secretary."

Zatkovich had not heard from Rudolph Sablich, the owner, for about five years. He testified:

"I offered a price to sell the property because I did not know really if Rudolph Sablich lived or not; I figured it would be a good idea to sell the property and give the money to his folks back in the old country."

A deed was mailed to respondent which was never returned, but in June, about a month after the execution of the alleged contract, Zatkovich received his first knowledge of respondent for five years, in the form of a letter written before the deed could reach respondent. Within two days after gaining

knowledge that his friend was alive, he caused notice to be served on appellants not to proceed with the building on the lots. The notice was as follows:

"Tacoma, Washington, June 11, 1919.

"North End Workers' Co-Operative Association, City—Gentlemen: On May 23, 1919, as agent for Rudolph Sablich, the owner of lots 3 and 4, block 24, Seaview Addition to Tacoma, I entered into a certain agreement with you, signed upon your behalf by Albert Luisch, president, and Frank Cvitanovich, secretary, a copy of which you undoubtedly have, and to which reference is hereby made for contents thereof.

"I desire to notify you that I have just received a letter from Rudolph Sablich which shows that he was alive on February 24, 1919. As you are aware, I did not have full power of attorney to sell these lots for the owner, and the signed statement which I have, signed by the owner, I have been informed is in the nature of a last will, giving me authority to sell the lots in the event of the death of Rudolph Sablich, and not under other conditions. In this letter, which I recently received from him, he tells me that he is married. This, I am informed, revokes the will given to me, so that my authority is entirely gone to, in any manner, represent the owner. I am therefore tendering back to you herewith the two hundred fifty dollars (\$250.00) paid as earnest money and part payment on the lots, and ask that the agreement be canceled. If you do not desire to accept it, I am willing to send the deed to Rudolph to be executed by himself and his wife. If they, or either of them refuse to sign, however, I notify you that I will not be responsible to your company in any manner for any loss that you may sustain by reason of improvements placed by you upon the property, or in any other manner. You are notified that, so far as I am concerned, if you proceed to improve the property, you do so at your own peril, with knowledge that the property does not belong to you, and that the owner has not agreed to sell and convey it to you.

"If you do not accept the two hundred fifty dollars (\$250.00) herewith tendered to you, please be advised that I am holding the same for you and subject to your order, and I notify you that I will personally not give to you a bond for a deed, reference to which is made in the contract referred to, entered into on May 23, 1919. [Signed] John Zatkovich."

At that time some grading had been done and a small quantity of lumber had been delivered on the ground, but no construction had been commenced, and no evidence of value of either grading or lumber was offered. Appellants ignored the notice, erected their building, and have continuously occupied it since its completion in the fall of 1919.

When respondent arrived in Tacoma in the early fall of 1920, he learned for the first time of the possession of appellant and the erection of the building. They tendered him \$250, and demanded a deed. He refused, and appellants commenced this action for specific performance based on the instrument executed by Zatkovich to it.

[1, 2] All the authority Zatkovich had was the writing given by Sablich prior to his departure for Europe. Although appellant made repeated attempts to get Zatkovich to admit that he had some other authority than that written instrument, Zatkovich continually asserted that he had no other authority, and the existence of the written instrument would tend to establish the authority of Zatkovich as that contained in the written instrument, and none other. That instrument, while it was very imperfectly executed, was undoubtedly intended as a will. It attempted to give the property to Zatkovich, with certain testamentary dispositions to others. There was nothing in the instrument authorizing Zatkovich to sell and account to Sablich for the proceeds. It said, "These two lots located on 49th street, leaving to J. Zatkovich, and he out of that must pay," etc., and that, when the amounts specified to be paid, aggregating \$350 were paid as therein provided, then the two lots remained his (Zatkovich's).

Appellant concedes that the instrument of 1913 was not a power of attorney authorizing Zatkovich to make a deed, but claims that under our decision in *Littlefield v. Dawson*, 47 Wash. 646, 92 Pac. 428, an agent may be even orally authorized by his principal to make a contract binding upon the principal for the sale of lands. The case cited does not so decide, but decided that, the agent having made an oral contract under a written contract of agency for the sale of specific lands, and the contract having been acted upon and ratified by the agent's principal, the vendee could enforce performance. This case is not like that in any particular. In that case the agent's contract creating his authority contained this provision:

"We agree to convey the same or cause the same to be conveyed by good and sufficient warranty deed to the person or persons designated by you [the agent]."

And the court asked:

"If the authority to make a binding contract was not included in the terms of the agency, of what force are the above words?"

There was no such authority in the instrument given by Sablich to Zatkovich in 1913. The instrument received by appellant in negotiating for the lots contained the clear statement that the owner of the lots, Sablich, had gone abroad, and left a signed statement with Zatkovich to sell the lots, "but that said signed statement is not a full power of at-

torney." This indicated to appellant the limit of Zatkovich's authority; and, furthermore, Lulsch, one of the witnesses to the instrument of 1913, was also one of the officers of appellant, and a witness for appellant at the trial of this case, and testified that he knew the contents of the instrument of 1913, and endeavored to establish that Sablich made Zatkovich his agent to sell the real estate. That being the situation, appellant must be held to have had exact knowledge of the limitations of the authority of Zatkovich, and that Zatkovich could not convey title to the lots unless Sablich was dead, and then convey them as executor. Conceding, for argument's sake, that the instrument would have been effective as a will had Sablich died, he did not die, and the instrument never became effective.

[3] When Zatkovich gave his notice to appellant that the contract theretofore executed and delivered by him for the sale of the lots to appellant, he designated himself as agent for Rudolph Sablich. Upon this appellant seems to contend that, Zatkovich having declared himself agent, it is proof of his agency. It is fundamental law that one cannot establish agency nor the scope of agency by declarations of the alleged agent.

Zatkovich gave prompt notice to appellant of the fact of Sablich's being alive, and of his (Zatkovich's) incapacity to convey the real estate; tendered the \$250 he had received as earnest money back, and demanded that the agreement be canceled. At that time appellant had done but very little work towards improving the premises by construction of the building, and had only a small amount of material upon the premises. Appellant chose to ignore the notice, and proceed at its own risk to erect the building upon the premises.

[4] Upon this situation appellant seems to contend that it is entitled to recover the value of the improvements under the betterment statutes. Laws of 1908, p. 262 (Rem. Code, §§ 797-799). Those statutes were enacted in connection with the statutes providing for possessory actions for the recovery of real property upon which permanent improvements have been made, etc. This is not a possessory action under the statutes, but an action for specific performance of a contract, and the betterment statutes can in no way apply.

The judgment of the trial court is right, and is affirmed.

PARKER, C. J., and FULLERTON, BRIDGES, and MACKINTOSH, JJ., concur.

(116 Wash. 70)

JARRARD v. JARRARD. (No. 15992.)

(Supreme Court of Washington. June 7, 1921.)

1. Divorce \S 56—Negotiations for property settlement held not collusion.

Where a wife, after knowing of the pendency of her husband's divorce action, demanded a property settlement, intimating that otherwise she would defend and defeat the action, and an agreement was reached that she receive title to the home property in full of her property rights, *held*, there was no collusion, as collusion is usually defined.

2. Divorce \S 184(5)—Discretion of trial court as to opening defaults not lightly interfered with.

The discretion vested in the trial court as to reopening default divorce judgments will not generally be interfered with by the Supreme Court, especially where the application is prompt and the parties' condition has not changed.

En Banc.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Petition by Mary E. Jarrard against G. T. Jarrard to set aside decree of divorce entered against her by default. From a judgment vacating the decree and permitting defendant to appear, answer, and defend, G. T. Jarrard appeals. Affirmed.

D. R. Glasgow, of Spokane, for appellant.

W. C. Donovan, of Spokane, for respondent.

TOLMAN, J. The respondent on January 3, 1920, signed and verified a petition, which was duly filed two days later (whether served in the interim does not appear), in and by which she sought to have set aside a decree of divorce entered by default on December 30, 1919, in favor of her husband, the appellant here. The petition charges that the decree was obtained by reason of fraud practiced by the prevailing party (a) in obtaining service by publication by mailing a copy of the summons and complaint to her, "General Delivery, Portland, Oregon," when he knew her street address in that city, alleging that she never received the papers which were so mailed; and (b) charging in effect that the husband testified falsely upon the trial of the divorce action that a property settlement had theretofore been made, and that he knew of no reason for his wife having left him, when in fact he induced and persuaded her to leave, and gave her money with which to do so, and making further allegations which, if true, would defeat the husband's action, and probably entitle the wife to a divorce. Appellant by answer took issue upon these allegations. The case came on for trial

before a judge other than the one who had heard the divorce case, and from a judgment vacating the decree of divorce and permitting respondent to appear in, answer, and defend the divorce action, the case is brought here on appeal.

The trial court found that there was no fraud in the matter of the service of the summons, and no irregularity therein, with which finding we are in entire accord. He also found that there was collusion between the parties prior to the entry of the decree, that respondent has a meritorious defense to the divorce action, and that public policy demands that the decree be vacated and the wife be permitted to defend.

[1] We are not satisfied that collusion is here shown, as collusion is usually defined. The wife, after she had knowledge of the pendency of the action, demanded a property settlement, and intimated that, unless a settlement satisfactory to her was made, she would defend and defeat the action. All her demands were made by letters written to her husband's attorney, and we see nothing collusive in his answers thereto, his submission of the demands to his client, or in the agreement which was reached that the wife should receive title to the home property in full of her property rights.

We are satisfied that there was a sufficient showing of a meritorious defense to warrant the court, under Rem. Code, \S 235, were this other than a divorce action, in permitting the defendant served by publication to appear and defend the action. The Legislature seems to have excepted divorce actions from the operation of this statute upon no other theory, so far as we can judge, than that within the year the situation might so change as to make it unwise to disturb a decree; but where the application is made, as here, promptly and within a very few days of the rendition of the judgment, and no change in conditions has occurred, the reason for the rule does not exist.

But in any event, speaking of this section of the statute in *Chaney v. Chaney*, 56 Wash. 145, 105 Pac. 229, Mr. Justice Parker said:

"It did not take away any rights possessed by parties having judgments rendered against them, but gave additional rights to parties having judgments rendered against them upon service by publication. In the absence of this provision, a judgment rendered upon service by publication could not be set aside for any different reason than could other judgments. This section is not the whole law upon the subject of setting aside divorce decrees, simply because such decrees are excluded from its operation."

And in *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891, L. R. A. 1917B, 405, 18 Ann. Cas. 999, after reviewing the previous decisions of this court upon this subject, it was said:

"It would seem, therefore, that, notwithstanding the doctrine, frequently announced, that a decree of divorce will never be vacated because of the probable evil consequences following the severance of a new relation, bearing as it might after-begotten children, the better rule is that, notwithstanding the decree, a court will reopen and try the case, if the decree is the result of fraud practiced upon the other party or upon the court."

And in the same case, in discussing the grounds upon which a decree of divorce may be vacated, it was further said:

"It is contended, however, that, the lower court having had complete jurisdiction, a mere offer to prove that the decree was obtained as the result of perjured testimony and was fraudulently obtained is insufficient. Whatever the rule may be when the divorce proceeding is collaterally inquired into, it must be remembered that this is a direct application, timely, and diligently prosecuted, and no harm can result to any innocent person by a further inquiry as to the justice of respondent's cause. Aside from these considerations, the interest of the public in all actions for divorce is such that a policy has grown up in accord with enlightened sentiment to discourage and deny divorces, unless claimed upon proper grounds and sustained by an honest disclosure of the facts. There is much in the record that prompts further inquiry."

It is apparent from the record before us that the respondent knew of the pendency of the action in ample time to have made her defense before the default was taken against her, and that no sufficient excuse is now offered for her failure to do so. She therefore, having had opportunity to defend and defeat her husband's charges before judgment, and having failed without sufficient reason or excuse to do so, should not now be heard to complain, and, if her interest were the only interest at stake, no doubt the trial court would have denied the prayer of her petition and held her bound by the decree; but in part at least the judgment of the trial court is based upon public policy, and the interest of the public is the only interest which here demands consideration. Public policy as to divorce actions has been defined:

"Marriage is a relation in which the public is deeply interested, and is subject to proper regulation and control by the state or sovereignty in which it is assumed or exists. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight or trivial causes, or by the agreement of the husband and wife, or in any case except on full and satisfactory proof of such facts as by the Legislature have been declared to be cause for divorce. Such provisions

find their justification only in this well-recognized interest of the state in the permanency of the marriage relation." 9 R. O. L. p. 252, § 11.

And in *Faulkner v. Faulkner*, 90 Wash. 74, 155 Pac. 404, it was said:

"The real question then is: Should the court have set the decree aside when the fact appeared because of the public interest? That it has such power may be conceded, and perhaps, if the fact timely appeared, it might be its duty to do so. But, when the fact is made to appear after the right of appeal has expired, the court may be confronted with conflicting public interests, and a duty to determine the course which will best promote such interests. In other words, the matter becomes one of discretion with the court, to be reviewed on appeal only when such discretion is abused."

[2] In furtherance of this public policy as it is thus defined, much discretion must be vested in the trial courts, and when, as here, the application is made almost instantly and the condition of the parties has not changed and the trial court, after hearing and seeing the parties and their witnesses, is of the opinion that public policy requires that the decree be set aside and the party complaining be allowed to defend, we are not inclined to interfere. Indeed, in view of the state's interest, the nisi prius judges should be encouraged to exercise sound discretion in all such cases, to the end that divorces be not granted "except on full and satisfactory proof of such facts as by the Legislature have been declared to be cause for divorce." 9 R. O. L., *supra*.

The judgment appealed from is affirmed.

HOLCOMB, MOUNT, MITCHELL, FULLERTON, and BRIDGES, JJ., concur.

(116 Wash. 199)

In re OLSON. (No. 340.)

(Supreme Court of Washington. June 21, 1921.)

Attorney and client § 36(1)—Supreme Court may examine into charges against an attorney, though revocation of license has not been recommended.

The Supreme Court may, at its own option, examine into charges against an attorney proceeded against before the state board of bar examiners, even though the board has not recommended that his license be revoked or annulled; the court having inherent power to admit, suspend, or disbar attorneys at law, notwithstanding Pierce's Code, §§ 167-169, giving an attorney whose license has been revoked the right to petition Supreme Court to review findings of board.

En Banc.

In the matter of the proceedings for the disbarment of George Olson, attorney at

law. The Board of Law Examiners recommended that the charges be dismissed, and the Seattle Bar Association filed objections and exceptions to the recommendations and findings of the Board of Law Examiners. Findings and recommendations of the Board of Law Examiners affirmed.

Carroll Hendron, of Seattle, for prosecutor.

J. C. Allen, Wm. R. Bell, and Tucker & Hyland, all of Seattle, for respondent.

HOLCOMB, J. Proceedings were instituted before the state board of law examiners, upon a complaint against George Olson, for his disbarment from the practice of law in the state of Washington, the original complaint being upon two charges or counts. The first charge was that he perpetrated a fraud upon Henry J. Gorin, in that he induced Henry J. Gorin to execute his promissory note for \$4,000 upon the representation that he would receive as consideration therefor 25 shares of the capital stock of the Broadway State Bank of Seattle, of the value of \$160 per share, and would be employed by the bank as its attorney at a salary of \$1,000 per annum. It was further alleged that confidential relations existed between Gorin and Olson, in that they had associated together in various capacities, and that by reason thereof Gorin believed the statements of Olson, and relied thereon, and delivered his note for the above amount to Olson, but never received the stock or the employment, and that the bank was then insolvent and the stock worthless, all of which was known to Olson.

The second charge in the original complaint was to the effect that Olson, as attorney in a certain cause, prepared findings of fact, conclusions of law, and decree in the superior court of Washington, for King county, which conformed with the decision of the court as orally announced, and upon which opposing counsel indorsed his approval, but that Olson did not present the decree, served by copy upon opposing counsel, to the court, but presented one of a different purport, which was signed and filed.

A hearing was had upon the charges of the original complaint, and the matter was taken under advisement by the board of law examiners. Thereafter another complaint was filed against Olson, charging him with mismanagement and breach of trust with reference to the handling of the estate of Hans Bergman, deceased, whereby he acquired and appropriated property belonging thereto to his own use, the charges in which complaint were heard by the board of law examiners at subsequent dates. After hearings on the complaints, the state being represented by counsel, the Seattle Bar Association by counsel, and Olson by counsel,

the board of law examiners reported to this court that it—

“had carefully considered and weighed all oral and documentary evidence submitted relative to all the charges set forth in said complaints, and is of the opinion that the evidence submitted does not sustain any of said charges, and therefore recommends that said charges should be dismissed.”

Upon its findings and recommendations being filed, the Seattle Bar Association, by its attorney, filed objections and exceptions to the report and findings, and the matter was heard before this court en banc.

Counsel for respondent, Olson, urge that no objections or exceptions can be presented to this court from the findings and recommendations of the board of law examiners by the state or on its behalf, on the ground that the statute (Laws of 1917, c. 115, p. 421, as amended by the Laws of 1919, c. 100 [Pierce's 1919 Code, §§ 167, 168, and 169]) makes no provision for such procedure. Section 169, Pierce's Code, reads in part as follows:

“Any person whose license has been annulled or revoked may petition the Supreme Court of the state to review the findings of the board, and to reverse and modify the same, in which event the board shall file with the Supreme Court a complete transcript of the evidence and proceedings of the case together with its findings, which findings shall constitute a prima facie case, and the burden shall be on the appellant to show wherein such order of the board was unlawful. The Supreme Court shall fix rules for the procedure in such appeals and shall, after hearing, render judgment therein. If it shall find that the order of the board was not in accordance with law, the court shall reverse or modify the same; or may remand the same to the board for further investigation and consideration. But if the board did not exceed its authority and appellant had a fair trial, the court shall affirm the order of the board.”

It will be seen that under the statutes now in force no one but the person whose license has been annulled or revoked may proceed as of right in this court against the findings of the board of law examiners to reverse or modify the same.

But under the inherent power of this court to admit, suspend, or disbar attorneys at law, notwithstanding the statute gives the right as a matter of course only to the person whose license has been annulled or revoked to object to and have a review of the same, we have felt obliged, in a matter of such importance to the bar and the public to consider that we may, at our own option, examine into the charges against an attorney proceeded against before the state board of bar examiners, even though his license has not been recommended to be revoked or annulled by the board. We may not feel induty bound to do so in all such cases, but

the importance of this case was such that we have felt disposed to do so.

The voluminous record has been examined with considerable care. The charges against the attorney appeared to be very serious, and we especially thought that the first and third charges were particularly grave; but after examining the record we are unable to arrive at any conclusion differing from that of the state board of law examiners. The most that can be said against the attorney as to the present charges is that he seems to have had an unnecessary propensity for voluminous and circuitous proceedings in transacting business, where simplicity and direct methods would have been much more commendable. Some of the things complained of against him seemed at first to have been well-founded; but, after straightening out the great complexity and circumlocution of his transactions, they appear not to have harmed those involved.

We are of the opinion that the findings and recommendations of the board of law examiners must be and are approved and affirmed.

PARKER, C. J., and TOLMAN, BRIDGES, and MITCHELL, JJ., concur.

MAIN, J., concurs in the result.

(116 Wash. 122)

STATE ex rel. AMERICAN SAV. BANK & TRUST CO. v. SUPERIOR COURT FOR OKANOGAN COUNTY et al. (No. 16411.)

(Supreme Court of Washington. June 14, 1921.)

1. Corporations \S 503(1)—Caring for property acquired on foreclosure not "doing business" or "transacting business" for purpose of venue.

Under Rem. Code 1915, \S 206, permitting a corporation to be sued in any county where it transacts business, a corporation, by caring for, cultivating, and harvesting orchard lands acquired by foreclosure of its mortgage thereon, under Laws 1917, p. 291, \S 37, held not "doing business" or "transacting business" in the county where the lands were situated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business; Transacting Business.]

2. Venue \S 22(1)—Suit against resident and nonresident not maintainable in county where nonresident had property attached.

Suit against a domestic corporation and a nonresident individual could not be brought under Rem. Code 1915, \S 207, in a county where the corporation was not subject to suit and in which the nonresident defendant had not been personally served, because of the mere fact that the nonresident defendant had property in that county which it was sought to attach, since the law does not require that a nonresident de-

fendant be proceeded against in a county in which he has property which is to be attached, but expressly directs, by sections 655, 656, that writs of attachment may issue to other counties.

Holcomb, J., and Parker, C. J., dissenting.

En Banc.

Appeal from Superior Court, Okanogan County; C. H. Neal, Judge.

Application by the State of Washington, on the relation of the American Savings Bank & Trust Company, for a writ of prohibition directed to the Superior Court of Okanogan County and Hon. C. H. Neal, Judge thereof. Permanent writ ordered to issue.

Farrell, Kane & Stratton, of Seattle, for relator.

J. Henry Smith, P. D. Smith, and W. C. Brown, all of Okanogan, for respondents.

TOLMAN, J. The relator, the American Savings Bank & Trust Company, a corporation, was incorporated under the laws of this state in the year 1901; its articles of incorporation naming its principal place of business as being in King county, and authorizing it to carry on the business of banking, with the usual powers pertaining to banks and trust companies. The relator has never had an office for the transaction of business in Okanogan county, and at no time has it maintained an officer, agent, or other person upon whom process against it could be served, resident in said county. Nor has the relator ever transacted any business in Okanogan county, except as hereinafter referred to.

In September, 1916, the relator and one Murray, in the usual course of business in King county, acquired a promissory note made by one Peterson for \$25,000, and interest, together with a mortgage given to secure the same upon certain real estate consisting of orchard land situated in Okanogan county. In August, 1918, the relator and Murray, as owners of the note and mortgage referred to, employed J. Henry Smith, an attorney at law practicing in Okanogan county, to foreclose the \$25,000 mortgage, and thereafter, apparently with the knowledge and consent of the relator, P. D. Smith and W. C. Brown, also attorneys practicing in Okanogan county, were associated with J. Henry Smith as attorneys for plaintiff in such foreclosure action. The action to foreclose the mortgage was commenced in Okanogan county and prosecuted to a judgment of foreclosure, from which an appeal was taken, and the judgment of foreclosure was thereafter affirmed by this court, in *American Savings Bank & Trust Co. et al. v. Peterson*, 191 Pac. 837. In the meantime the real estate covered by the \$25,000 mortgage, which was so foreclosed, being in part subject to the lien

of a prior mortgage for \$10,000, the relator and Murray, to protect themselves, acquired this first mortgage, procured it to be foreclosed by the same attorneys, and thereafter, upon foreclosure sale, purchased all of the property subject to the mortgages for the amount due thereon. In the month of March, 1919, for the purpose of protecting and preserving the property so acquired, the relator and Murray took possession of the orchard lands covered by the mortgages and proceeded to cultivate, prune, spray, and care for the same, extended the irrigation system for the better irrigation and care of the orchards, harvested the crop therefrom in the years 1919 and 1920, and are continuing in such possession and care of the property through their employees, for the sole purpose, as relator alleges, of preserving the value of the orchards and preventing the deterioration of the property until such time as the lands may be sold at prices and upon terms satisfactory to them; relator alleging that they are making every effort to so sell, and have not had the intention at any time to engage in farming or fruit raising, save only as an incident to preserving the value of these lands until they can realize thereon.

In February, 1921, P. D. Smith, J. Henry Smith, and W. C. Brown began an action in the superior court for Okanogan county against the relator and Murray to recover a balance of \$2,000 claimed to be due them as attorney's fees earned in the foreclosure proceedings hereinbefore referred to. Summons and complaint were personally served upon the relator in King county, Wash., on February 7, 1921, and an affidavit in due form was filed, setting forth that Murray was a nonresident of the state of Washington, and a writ of attachment was sought and issued against him under which the sheriff of Okanogan county levied upon the interest of Murray in the real estate which had been the subject of the foreclosure suits hereinbefore mentioned; and since that time the plaintiffs in that action have proceeded regularly to serve the summons and complaint upon Murray by publication, he being a resident of the state of Montana, which publication was proceeding in due course but had not been completed at the time of the issuance of the alternative writ herein. In due course, and within 20 days after service upon it, relator appeared specially in said action and objected to the jurisdiction of the court on the ground that the relator had no office nor agent in, and was not transacting business in, Okanogan county, within the contemplation of section 206 of the Code. These objections to the jurisdiction being overruled, the relator, still preserving its special appearance, made demand for a change of venue to King county, accompanied by an affidavit of merits and a demurrer to the complaint, which demand was by the trial court denied. Thereupon the relator sought and obtained

an alternative writ of prohibition to be issued out of this court, directed to the respondent, as judge of the superior court for Okanogan county, restraining the superior court from proceeding further as against relator until the further order of this court, and requiring it to show cause why it should not be permanently restrained from further proceeding in said cause as against the relator.

[1] The statute reads:

"An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this Code." Rem. Code, § 206.

It is not contended that the relator maintained an office or transacted any of its banking or trust business in Okanogan county, or that any person there resided upon whom process against the relator could be served. We have heretofore held that the mere bringing and prosecution of an action does not constitute the doing of business within the meaning of similar statutes. *Marble Savings Bank v. Williams*, 23 Wash. 768, 63 Pac. 511; *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505. This being the settled law, it would seem to follow that the incidental care and preservation of the fruits of such an action would come within the same rule. By the terms of our statute (chapter 80, Laws of 1917, § 87), a bank or trust company may acquire real estate only for certain purposes or in the collection of debts and foreclosure of its liens and securities; and therefore it must be assumed here that relator was, in its relation to this property, pursuing only its statutory rights to collect its debt. To care for the property, preserve by cultivation, and the adding of the necessary means of irrigation was as much a part of the collection of its debt as was the acquiring of the title by means of the foreclosure. The natural result of the care and preservation of orchard lands is the production of a crop, and that this should be marketed and the proceeds as realized applied in satisfaction of the cost of cultivation, treated as income on the debt which is in process of collection or as payment pro tanto, does not appear to affect the principle involved.

What is meant by the statutory term "transaction of business" is very well defined by the following:

"It is frequently stated that the words 'doing business' and 'transacting business,' as used in the statutes imposing conditions on foreign corporations, refer only to the transaction of the ordinary or customary business in which a corporation is engaged, and do not include acts not constituting any part of its ordinary

business. In other words, the test applied is, Is the corporation engaged in the transaction of that kind of business, or any part thereof, for which it was created and organized? If so, it 'does business,' within the meaning of the Constitutions and statutes. If not—if the act it is doing or has done is not within the purpose of the grant of its general powers and franchises—it is not the business to which the constitutional or statutory requirement is directed." 12 R. C. L. § 49, p. 71.

And we have already approved and followed this rule. *Rich v. C., B. & Q. R. Co.*, 34 Wash. 14, 74 Pac. 1008; *H. G. Wells Lumber Co. v. Superior Court*, 193 Pac. 229.

We conclude that relator does not, and did not at the time the cause of action arose, transact business in Okanogan county within the statutory meaning of that term.

[2] It is contended, however, that the superior court of Okanogan county had jurisdiction under the terms of Rem. Code, § 207, which provides:

"In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial, as provided in the next two succeeding sections."

Of course, had Murray resided in Okanogan county, or had he there been personally served with process, there would be no question as to the right to there proceed. But since Murray was a nonresident of the state, the mere fact that he owned property in that county which it was sought to attach cannot be permitted to overweigh relator's rights. While it may be more orderly to proceed against a nonresident defendant in a county in which he has property which is to be attached, the law does not require it, but expressly directs that writs of attachment may issue to other counties. Rem. Code, §§ 655, 656. And since section 206 of the Code is intended for the benefit of corporation defendants residents of the state, the statute may not be set aside or its force avoided by electing to sue a nonresident codefendant in a particular county, when equal relief may be obtained against the nonresident defendant by suing both in the county where the resident corporation transacts business.

Nor was the nonresident defendant Murray served with process in Okanogan county within the meaning of the statute. True, the summons was there being published, but with the intent in law that notice of the pending action should by that means reach Murray at his foreign domicile, where also the statute requires a copy of the summons and complaint to be addressed and mailed to him. The service referred to in section 207 of the Code is undoubtedly personal service, but, in any event, when relator raised this issue the service by publication had not proceeded to a point where Murray could be

said to have been served anywhere or at all; in fact had not then been commenced.

Section 207 is applicable in so far as it provides that actions must be tried in the county in which the defendants, or some of them, reside; and, since Murray resides in none of the counties of this state and relator resides in King county, we conclude that the action should have been brought in, or transferred to, King county for trial.

The permanent writ will issue.

FULLERTON, MAIN, MITCHELL, BRIDGES, and MACKINTOSH, JJ., concur.

HOLCOMB, J. (dissenting). It seems to me that this decision is utterly unsound.

Prior to 1909 the statute provided:

"An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation." Bal. Code, § 4854.

In 1909 this statute was amended so as to read (section 206, Rem. Code), as follows:

"An action against a corporation may be brought in any county *where the corporation transacts business or transacted business at the time the cause of action arose*; or in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code." (Italics mine.)

As pointed out by Mr. Justice Mount, in *Strandall v. Alaska Lumber Co.*, 73 Wash. 67, 131 Pac. 211, the words "where the corporation transacts business or transacted business at the time the cause of action arose" were inserted into the previous statute evidently for the purpose of authorizing suits to be brought in the county where the corporation transacts business, whether it has an office for that purpose in such county or not.

The present decision would practically eliminate the amendatory provisions of the act of 1909 found in section 206, and prevent such corporation as the relator, which is doing a banking and trust business, from being sued in any county other than the county where it has its office or any person resides upon whom process may be served against such corporation.

It is said in the majority opinion that the business of operating its land as a farm or orchard in Okanogan county is not a part of relator's corporate business, and therefore it is not transacting business in Okanogan county within the statutory meaning of the term. This reasoning is fallacious, because the relator, although a bank and trust company, has power incidental to its principal powers of acquiring land through fore-

closure and otherwise; of doing business in any county of the state; and, incidentally, of managing its lands, actively for the purpose of profit, as it has done in this case for two years. These are certainly incidental powers, and therefore transactions under them constitute "transacting business" within the meaning of the statute.

It is to be presumed the corporation acts only in conformity with its charter powers, and that all its transactions are authorized.

If this reasoning is not correct, then all those who have dealt with the relator as a farmer or orchardist, such as those who furnished supplies and materials for the operation of its farm or orchard, having any controversy with the relator as to the amount due for such supplies and materials, would be obliged to go to King county, the county of relator's residence, in order to maintain an action against it, because it has not been doing business in Okanogan county with these persons with whom it dealt directly and made express or implied contracts.

In my opinion the statute (section 206, Rem. Code) should receive a liberal construction as to what is the "transaction of business" by a corporation in a county, rather than a strained one. It is evident that the Legislature had that in view when enacting section 206. It is no more unjust, or a matter of hardship, upon a corporation transacting any kind of business, either primary or incidental to its corporate powers, to be sued and jurisdiction maintained in a county other than the county of its residence, than it was to require it to go to Okanogan county to maintain its action to foreclose its mortgage upon lands in Okanogan county.

It seems to me that the suggestion of respondents that section 206 should be construed so that a corporation may be sued in the county where it transacts business "upon all matters growing out of the business so transacted in such county" is correct, and that that rule would prevent injustice or hardship and would be calculated to best meet the needs of all concerned.

For these reasons, I dissent.

PARKER, C. J., concurs with HOLCOMB, J.

(60 Mont. 287)

HUMBER v. MARSHALL. (No. 4344.)

(Supreme Court of Montana. June 6, 1921.)

1. Appeal and error ⇐231(9)—Objection to instruction denying recovery on counterclaim held not to show error.

Where defendant in an action for the purchase price of brick sought to recover by counterclaim demurrage paid by him on defective brick and damages caused by delay in the construction of buildings by him, an objection by

defendant to an instruction denying recovery on the counterclaim for the reason that the testimony showed defendant was compelled to replace the defective brick to his damage does not point out any error in the instruction, since the alleged damage was not pertinent to any issue in the case; therefore the instruction cannot be held erroneous under Rev. Codes, § 6746, prohibiting reversal for any error in instructions which was not specifically pointed out.

2. Sales ⇐355(1)—Expense of replacing defective brick cannot be recovered by counterclaiming buyer as general damages.

The expense incurred in replacing defective brick cannot be recovered under a general allegation of damage in a counterclaim in an action for the purchase price of the brick, and therefore cannot be recovered unless pleaded as special damages.

3. Appeal and error ⇐1067—Instruction on measure of damages on counterclaim properly refused after verdict was directed against counterclaim.

Where the trial court had properly given an instruction that defendant could not recover on his counterclaim, there was no error in refusing a requested instruction stating the measure of damages in the counterclaim.

Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.

Action by Fred M. Humber against John W. Marshall. Judgment for plaintiff, and defendant appeals from the judgment and from an order refusing a new trial. Affirmed.

Percy Napton, of Winnett, and C. B. Nolan, of Helena, for appellant.

H. A. Frank and R. F. Gaines, both of Butte, for respondent.

HOLLOWAY, J. Plaintiff brought this action to recover \$753.75, alleged to be due as a balance of the purchase price of brick sold and delivered by plaintiff to defendant, and to foreclose a materialman's lien.

The answer denies all the allegations of the complaint and sets forth that defendant purchased from plaintiff 240,000 brick under an express warranty that they should be sound and merchantable, that 94,000 of the brick tendered were unsound and unfit for use, and that defendant refused to accept the same and notified plaintiff. As a counterclaim defendant alleges that he was compelled to pay demurrage in the sum of \$48 upon the 94,000 brick, and that by reason of plaintiff's failure to deliver the entire 240,000 merchantable brick he was prevented "from carrying out his business as a contractor and builder and delayed the construction and building of buildings under construction on or about the said 13th day of April, 1917, to defendant's damage in the sum of \$1,000." Upon the affirmative allegations issues were raised by reply.

At the instance of plaintiff, the court gave instruction No. 3, directing the jury that defendant had failed to prove his counterclaim and that he could not recover any damages. The court refused to give defendant's requested instruction No. 1, defining the measure of his damages.

From a judgment in favor of plaintiff and from an order refusing a new trial, defendant appealed, and in his brief assigned eleven errors, but upon the hearing in this court his counsel expressly waived all of them except the specification that the court erred in its rulings upon the two instructions above.

[1] The record discloses that at the settlement of instructions counsel for defendant objected to instruction No. 3 given "for the reason that the testimony in the case shows that because of the breach of the contract upon the part of the plaintiff the defendant was compelled to and did replace a certain number of brick, to wit, 25,000, which 25,000, from the evidence, was the brick of the plaintiff, and the testimony shows said brick was inferior and not in keeping with the agreement entered into between the plaintiff and the defendant relative to the brick, and that the defendant replaced said brick by other brick, to his damage in the sum of \$7.50 per thousand."

Section 6748, Revised Codes, which governs the settlement of instructions in civil cases and which defines the authority of the appellate court in its review of questions arising upon instructions given, provides, among other things:

"On such settlement of the instructions the respective counsel, or the parties, shall specify and state the particular ground on which the instruction is objected or excepted to, and it shall not be sufficient in stating the ground of such objection or exception to state generally that the instruction does not state the law, or is against law, but such ground of objection or exception shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. * * * And no cause shall be reversed by the Supreme Court for any error in instructions, which was not specifically pointed out and excepted to at the settlement of the instructions as herein specified, and such error and exception incorporated in and settled in the bill of exceptions or statement of the case as herein provided."

This statute is too plain to require construction. It limits this court in its review to the particular objections urged upon the trial court at the time the instructions are settled and is conclusive against the right of defendant to question the correctness of the court's ruling in giving instruction No. 3. *Poor v. Madison River Power Co.*, 41 Mont. 236, 108 Pac. 645; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Surman v. Cruse*, 57 Mont. 253, 187 Pac. 890; *Sanborn*

Co. v. Powers, 58 Mont. 214, 190 Pac. 890. Instruction No. 3 refers only to defendant's counterclaim, which is predicated upon the delay caused by plaintiff's alleged breach of warranty, and not upon the additional expense incurred by defendant. The fact, if it be a fact, that defendant was compelled to purchase other brick to replace defective brick delivered by plaintiff, was not pertinent to any issue raised by the pleadings. The only item of special damages pleaded was the \$48 paid for demurrage.

[2] The expense incurred in replacing defective brick could not have been recovered under the allegation of general damages contained in the counterclaim (*O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166), and the court was fully justified in disregarding the objection interposed.

[3] The court having instructed the jury that defendant was not entitled to recover any damages, it would have erred grievously by giving defendant's instruction No. 1, defining the measure of his damages. The two instructions could not be reconciled upon any possible theory, and therefore it is unnecessary to discuss the merits or demerits of the instruction tendered. Furthermore, the record sustains the trial court in giving instruction No. 3, for there is not any evidence to prove the counterclaim pleaded.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur.

(60 Mont. 254)

PIONEER MINING CO. v. BANNACK GOLD MINING CO. (No. 4384.)

(Supreme Court of Montana. June 1, 1921.)

1. Vendor and purchaser \S 232(2)—Purchaser of land on which adjoining owner maintained flume for water power was chargeable with notice that flume was being used for operation of adjoining owner's mill.

Grantor in conveying a portion of the land and some of the mill sites owned by it reserved the "lumber and material in the water flume connecting with the so-called G. mill, and in the ore bins and mill tram thereon, said lumber and material being the property of the B. Company," and the right to a roadway connecting with the G. mill, and the right to discharge mill tailings from operation of such mill. The G. mill was operated by water power conveyed to it through ditch and flume extending across land so conveyed. Held, that grantor's successor, in purchase of land on which the flume was being maintained for conveyance of water to the G. mill, was chargeable with notice of the existence of the G. mill and of the fact that it was being operated by water power conveyed to it through such flume, in

view of the reservation of flume in grantor's deed and in view of the fact that the flume extended across land being purchased by it.

2. Waters and water courses ¶156(4)—**Reservation of material in flume reserved right to use flume and penstock.**

Grantor, in conveying a portion of the land and some of the mill sites owned by it, reserved the "lumber and material in the water flume connecting with the so-called G. mill, and in the ore bins and mill tram thereon, said lumber and material being the property of the B. Company," and the right to a roadway connecting with the G. mill, and the right to discharge mill tailings from the operation of such mill. The G. mill was operated by water power conveyed to it through ditch and flume extending across land so conveyed. *Held* that grantor's successor in interest, which had also acquired the operating rights of the B. Company, had a right to convey water across the land conveyed to maintain a flume thereon and a penstock as a part thereof, as against grantee's successor in interest: the ditch, flume, penstock, and tailrace being necessary appurtenances to mill, the use of which were necessary to its operation; in view of Revised Codes, §§ 4428, 4429, and 4844.

3. Easements ¶1—**No easement exists where there is unity of ownership.**

No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts, but the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes may be created or reserved.

4. Easements ¶36(1)—**Parties presumed to contract with reference to condition of property at time of sale.**

As respects easements, parties are presumed to contract with reference to the condition of the property at the time of the sale, provided the marks are open and visible.

5. Easements ¶15—"Implied easements" rest upon implied intent.

Implied easements rest upon implied intent gathered from the circumstances surrounding the conveyances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Implied Easement.]

6. Easements ¶15—"Apparent easement" defined.

An easement is apparent when it may be discovered upon reasonable inspection.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Apparent Easement.]

7. Easements ¶15—**One should not be deprived of an implied easement when right thereto is clearly established.**

The doctrine that easements by implication should be discouraged should not be carried to the extent of depriving a party of his rights clearly established by the evidence in a particular case.

8. Waters and water courses ¶278—**Mine operator with right to maintain flume on adjoining land could change location of flume and use of water.**

Under Rev. Codes, § 4842, mine operator with easement on adjoining land giving it the right to maintain flume thereon had the right to change the location of the flume and the use to which the water was being put.

9. Appeal and error ¶1171(6)—**Judgment for defendant in ejectment not reversed merely because of temporary existence of toilet building on plaintiff's land without injury to plaintiff.**

In ejectment, in which it was claimed that defendant was maintaining retort building, flume, penstock, pumphouse, tailrace, and toilet building on plaintiff's land, where retort building did not encroach on plaintiff's territory, where pumphouse had never been moved, and where defendant had easement entitling it to use of penstock, flume and tailrace on plaintiff's land, the mere fact that toilet building was upon plaintiff's land was not ground for reversal of judgment for defendant, where the use thereof was merely temporary, and the injury resulting therefrom, if any, was too small to be a basis for the computation of any damages, unless nominal.

Appeal from District Court, Beaverhead County; Joseph C. Smith, Judge.

Action by the Pioneer Mining Company against the Bannack Gold Mining Company. From a judgment for defendant and from order denying a motion for a new trial, plaintiff appeals. Affirmed.

H. C. Hopkins, of Butte, for appellant.

Lew L. Callaway, of Great Falls, E. J. Callaway, of Dillon, and E. B. Howell, of Butte, for respondent.

POORMAN, C. C. This is an action in ejectment. Verdict and judgment for defendant. Plaintiff appeals from the judgment and from an order overruling its motion for a new trial. The acts of defendant complained of appear in the statement.

At the times mentioned in the complaint plaintiff was the owner of certain mill sites and placer claims, or parts thereof, described in the complaint, including the Junction millsite, the French millsite, and the South Side placer. The defendant owned certain lands northwest of and adjoining the lands of plaintiff. At one time the Western Mine Enterprise Company owned all of the lands involved herein, and in 1897 it conveyed by deed to A. F. Graeter and others all or a part of the Junction millsite, the French millsite, and the South Side placer, with other lands. This deed contains the following reservations:

"Excepting the lumber and material in the water flume connecting with the so-called Golden Leaf mill, and in the ore bins and mill tram thereon, said lumber and material being the

property of the Bannack Mining & Milling Company, and excepting and reserving to the said party of the first part the right of a roadway for wagons across the said premises to connect with the Golden Leaf mill; the right to discharge mill tailings upon the said premises from the operation of the said mill, and excepting and reserving any and all veins or lodes of quartz which may be found or which may be within or upon the said premises and the right to work and explore the same."

The grantees named in this deed in 1898 conveyed their interest to plaintiff. In 1906 the Western Mine Enterprise Company sold and conveyed all of its property which it had not theretofore sold to Graeter and his associates to Carlton H. Hand, who in turn sold it to the defendant company. The predecessor in interest of the Western Enterprise Company was the Golden Leaf Mining Company, the then owner of the Golden Leaf mill, which was operated by water power conveyed to it through the North Side ditch, and the flume, extending across a part of the lands conveyed to the plaintiff company. At the time of the execution of the deed to Graeter and others, the Western Mine Enterprise Company owned the Golden Leaf mill and the land on which the same was situated, but did not own the mill machinery. That was owned by a subsidiary company known as the Bannack Mining & Milling Company, which was the operating company of the mill. The rights of this latter company subsequently passed to the defendant herein.

The defendant maintains that at the time of the sale to Graeter the flume and mill were in a workable condition, the witness stating:

"We had been using the mill and conveying the water from the North Side ditch down to the mill. At the exact time of the conveyance to Graeter * * * they would be in such a condition that a few dollars would have put them into operating condition. It would be just the ordinary work that would have to be done on a flume if you were to shut down in the fall, say, and start work in the spring."

This condition of the mill and flume is disputed by the plaintiff.

The defendant further maintains that the plaintiff, in dredging its ground, destroyed the flume and so changed the surface of the ground that it was impossible to ascertain the exact location of the original flume. Plaintiff also disputes this fact, and maintains that there was no flume there except in certain places.

Subsequently the Bannack Mining & Milling Company rebuilt the flume and, as maintained by defendant, on the same line of the original flume, as nearly as could be then ascertained. The flume so built was of practically the same size as the original flume. The plaintiff, however, claims that the new flume was in a new location and was larger than the old flume.

Some time prior to the trial, the plaintiff caused its ground to be surveyed, and according to that survey, as appears from the evidence, the building designated as a retort building projected onto plaintiff's land a distance of 3.35 feet in width and 24 feet in length. There was also a structure designated as a penstock, or standpipe, which extended across the line onto plaintiff's ground a distance of 5 feet, also a pumphouse 7 feet 3 inches by 9 feet, a toilet building 7 feet 3 inches square, a tailrace 93.5 feet long, 12 feet wide, and 10 feet deep, but according to the survey made by the defendant, which was also in evidence, the retort building was not on the plaintiff's land, and the building known as the pumphouse was entirely abandoned and removed by the defendant before the commencement of the action; that it was only a small house; that the pump was used to pump water in mixing cement for the foundation of the mill; that the toilet was a mere temporary structure set upon the gravel, without a pit or foundation. The flume referred to in the plaintiff's evidence was also upon the plaintiff's ground. It was also maintained by defendant that this flume, tailrace, and standpipe are necessary to the operation of the mill. All these matters, in so far as there was a conflict of evidence, were determined by the verdict of the jury. The only question then remaining here is the question of law relating to the right of the defendant to maintain the flume and the tailrace. The standpipe or penstock, according to the testimony in this case, was a necessary part of the flume, being required to enable the defendant to utilize the water with which to operate the mill.

[1, 2] At the time plaintiff acquired title to this land, it was charged with the knowledge of the existence of this mill and of the fact that same was operated by water power conveyed to it through the North Side ditch and the flume, for the ditch and the flume extended across the land conveyed to plaintiff, and the deed to the plaintiff's immediate grantor refers to the "water flume connecting with the Golden Leaf mill," reserving the material thereon, with the statement that the same belonged to the Bannack Mining & Milling Company. The deed also reserves a right to a roadway for wagons to the "Golden Leaf mill," also "the right to discharge tailings upon the said premises from the operations of said mill." The Western Mine Enterprise Company was at the time of the conveyance to plaintiff's immediate grantors the owner of the mill, which was operated only by this water power. While the deed did not expressly reserve the right to convey water across the land conveyed to the plaintiff's grantors, or to erect and maintain a flume thereon, yet there is the clear implication that the company did not intend to abandon its mill or the operation thereof, else why would it reserve the right to discharge

mill tailings upon the premises conveyed "from the operation of the said mill"?

[3, 4] It is true, as maintained by appellant, that no easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts, but the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes may thus be created or reserved. The parties are presumed to contract with reference to the condition of the property at the time of the sale, provided the marks are open and visible. *Lampman v. Milks*, 21 N. Y. 505; *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126; *Oland v. Mackintosh*, 45 Nova Scotia, 13; 19 C. J. 920.

It is also quite generally held that, where there is a grant of land, with full covenants of warranty, without express reservations of easements, there can be no easement by implication, unless the easement is strictly one of necessity. 19 C. J. 920.

"In a sense no easement or quasi easement can well be absolutely necessary to any possible enjoyment of property. The most that can be required is that it be, in addition to being apparent and continuous, essential to use and enjoyment of the premises as permanently improved at the time of the conveyance of the servient estate. And this appears to be what is meant by the term 'strict necessity,' in defining easement reserved by implication." 19 C. J. 920, note 75, div. A.

"The term 'necessity' is to be understood as meaning that there could be no other reasonable mode of enjoying the dominant tenement without the easement." *Starrett v. Baudler*, 181 Iowa, 965, 980, 165 N. W. 216; *L. R. A.* 1918B, 528; 19 C. J. supra.

"The word 'necessary' is not to be limited to absolute physical necessity; and a way over land of the grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense; and in determining this question, a jury may consider the comparative value of the land and the probable cost of such a way." *Pettingill v. Porter et al.*, 8 Allen (90 Mass.) 1, 85 Am. Dec. 671; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 68, 694.

[5] Implied easements rest upon implied intent gathered from the circumstances surrounding the conveyance. *Wells v. Garbutt*, 132 N. Y. 430, 437, 30 N. E. 978.

[6] An easement is apparent when it may be discovered upon reasonable inspection. *Lampman v. Milks*, supra.

[7] The Massachusetts court construes the law there strictly against implied easements, and it may be true, as stated by the New York court in *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667, also *Tiffany*, *Real Property* (2d Ed. 1920) § 380, that it is good policy to discourage easements by implication, but this doctrine cannot be carried

to the extent of depriving a party of his rights clearly established by the evidence in the particular case. It is also apparent, and as held by the authorities above cited, that a distinction is to be made between the easement reserved for the benefit of the estate granted and for the benefit of a separate estate. A quite thorough discussion of this subject may be found in *Elliott v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 750, and note thereto; also 29 C. J. 920, 921.

The right to conduct water to the mill necessarily implies the right to conduct it from the mill, and the statute in certain cases requires this to be done. Section 4844, R. C.

"Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." Section 4428, R. C.

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air, or heat from or across the land of another." Section 4429, R. C.

From the evidence in this case, this ditch and flume, penstock, and tailrace were necessary appurtenances to this mill, and as such they were reserved by the Western Mine Enterprise Company.

[8] Plaintiff also claims that the location of this flume was changed, and that the use to which the water was put was also changed, but the right to do this is granted by statute. Section 4842, R. C. And there is not any evidence here to show that the change, if any, in the location of the flume or the tailrace, or the mode of operation of the mill, added any burden to the servient estate, or caused any additional damage thereto.

Plaintiff also takes exception to the introduction of some evidence and the instructions of the court, but all of these were addressed either to showing the good faith of the defendant in its operations of this mill and the construction of the flume and the buildings, or to the theory adopted by the court that the flume, if necessary to the operation of the mill, was an appurtenance thereto.

"An entry upon the land of another under assertion of title is an ouster (*West v. Lanier*, 19 Humph. 762). In *Ewing v. Burnet*, 11 Pet. 52, it is said: 'An entry by one man upon the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done. In legal language, the intention guides the entry, and fixes its character.'" *Bramlett v. Flick*, 23 Mont. 95, 106, 57 Pac. 869, 872.

The jury having found that the retort building did not encroach upon the territory of the plaintiff, and the penstock being a part of the flume, which the defendant had a right to maintain, and the pumphouse, if it ever was an unlawful invasion of plaintiff's rights, having been removed prior to the

commencement of this action, and the defendant having the right to maintain the tail-race, the evidence relating to damages becomes immaterial, for

[9] The only question remaining would be that with reference to the tollet building, and that, according to the evidence, was only for temporary use, and the injury resulting therefrom, if any at all, is clearly too small to be a basis for the computation of any damages, unless merely nominal, and that is not sufficient to warrant reversal. *Wallace v. Weaver et al.*, 47 Mont. 487, 446, 133 Pac. 1099; 4 C. J. 1179; 3 Cyc. 447; 20 R. C. L. § 87, p. 285. The right of the plaintiff to the land is fully protected by the judgment.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(60 Mont. 270)

McKEEVER et al. v. OREGON MORTGAGE CO., Limited. (No. 4388.)

(Supreme Court of Montana. June 6, 1921.)

1. Contracts \S 187(1) — Cannot be enforced by third person unless "expressly" made for his benefit.

Under Rev. Codes, § 4970, providing that a contract made expressly for the benefit of the third person may be enforced by the third person, the word "expressly" means in direct terms, and the party for whose benefit a contract was made cannot enforce it, unless he was named or otherwise sufficiently described or designated therein, or was a member of the class for whose benefit the contract was expressly made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Expressly.]

2. Contracts \S 187(3) — Complaint by third person held not to show contract was made for plaintiff's benefit.

In an action by the vendors of land to recover the balance of the purchase price from the mortgage company which loaned the money to the purchasers on a mortgage, a complaint, alleging the mortgage and stating that the mortgage company arranged to hold the balance until patent was received for a portion of the land, and then to pay it directly to the vendor, does not show that the contract was made expressly for the vendor's benefit, and therefore does not entitle the vendor to enforce it.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

Action by Susie S. and Joseph B. McKeever against the Oregon Mortgage Company. Judgment for plaintiffs, and defendant appeals from the judgment and from an order

denying a new trial. Reversed and remanded for new trial.

E. K. Cheadle, of Lewistown, and James A. Walsh, of Helena, for appellant.

Charles J. Marshall, of Lewistown, S. P. Williams, of Jordan, and R. J. Anderson, of Lewistown, for respondents.

HOLLOWAY, J. On October 10, 1912, Susie S. McKeever and Joseph P. McKeever sold and conveyed to Clara I. Kitts and Senia L. Kitts 320 acres of land in Fergus county for the consideration of \$7,600. In order to make payment for the land, the purchasers obtained a loan from the Oregon Mortgage Company, Limited, and secured it by a mortgage upon the purchased property.

In the complaint herein it is alleged that \$5,834 of the purchase price was paid to Mrs. McKeever on the day of the sale, and that the balance (\$1,766) was withheld pending the receipt of a patent to 160 acres of the land. It is further alleged that on the day of the sale, the defendant mortgage company "arranged" with Mrs. McKeever to hold the \$1,766 until patent should be received and recorded, and then to pay it directly to her; that patent was thereafter received and recorded, and defendant notified, and that, though demand was made, the defendant has failed and refused to make payment. The prayer is for \$1,766 and interest.

A general demurrer was interposed to this complaint, but it was overruled, and defendant then answered. It denied that it ever "arranged" or agreed to hold the \$1,766, or any amount, for Mrs. McKeever, or that it ever entered into any agreement of any kind or character with her. It admitted the sale by plaintiffs to the Madams Kitts, and that it advanced to the purchasers \$6,000 and secured the loan by a mortgage upon the purchased property.

Upon these pleadings the cause was tried, resulting in a verdict and judgment in favor of the plaintiffs for the amount demanded, and defendant appealed from the judgment and from an order denying its motion for a new trial. It is insisted that the court erred in overruling the demurrer.

We would be at a loss to understand the theory upon which it is sought to impose upon the defendant mortgage company the duty to pay to Mrs. McKeever money which confessedly belonged to the Madams Kitts in the first instance, at least, but for the information vouchsafed by counsel for plaintiffs in their brief. They say:

"This action * * * was brought on a contract between two persons for the express benefit of a third person. The mortgage was executed by the Mrs. Kitts, in favor of the defendant and appellant, for the express purpose of paying the debt owed by the Mrs. Kitts to the McKeeveres. This action was brought

by the plaintiff and respondent on that contract."

[1] In the absence of statute, most of the courts of this country recognize and enforce a contract made between two parties for the benefit of the third, but some diversity of views appears relative to the character of the contract and the relationship of the parties. The rule most generally followed is that there must exist on the part of the original parties to the contract a clear intent to benefit the third party. 2 Elliott on Contracts, § 1413. In *Lawrence v. Fox*, 20 N. Y. 268, the rule as stated above was adopted in the state of New York by a divided court, but later, in an action in which it was sought to apply the rule, the Supreme Court, in *Hoffman v. Schwabe*, 33 Barb. (N. Y.) 194, said:

"But there is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for the benefit of a third party."

The latter contract was held to be within the rule; the former not within it.

When the Field Civil Code was reported to the Legislature of New York in 1865, it assumed to state the rule according to the prevailing judicial opinion. Section 749 of that Code declares:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

In 1872 the Field Code was adopted in California, and section 749 above became section 1559 of the California Civil Code, and has continued in force since that date. Our Civil Code, adopted in 1895, was practically copied from the Field Code and the Civil Code of California, as is disclosed by the report of our Code Commissioners. Section 4970, Revised Codes, is a verbatim copy of section 749 of the Field Code. The language employed is significant. The contract must be made expressly for the benefit of the third party, and the word "expressly" means "in direct terms." Webster's International Dictionary. This is the meaning given to it by the California court long before our Code was adopted. *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100.

It is held by practically all of the authorities that it is not sufficient that the contract may incidentally benefit the third party. *Tatem v. Eglanol Mining Co.*, 45 Mont. 367, 123 Pac. 28. The party for whose benefit the contract is made must be named or otherwise sufficiently described or designated. *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71; 13 C. J. 711. However, if the contract was made expressly for the benefit of a class of persons to which class the party seeking enforcement belongs, he may obtain the benefit of it. *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541.

[2] The only contract mentioned in the complaint in this action as having been made between the Madams Kitts and the defendant mortgage company is the one evidenced by the mortgage itself. The mortgage was not introduced in evidence, and neither it nor a copy of it is attached to the complaint. It is not alleged that it contains a provision to the effect that the mortgage company should pay the \$1,766 to Mrs. McKeever, and therefore it cannot be said that it was made expressly, i. e., in direct terms, for her benefit. So far as disclosed by the complaint, the mortgage was made primarily for the benefit of the Madams Kitts, to enable them to purchase the property mentioned. The burden was cast upon plaintiffs to prove that the mortgage was made expressly for their benefit or for the benefit of Mrs. McKeever (*Thomson v. Bettens*, 94 Cal. 82, 29 Pac. 336), and if it was necessary to prove this fact it was equally necessary that it be alleged. The bare statement of these rules is sufficient to demonstrate that the complaint herein does not state a cause of action upon the theory advanced by counsel for plaintiffs, and we cannot conceive of any other theory upon which it can be sustained. In this view of the case it is unnecessary to consider the other assignments.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur.

(34 Idaho, 50)

MOORE v. BOISE LAND & ORCHARD CO.
et al. (DEAN, Intervener). (No. 3338.)

(Supreme Court of Idaho. May 28, 1921.)

Appeal and error \Leftrightarrow 1208(1)—Remedy of "restitution" defined.

The remedy of restitution requires restoration of property which one has lost, on account of the execution of an erroneous judgment, by the party who has obtained it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Restitution.]

Dunn, J., dissenting.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Proceedings by Crawford Moore, trustee, against the Boise Land & Orchard Company and others, wherein M. F. Dean intervenes. Judgment for plaintiff, and intervener appeals. Reversed, with directions to dismiss.

S. T. Schreiber, of Boise, for appellant.

Edwin Snow, Ira E. Barber, and Chas. F. Koelsch, all of Boise, for respondent.

RICE, C. J. This is the second appearance of this case in this court. The opinion upon the former hearing is reported in 31 Idaho, 390, 173 Pac. 117, where the facts are stated. Pending the appeal, the property concerned in the litigation was sold at sheriff's sale pursuant to the judgment. After the remittitur was filed, Dean presented his petition to the district court asking for restitution by Crawford Moore, purchaser at the execution sale, of the amount of the purchase price of said premises represented by the judgment of McReynolds, which this court had adjudged not to be a lien upon the property. At the hearing it was shown that the land was bid in by Moore at the sale for the aggregate amount of his own liens and that of Rayburn, and the judgment of McReynolds, pursuant to a written agreement by which on redemption of the property, or, if not redeemed, upon the sale thereof, the judgment liens should be discharged out of the proceeds in the order of their several priorities as set forth in the decree of the trial court. Moore did not pay the amount of his bid to the sheriff in cash, but in lieu of payment there was credited against his bid the amount of his liens and that of Rayburn, and the amount of the judgment of McReynolds. By its judgment in this proceeding the court decreed "that he, the said M. F. Dean, be, and he hereby is, substituted to all rights and privileges which W. D. McReynolds could or might have had under and by virtue of the sale of the premises in this cause at the sheriff's sale," and decreed that the right to which he was substituted gave him a lien upon the premises subject to those of Moore and Rayburn. It further decreed that upon the sale of said premises Dean should be entitled to participate in the proceeds thereof to the amount of his judgment, subject to the payment of the prior liens of Moore and Rayburn.

O. S. § 7171, provides:

"When the judgment or order is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment on the appeal from which the proceedings were not stayed. * * *

Appellant lost no right by the erroneous judgment, except the right to redeem under the statute by paying the amount of the prior liens, exclusive of the McReynolds judgment, erroneously declared to be a prior lien, and the right to receive the proceeds of the sale in excess of such prior liens. Appellant did not seek to set aside the sale, and he would not have been entitled to such relief had he sought it. *Barnhart v. Edwards*, 129 Cal. 572, 61 Pac. 176. See, also, *Falk v. Ferdinand Brewing Co.*, 67 Kan. 131, 72 Pac. 531.

The remedy of restitution requires restoration of property which one has lost, on account of the execution of an erroneous judgment, by the party who has obtained it. This having been an execution sale, it was necessarily for cash, and the relationship of the parties is the same as if Moore had paid the amount of his bid to the sheriff and the sheriff had distributed the proceeds of the sale in accordance with the directions of the judgment.

Moore received nothing from the transaction that he was not entitled to receive. If his lien had been declared invalid and he had received credit therefor, he would have received a credit to which he was not entitled and would have been liable to appellant, Dean, therefor to the extent of Dean's judgment. *Yndart v. Den*, 125 Cal. 85, 57 Pac. 761; *Patton v. Thomson*, 3 Cal. Unrep. 871, 33 Pac. 97. See, also, *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589.

Dean was not a party to the contract, pursuant to which the property was bid in by Moore, and cannot be required to become a party thereto, or to accept a substitution to McReynolds' interest in the property.

The judgment therefore should not be affirmed, but should be reversed, with direction to dismiss the proceeding.

It is so ordered. No costs awarded.

BUDGE and LEE, JJ., concur in the conclusion reached.

McCARTHY, J., sat at the hearing, but took no part in the opinion.

DUNN, J. (dissenting). I am unable to agree with the conclusion reached by the majority of the court. On the trial of the main case the court decreed the sale of the northwest quarter of the southwest quarter of section 33, township 4 north, range 1 east of the Boise meridian, and the application of the proceeds thereof, after the payment of the costs and expenses of sale, to the payment of certain liens as follows: First, the liens of Crawford Moore, trustee, the plaintiff in said action; second the lien of B. E. Rayburn; third, the lien of W. D. McReynolds; fourth, the lien of M. F. Dean, appellant herein; and the residue, if any, to Dean Perkins, as receiver of the Wyoming Land & Holding Company. Dean appealed from this judgment, but gave no stay bond. Pursuant to the decree said property was sold by the sheriff to the plaintiff, Crawford Moore, trustee, for the sum of \$15,816.21, said sum being the total amount of the liens held by Moore, Rayburn, and McReynolds, together with the costs in said action and the expenses of said sale. Said costs and expenses were paid in cash to the sheriff, but the remainder of said purchase price was discharged by the application thereto of the several amounts due on the said liens of Moore, Rayburn, and McReynolds.

(198 P.)

On the hearing of the appeal in this court said decree was affirmed so far as it affected the claims of Moore and Rayburn, but was reversed as to the McReynolds claim. Thereupon Dean filed in the district court his petition asking for restitution by Crawford Moore of the amount of the purchase price of said property represented by the lien of McReynolds; the said McReynolds' lien having been adjudged by this court invalid.

Moore and McReynolds were cited by the district court to show cause why an order of the court should not be made directing them to make restitution in full of said amount, being \$998.67 together with costs and interest from September 4, 1915. Moore appeared and answered said petition, but the proceedings were dismissed by the petitioner as to McReynolds. The substance of Moore's answer was a denial that he or Rayburn or McReynolds had received any proceeds of said sale, or that the lands were sold for cash, or that any moneys were paid on the purchase price, save and except the costs of sale, or that the reversal of the judgment of the trial court left any sum to be applied to the judgment of Dean, or that Moore, as trustee, or at all, is the owner of said lands, or that he retains any proceeds of any sale thereof, or that he retains the proceeds of the McReynolds judgment or any part thereof, or that he withholds any part thereof from the petitioner. As a defense he set up that said land was bid in at the sale for the aggregate amount of his own liens and those of Rayburn and McReynolds under an arrangement by which, on redemption of the property, or on realization therefrom, the said judgment liens should be discharged out of the proceeds in the order of their several priorities as declared by the decree of the trial court, and that, except for such arrangement and agreement, the said purchase would not have been made or entered into, nor would said amount or any amount in excess of the sum of the liens of said Moore and costs of the sale have been bid at such sale; that the two liens awarded to Moore, as trustee, were based on two mortgage deeds pledged as collateral by one W. H. Gibberd, by reason of which the said Moore holds the said property in trust for the said Gibberd; that by reason of the foregoing pledge the said lands became a pledge to the said Crawford Moore, as trustee, for the sum of said two deeds, costs, and interest; that the said B. E. Rayburn and the said W. D. McReynolds were entitled, after the payment of said mortgage liens, to share in the order of their priority and to the extent of their judgments in the proceeds of such lien property, and that the said Gibberd would be entitled to the residue, if any; that the estate acquired by the said McReynolds was a contingent one, being subject to the paramount rights of said Moore and the said Rayburn and entitling the said McReyn-

olds to an accounting of rents and issues, less taxes, assessments, costs and expenses incurred in the conduct of the said lands; that the said Moore received nothing at said sale by reason of the McReynolds judgment; and that the sole fruits of said sale, so far as McReynolds was concerned, was a contingent estate in said land, as to which estate the said Moore disclaimed any interest; that by reason of the decision of the Supreme Court the said Dean was entitled to be subrogated to the said contingent estate of the said McReynolds, and was a proper and necessary party to an action to foreclose the said pledge as against the said Gibberd; that such action was then pending in said court; that petitioner was a party thereto; and that therein petitioner could fully protect and procure all his rights under said judgment so far as they related to said land and property, or said or any conduct of the purchasers of the said property.

After hearing the testimony offered by the respective parties, the court made and filed its findings of fact and conclusions of law and thereupon entered a judgment awarding Dean a lien on the above-described property, subject to the prior liens of Moore and Rayburn, and providing that upon sale of said premises the residue, if any, after discharging the liens of Moore and Rayburn, should be paid to Dean up to the amount of the balance due him, with interest from the 15th day of March, 1915, but said judgment made no award to Dean of the money asked by him, nor of any part thereof.

Dean has appealed from said judgment and assigns four errors as follows:

"First, that the decision, order and judgment of the court is contrary to the law and the evidence; second, that the court erred in admitting certain evidence over objection of petitioner, and erred in admitting Exhibit 1 of plaintiff in evidence; third, that the court erred in overruling the motion of petitioner, intervenor, to strike the 'answer and return,' of plaintiff, Crawford Moore, trustee, from the files; and, fourth, that the court erred in admitting evidence in support of the 'answer and return,' of Crawford Moore, trustee."

It will not be necessary to deal with these assignments separately. Exhibit 1 referred to in appellant's second assignment is a contract that was entered into by Moore, Rayburn, and McReynolds prior to the sale of said property by which it was agreed, in substance, that Moore should buy said property at the sheriff's sale and should bid therefor the aggregate amount of the liens of Moore, Rayburn, and McReynolds together with the costs and expenses of sale to the amount of \$15,816.21, and should thereafter hold said property as trustee and handle it to the best advantage and upon sale thereof or redemption thereof pay out the proceeds: First, to Moore for his liens and judgments, including all costs, taxes, or ex-

penditures made by him on account of said premises which were entitled to become charges or liens thereon or which might be expended thereon by mutual agreement of the parties under said contract; second, to B. E. Rayburn to the amount of his judgment and lien; and, third, to W. D. McReynolds to the amount of his judgment and lien, it being the intention of said "agreement to expressly provide that the said liens and judgments shall be recovered from sale of the premises or redemption thereof in case of a purchase by plaintiff in the order of their priorities as determined by the court."

No question is raised by either party on this appeal as to the validity of the sale of said property. While considerable attention has been paid in appellant's brief to the subject of setting aside said sale, the prayer of his petition is that Crawford Moore, trustee, may be required to pay to appellant the amount of the McReynolds' claim, namely, \$998.67, with interest and costs, and the only question presented to this court is whether or not Dean is entitled to recover said amount from Monroe.

The contention of Moore is that the rights of Dean are fully satisfied by having his lien moved up to the place formerly occupied by that of McReynolds, but this consideration is entirely beside the question whether or not Dean is entitled to recover the amount of the McReynolds lien on account of Moore's bid having covered said lien. Moore was clearly within his rights when he proceeded to have the land sold pursuant to the court's decree, but when he proceeded thus without waiting for Dean's appeal to be determined he assumed the risk of the appellate court's holding invalid one or all of the lien claims that he applied to the purchase price of this property. The contract made by Moore, Rayburn, and McReynolds was one that they had a right to make, but in making it they could not limit the rights of Dean as a lien claimant. Moore says that without this arrangement made by himself, Rayburn, and McReynolds he would have bid only the amount of his own claims and the necessary costs and expenses of sale, but, having elected to take the risk of including in his bid an amount sufficient to cover the claims of Rayburn and McReynolds, and having used said claims in the payment of his bid, I do not see how he can escape responsibility for the full amount of his bid after this court has held the McReynolds claim for naught. His bid, so far as Dean is concerned, must be held to have been a cash bid. It was entirely proper for him to apply to its payment his claims and those of Rayburn and McReynolds, because at that time all of said claims were entitled to be regarded as valid, and the law did not require of him the useless process of paying in cash the amount of these liens, of which he had control, only to have it immediately returned to him by the sheriff. But his right

to apply such claims in discharge of his bid presupposes the validity of each one of said claims, and if any one of them was held invalid, as was the case with the McReynolds claim, then upon such holding it became obligatory upon him to make good the amount thereof in cash to the next lien claimant, who in this case is Dean.

Moore claims that he received nothing from the sale, and therefore ought not to be required to pay anything on account of the failure of the McReynolds claim. He received the property, whose title he now holds, and he paid for it in part with this invalid claim. If he can hold this property and escape making good the loss of this claim of McReynolds, then he could hold it without making payment in cash, if, in addition to that of McReynolds, his own lien and that of Rayburn had failed; for there would still have been a valid sale so long as Dean's claim was held good. I think he would hardly go so far as that. If not, then his present contention must fail.

Speaking of Moore's lien, the majority opinion says:

"If his lien had been declared invalid and had been credited against his bid, he would have received a credit to which he was not entitled and would have been liable to appellant Dean therefor."

True. Then how can he escape liability for the amount of the invalid McReynolds lien after taking it over and using it as his own, obtaining credit for it against his bid as if it were his own? I can see no distinction to be properly drawn in this regard between his own lien and those that he used as his own and from which he obtained the same financial advantage as he did from his own. If he would be required to make good the loss in the one case, he must also in the other.

Many authorities have been cited by counsel on both sides bearing upon the general question of restitution, but I have found only two cases that seem to be applicable to such a situation as is presented in this case. These are cited by the respondent Moore, but they clearly support the claim of appellant, Dean. This first case is that of *Yndart v. Den*, 125 Cal. 85, 57 Pac. 761. This was a case of mortgage foreclosure in which the plaintiff at the foreclosure sale purchased the property for the full amount of his claim. On appeal the Supreme Court reduced the amount of the judgment by \$470.19, and in passing on the question of restitution in that case the court said:

"Defendants lost no rights or property by the execution of the judgment before the right of appeal had expired, except in the single item of the excess of interest included in the judgment. Complete justice will be done defendants by repayment of this excess to wit four hundred seventy dollars and nineteen cents."

The other case is that of *Falk et al. v. Ferdheim Brewing Co.*, 67 Kan. 131, 72 Pac. 581. This was an action in which the court decreed the foreclosure of two mortgages on the same property, and the defendants succeeded in reversing the judgment as to the second mortgage. The property was sold, however, before the reversal, and was bid in by the plaintiff at the aggregate amount due upon both mortgages. On obtaining reversal as to the second mortgage defendants sought to have the sale set aside as void, but the court held that, since the judgment foreclosing the first mortgage was valid, the defendants were not entitled to the relief sought, saying:

"Under the circumstances of this case, we see no reason for holding that the judgment defendants were entitled to have the sale set aside, much less ignored. Even if the supersedeas bond had been given before the sale, the property could have been sold under the superior judgment, thereby cutting off all rights of defendants in the matter excepting the right to redeem under the statute by paying the amount of the first lien, and the right to receive the proceeds of the sale in excess of that amount. These are the only rights that defendants lost or that were suspended by the erroneous judgment against them, and a complete restoration to these rights did not require the setting aside of the sale, but resulted from the mere reversal of the judgment."

Under the admitted facts in this case, Dean is entitled to judgment against Moore for the sum of \$908.67, with interest thereon from the 4th day of September, 1915, less such proportion of the costs and expenses of the sale as may be properly charged against the McReynolds claim. To this extent the judgment of the trial court should be modified; in all other respects said judgment should be affirmed.

(34 Idaho, 797)

ELLIOTT & HEALY v. WIRTH.

(Supreme Court of Idaho. May 28, 1921.)

1. Evidence ⇨82—Alias summons presumed to precede order based thereon.

Where neither an affidavit for service of alias summons outside the state nor the order based thereon contain the words "alias summons," yet both recite that summons had theretofore been issued, returned, and filed with the clerk, and the alias summons, affidavit, and order were issued, filed, and made on the same day and recorded in the register of actions in the order given, in the absence of a contrary showing it must be presumed that such alias summons preceded the order in point of time and was "the summons" to which the affidavit and order refer, and that it was the alias summons ordered to be served upon the defendant outside the state.

2. Records ⇨(7(2,3)—Court may order lost alias summons to be replaced by another.

A court has control over its process, and where proper jurisdictional facts empowering the court to act are established to its satisfaction, such process may be delayed, but not defeated, by mishaps occurring while in the hands of the person by whom service is to be made. It is within the power of the court to order a lost alias summons to be replaced by another upon being satisfied by such loss.

3. Process ⇨153—Errors or delays in service not affecting substantial rights should be disregarded.

Errors, defects, or delays in the service of process which do not affect the substantial rights of the parties should be disregarded.

4. Evidence ⇨82—Process ⇨73—Verified complaint on file stating cause of action a prerequisite to order for personal service of summons out of state; where complaint on file, presumption is that court found that it stated a cause of action.

The existence of a verified complaint on file stating a cause of action against a defendant upon whom service is sought to be made is an essential prerequisite to the issuance of an order for personal service of summons outside of the state, under the provisions of C. S. § 6677. Where such a complaint was actually on file at the time the order for service of summons was made, the presumption must be that the court so found, and such presumption is not overcome by a recital that a cause of action exists as appears by affidavit, when the affidavit refers to and adopts the complaint.

5. Appearance ⇨9(8)—Appearance to set aside execution sale for inadequacy of price constitutes a general appearance.

Where a defendant purports to appear specially and moves that a sale under execution be set aside by reason of inadequacy of the sum paid for the property sold, he seeks relief which could be granted only upon the hypothesis that the court has jurisdiction of the cause. Such appearance is accordingly a general appearance and gives the court jurisdiction over him for all purposes of the case.

6. Execution ⇨250—Mere inadequacy of price not sufficient ground to set aside execution sale in absence of fraud.

Mere inadequacy of price at which property is sold under execution is not sufficient ground to set aside the sale, where the parties stand on an equal footing, and there are no confidential relations between them, and no element of fraud, unfairness, or oppression is shown to have existed with respect to such sale.

7. Execution ⇨253(2)—Defendant in default cannot, seven months after sale under execution, question adequacy of price.

Where a litigant permits judgment to be taken against him by default, he cannot be heard seven months after a sale upon execution in pursuance of such judgment to question the adequacy of the price for which the property in question was sold, in the absence of

proof of fraud, unfairness, or oppression with respect to the sale, or the existence of a confidential relation between the parties.

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by Elliott & Healy, copartners, against John Wirth for attorney fees. Judgment for plaintiffs by default. Motion to quash the summons, vacate default, and set aside judgment and sale under execution denied, and defendant appeals. Affirmed.

Wyman & Wyman, of Boise, for appellant.
J. R. Smead, of Boise, for respondents.

BUDGE, J. This action was brought by respondents to recover \$718 for legal and professional services rendered by them to appellant.

From the record it appears that on April 28, 1917, a verified complaint was filed herein, summons was issued, and certain capital stock of the Ames Wholesale Grocery & Supply Company, owned by appellant, was attached; that on May 9, 1917, the sheriff filed the summons with the clerk, with his return thereon that after due and diligent search and inquiry he was unable to find appellant in Ada county, state of Idaho; that an alias summons was issued; that respondents filed an affidavit, dated April 30, 1917, for service of summons on appellant outside of the state, and the court ordered service to be made upon appellant outside of the state and at his residence at or near Creswell, Or.; that the alias summons was mailed on May 15, 1917, to the sheriff of Lane county, Or., for service, by whom it was lost; that on July 21, 1917, the court, on motion of respondents supported by affidavit of such loss, ordered the clerk to issue a second alias summons; and that this second alias summons was duly served upon appellant by the sheriff of Lane county, Or., on July 23, 1917, by delivering to and leaving with said appellant a copy of the alias summons attached to a copy of the complaint.

Appellant having failed to appear and answer the complaint, and the time allowed by law for answering having expired, his default was entered September 8, 1917, and judgment was rendered against him September 11, 1917, for \$718 and costs. Execution was thereupon issued, and the stock theretofore attached was sold on September 20, 1917, to respondents, for \$50.

On April 26, 1918, appellant, purporting to appear specially, moved the court to quash the summons and set aside the pretended service thereof, to vacate the default and set aside the judgment, and to set aside the sale made under execution. This motion was supported by the affidavit of appellant to the effect that the stock in question was worth more than \$750, and that the certificate of stock had been placed by appellant in

the hands of respondents in connection with legal services theretofore rendered to him by them, with which was submitted the answer and cross-complaint of respondents in an action in the district court wherein the Ames Wholesale Grocery & Supply Company was plaintiff, and the appellant and respondents herein were defendants, in which respondents by way of cross-complaint in conversion allege that the value of said stock and the said accumulated dividends and earnings thereof at the time of the conversion thereof by said corporation was the sum of \$1,450.

Appellant's motion was overruled by the court on October 7, 1918, from which action this appeal is taken.

Appellant makes three assignments of error, and contends that the order of the court that service be made upon appellant outside the state had reference to the original summons; that the order for the issuance of the second alias summons was not made within a reasonable time after the affidavit for service of summons outside the state; that with respect to the existence of a cause of action the order was based upon respondents' affidavit, and not upon the verified complaint; and that the stock was purchased by respondents for a grossly inadequate consideration.

In their affidavit for service of summons outside the state respondents allege "that personal service of said summons cannot be made" on appellant in this state and ask an order:

"That personal service of the summons may be made outside the state in lieu of publication of summons, and that said service of summons be made on defendant at his residence at Creswell, Or."

And that portion of the order referring to the summons contains the following language:

"And it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained, and by the said affidavit made to appear, on motion of Elliott & Healy, attorneys for plaintiffs, it is ordered that the service of the summons in this action be made upon defendant by service outside of the state and upon said defendant at his residence at or near Creswell, Or."

[1] While neither the affidavit nor the order contain the term "alias summons," yet both recite that summons had theretofore been issued, returned, and filed with the clerk, and respondents did not ask nor did the court order that the summons theretofore filed be withdrawn and again served, notwithstanding it was beyond the power of respondents to withdraw the summons without an order of court to that effect. Ride-

baugh v. Sandlin, 14 Idaho, 472, 94 Pac. 827, 125 Am. St. Rep. 175.

The alias summons, affidavit, and order having been issued, filed, and made on the same day, and recorded in the register of actions in the order given, in the absence of a contrary showing we are constrained to presume that the alias summons preceded the order in point of time, and that that is "the summons" to which the affidavit and order refer. Though the latter makes reference to the summons, the alias summons must, under the circumstances, be the summons ordered to be served upon appellant outside the state.

Since the first alias summons was lost, appellant further contends that the court was without authority to issue a second alias summons in lieu thereof, in the absence of a second affidavit and order for service outside of the state, and that the first affidavit cannot, by reason of lapse of time, support the action of the court in ordering the issuance of the second alias summons.

[2] Numerous authorities are cited in appellant's brief to the effect that no appreciable time should elapse between the making of an affidavit for publication of service and the order therefor. Conceding the rule to be correct as announced in these authorities, nevertheless they relate to the publication rather than to the personal service of summons outside the state, and are not in point for the further reason that the order complained of is not an order for service of summons outside the state, but an order to replace a lost alias summons theretofore directed by a valid order to be so served. The first alias summons was designed for service upon appellant at or near Creswell, Or., if he could there be found, and for return to the court with a proper certificate by the person who should serve the same indorsed thereon. How, then, can it be seriously contended that this summons by being mislaid by the person attempting to serve it thereby became functus officio? If it is the office of summons to be served and returned, this office is not fulfilled by loss prior to attempted service, nor do we think it would be contended that a summons temporarily mislaid might not be subsequently served. The court has control over its process, and where proper jurisdictional facts empowering the court to act are established to its satisfaction, such process may be delayed, but not defeated, by mishaps occurring while in the hands of the person by whom service is to be made, and we entertain no doubt of the authority of the court to order the lost alias summons to be replaced by another upon being satisfied of such loss.

Moreover, appellant was in no wise prejudiced by the loss of the first alias summons and the issuance of the second. As was said by this court in *Empire Mills Co. v. District*

Court, 27 Idaho, 383, at page 393, 149 Pac. 499, at page 502:

"As we view it, it is not so much a question of mere service, or the means adopted in order to obtain the service, but rather the fact of service, which would confer upon the court the jurisdiction. * * *"

[3] The fact of service is established in this case, and appellant's substantial rights were not affected by the loss of the first and the issuance of the second alias summons. The court will disregard any errors or defects which do not affect the substantial rights of the parties. *Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158.

With respect to the existence of a cause of action against appellant, the affidavit for service of alias summons contained the following provision:

"That affiant believes that plaintiffs have a good cause of action in this suit against the said defendant, as will fully appear by plaintiffs' verified complaint filed herein and to which reference is hereby made, and that said defendant John Wirth is a necessary and proper party defendant thereto"

—while the order recites that:

"It appearing from the affidavit * * * that a cause of action exists in this action in favor of the plaintiffs therein and against the said defendant, and that the said defendant John Wirth is a necessary and proper party defendant thereto. * * *"

It is insisted by appellant that in view of the foregoing language the order was based, not upon the verified complaint, but upon the affidavit, whereas the statute provides:

"When the person on whom the service is to be made resides outside of the state * * * and it * * * appears by the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, and that he is a necessary and proper party to the action, such court * * * if the address of the defendant outside of the state is known, may make an order that personal service of the summons may be made outside of the state in lieu of * * * publication. * * *" C. S. § 6877.

[4] The existence of a verified complaint on file, stating a cause of action against the defendant upon whom service is sought to be made, is an essential prerequisite to the issuance of an order for personal service of summons outside of the state. Where such a complaint was actually on file, the presumption must necessarily be that the court so found, and this presumption is not overcome by a recital that a cause of action exists as appears by affidavit, when the affidavit refers to and adopts the complaint. *Ligare v. California South. R. Co.*, 76 Cal. 610, 18 Pac. 777; *Clemson Agricultural College v. Pickens*, 42 S. O. 511, 20 S. E. 401; *Coughran v. Markley*, 15 S. D. 37, 87 N. W. 2.

Appellant attacks the action of the court in refusing to set aside the sale under execution, not alone because of defective service, but for the further reason that the stock in question was purchased by respondents for a grossly inadequate sum. While he purported to appear specially, yet he sought to have the court pass upon nonjurisdictional as well as jurisdictional grounds. The object and only office of a special appearance is the presentation of a purely jurisdictional objection, and, as was held in the case of *Burnham v. Lewis*, 65 Kan. 481, 70 Pac. 837:

"An appearance in an action by a defendant for any purpose other than to contest the jurisdiction of the court will give the court general jurisdiction over such person for all purposes of the litigation."

In *Nelson v. Nebraska Loan & Trust Co.*, 62 Neb. 549, 87 N. W. 320, the court said:

"Whatever may have been the situation as to want of jurisdiction over the person of the plaintiff in error prior to the time he obtained leave to be made a party defendant and enter objections to the confirmation of sale, he thereby made a general appearance, and the court acquired jurisdiction over him for all purposes of the case. He has invoked the power of the court regarding other matters than that of challenging its jurisdiction over him, has made a general appearance, and waived all objections as to the manner in which he was brought into court."

[6] When appellant appeared and moved that the sale under execution be set aside by reason of inadequacy of the sum paid for the property sold, he sought relief which could be granted only upon the hypothesis that the court had jurisdiction of the cause. The appearance was therefore a general appearance, and gave the court jurisdiction over him for all purposes of the case. *Kaw Val. Life Ass'n v. Lemke*, 40 Kan. 661, 20 Pac. 512; *Gorham v. Tanquerly*, 58 Kan. 233, 48 Pac. 916; *Security L. & T. Co. v. Boston, etc., Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *Fowler v. Continental Casualty Co.*, 17 N. M. 188, 124 Pac. 479; *Raymond v. Nix*, 5 Okl. 656, 49 Pac. 1110; *Nichols & Shepard Co. v. Baker*, 13 Okl. 1, 73 Pac. 302; *Belknap v. Charlton*, 25 Or. 41, 34 Pac. 758; *Smith v. Day*, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055; *Bain v. Thoms*, 44 Wash. 382, 87 Pac. 504.

[6, 7] Aside from the question as to whether appellant's affidavit affords sufficient proof of the value of the stock at the time of the execution sale, and whether respondents' cross-complaint heretofore mentioned may be considered as an admission that the stock and accumulated dividends and earnings thereof was of the value of \$1,450, the rule is well established that mere inadequacy of the price at which property is sold under execution is not sufficient ground to set aside the sale, where the parties stand on an equal

footing, and there are no confidential relations between them. 23 Cyc. 676. No element of fraud, unfairness, or oppression is shown to have existed with respect to this sale. The bare possession of the stock certificate gave respondents no unfair advantage, nor does it raise the presumption of any confidential relation existing between appellant and respondents. In view of these facts, appellant having permitted judgment to be taken against him by default, he cannot be heard seven months after the sale to question the adequacy of the price for which the property was sold.

From what has been said it follows that the order appealed from should be affirmed; and it is so ordered. Costs are awarded to respondents.

LEE, J., concurs.

RIE, O. J., and DUNN, J., concur in the conclusion reached.

McCARTHY, J., being disqualified, did not sit at the hearing and took no part in the opinion.

(34 Idaho, 307).

EAST SIDE BLAINE COUNTY LIVE STOCK ASS'N v. STATE BOARD OF LAND COM'RS et al. (CAMPBELL et al., Interveners). (No. 3392.)

(Supreme Court of Idaho. May 28, 1921.)

1. *Mandamus* ¶85—Writ lies against State Board of Land Commissioners to compel it to lease lands to highest bidder.

Where two or more parties have applied to lease the same state land, a writ of mandate will lie against the State Board of Land Commissioners to compel it to lease such lands to the highest bidder.

2. *Public lands* ¶148½, New, vol. 9 *Key-No. Series*—Disposition of lands fixed by Constitution in State Board of Land Commissioners.

The direction, control, and disposition of the public lands of the state is, by article 9, §§ 7 and 8, of the Constitution, vested in the State Board of Land Commissioners, and must be exercised in accordance with the Constitution and statutes thereunder, and not otherwise.

3. *Public lands* ¶148½, New, vol. 9 *Key-No. Series*—Where Board of Commissioners acts without authority, court may interrupt its action.

If the Board acts without authority of law, the courts may interrupt its action and declare the law, and point out the legal scope within which the Board's judgment must be exercised.

4. *Public lands* ¶148½, New, vol. 9 *Key-No. Series*—Lease must be awarded to highest of two or more bidders for same land.

Where two or more parties apply to the Board to lease the same state lands, under either C. S. § 2907 or section 2910, the lease

must be awarded to the party making the highest bid.

Appeal from District Court, Ada County;
Chas. F. Reddoch, Judge.

Application of the East Side Blaine County Live Stock Association to obtain a writ of mandate against the State Board of Land Commissioners and others, wherein Stewart Campbell and Campbell Bros. intervene. Writ granted, and interveners appeal. Affirmed.

Oppenheim & Lampert and Jay M. Parrish, all of Boise, for appellants.

Roy L. Black, Atty. Gen., and Dean Driscoll, Asst. Atty. Gen., for respondent Board.

Martin & Cameron, of Boise, for respondent East Side Blaine County Live Stock Ass'n.

LEE, J. This action was commenced in the Third judicial district court by the respondent corporation, praying that a writ of mandate issue to the State Board of Land Commissioners, commanding it immediately to put up at public auction section 36, township 2 north, range 20 east, Boise meridian, for lease to the highest bidder. The court issued an alternative writ, commanding the defendants to immediately auction off the lease of said lands to the applicant who would pay the highest annual rental therefor, and that in default thereof defendants show cause before said court why said order had not been obeyed. Defendants demurred to said complaint, and thereafter Stewart Campbell and Campbell Bros. were permitted to intervene, and file a complaint in intervention, alleging that said State Board of Land Commissioners had already leased said land to them. A general demurrer to the complaint in intervention was overruled, and respondent answered the same. Defendants answered the respondent's complaint, and set up that the lands in question had been leased to Stewart Campbell, for the reason that he owned lands adjoining, and that he was in the military service of the United States. All of the demurrers having been overruled, a trial on the issues presented by the pleadings was had before the court, and it entered judgment directing that a peremptory writ of mandate issue, commanding said defendants, after giving proper notice to the applicants who had made applications to lease said lands, to immediately auction off at public auction said land lease, to the applicant who would pay the highest rental therefor. From this judgment the interveners appeal, and assign as error (1) that the court erred in overruling the interveners' demurrer to the complaint; (2) in entering judgment directing the defendants to auction said lands; (3) in issuing a peremptory writ of mandate di-

recting the State Board of Land Commissioners to order a public auction of the lease of said lands; (4) overruling interveners' objection to the introduction of any testimony on behalf of the plaintiff.

It appears that the plaintiff and its predecessors in interest had leased the lands in question for a period of 10 years immediately preceding December 30, 1918, and that prior to the expiration of this lease it made written request, in compliance with law and the rules and regulations of said Board, for an additional 5-year lease upon said lands; that, shortly prior thereto, appellants made application in due form to lease the same lands; that on December 17, 1918, the State Land Commissioner notified respondent that said Board had received its application for leasing said lands, together with the proper rental fees, and also the application of the intervenor Campbell; and that, if these conflicting applications could not be adjusted by the parties, the lease would be offered at public auction to the highest bidder; and that, if any prior right existed, it must be established previous to such auction; and that, on such claim being established, the Commissioner would eliminate such land from conflict, and lease to the applicant establishing such right, as provided by the rules and regulations of said State Board. For the purpose of "holding such auction and receiving such adjustment," respondent was notified to appear in person, or by agent, on the 30th of December, 1918, before the said Commissioner at his office at Boise.

At that time respondent appeared, by its agent, and demanded a right to bid at auction on the lease of said premises, under its said application, and said that it was ready and willing to bid above 10 cents per acre; but the Commissioner refused to put up said lease at auction, and ruled the same should go to the interveners, Stewart Campbell and Campbell Bros., who appear to represent one and the same interest, at a rental of 10 cents per acre. Respondent immediately took the matter before the Board, which was then in session, making the same demand and offer, but the Board also refused to lease the land to respondent, or to offer the same at auction, and ordered that it be leased to appellants for 10 cents per acre. The defendant Board's answer sets up as a reason for awarding the lease of these premises to the appellant Campbell that he was the owner of farm lands adjoining said section, and that the respondent was not such owner, and that at the time of the making of this lease said Campbell was in the military service of the United States, and admits that no auction for the lease of said land was ever held, and no sealed bids received, and no opportunity for making the same given, except in so far as the original application to lease constituted a bid.

The Commissioner testified that he was present at said meeting of the Board when these lands were leased to the appellant, and stated to the Board that two applications had been filed during the month of November for the same land; that he had sent out notices to the conflicting applicants to appear before him on that date, and that they did appear before him, but had been unable to adjust their said conflict; and that he recommended that the lease be granted to Campbell Bros. It appears from the minutes of the meeting of the Board that, upon the Commissioner making this report, upon motion of the Governor, which was carried unanimously, the action of the Commissioner was ratified, it being recited in the minutes as one of the reasons therefor that said Stewart Campbell was in the military service of the United States. The Board ordered the execution of a lease to Campbell Bros. at 10 cents per acre, which was prepared, but has not been delivered. During all of these proceedings before the Board, respondent was present by its agent, demanding that said lease be offered at auction to the highest bidder, and offered to bid more than 10 cents per acre for said lands.

The material facts are not controverted; this appeal presents the question as to whether or not, under these facts, said State Board may be required by mandate to offer the lease of said lands at public auction.

C. S. § 2907, provides that no lease of state lands shall be for a longer term than five years, and that, at the expiration of a lease by limitation, the holder may renew the same at any time within 30 days next preceding the expiration of such lease; in case two or more persons apply to lease the same land, the Commissioner shall notify all the applicants, requesting them to forward sealed bids for the same, accompanied by a certified check for the full amount, which bids must be in the Commissioner's office by January 31st following the expiration; and that the lease shall be given to the party making the highest bid. In case of a renewal, the Commissioner must notify the original lessee, advising him of the amount of the highest bid, and such former lessee and the party making the highest bid shall then have the right to make a new bid, and the party making the highest bid shall be awarded the lease.

C. S. § 2910, provides that, where two or more persons apply to lease the same land, the Commissioner shall at a stated time auction off a lease of said land to the applicant who will pay the highest annual rental therefor.

Article 9, § 7, of the Constitution provides that the Governor, Superintendent of Public Instruction, Secretary of State, Attorney General, and State Auditor shall constitute the State Board of Land Commissioners, and

shall have the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law.

Article 9, § 8, makes it the duty of the State Board of Land Commissioners to provide for the location, sale, or rental of all lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law, and in such a manner as will secure the maximum possible amount therefor, and that the general grants of land made by Congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction.

[2] This court has frequently held that the State Board of Land Commissioners is vested, under the provisions of article 9, §§ 7 and 8, of the Constitution, with the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law. Such direction, control, and disposition must be in accordance with the Constitution and statutes of the state, and not otherwise. *Balderston v. Brady*, 17 Idaho, 567, 107 Pac. 493.

[3] In this case the court further says:

"It is obvious that, if the contemplated action of the Board of Land Commissioners involves the exercise of a judgment or discretion vested in them by law, then this court cannot, and will not, attempt to control that discretion or in any manner interfere with or direct the action of the Board. If, on the other hand, the action proposed is without authority of law or has no legal sanction or authority * * * then and in such cases this court may interrupt them, and declare the law on the subject, and point out to them the legal scope within which their judgment and discretion must be exercised."

In *Pike v. State Board of Land Commissioners*, 19 Idaho, 268, 113 Pac. 447, Ann. Cas. 1912B, 1344, this court held that while the State Board of Land Commissioners are trustees or business managers for the state in handling its public lands and in matters of policy, expediency, and the business interests of the state, they are the sole and exclusive judges, so long as they do not run counter to the provisions of the Constitution and statutes.

In *Tobey v. Bridgewood*, 22 Idaho, 566, 127 Pac. 178, it was said that—

"Under the Constitution and the statute of this state * * * the State Board of Land Commissioners have the direction, control and disposition of the public lands of the state under such regulations as may be prescribed by law."

[1] Appellants' counsel earnestly contend that the complaint does not show that the respondent has complied with the statutory

requirements for the renewal of leases; that it is fundamental that a writ of mandate can be invoked only when a great wrong or injury will result by refusal of the officers to act; that no showing is made by respondent's complaint that it will be deprived of anything of value, or that any injury will be done it, or any vested right which it has will be injured or destroyed. We have endeavored to examine with care the numerous authorities cited, and they support the general principles of law announced; but we do not think they are applicable to the conditions of this case, for the reason that the writ prayed for in this case asks that the Board be required to perform a public duty, which is clearly enjoined upon it by law, the performance of which is in the interest of public good, to the end that the state shall receive the greatest possible amount of revenue for the lease of its school lands, a benefit which inures to all alike. Although the respondent may have asked for this writ because it believed that it would be especially benefited thereby, entirely aside from this consideration, the public welfare to be subserved is a sufficient reason for granting this writ to compel obedience to a plain provision of the law, which requires these lands to be leased at public auction to the highest bidder therefor.

[4] The dominant purpose of these provisions of the Constitution and of the statutes enacted thereunder is that the state shall receive the greatest possible amount for the lease of school lands for the benefit of school funds, and for this reason competitive bidding is made mandatory. C. S. § 7254, provides that a writ of mandate may issue to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law enjoins as a duty resulting from an office, trust, or station. The provisions of the Constitution and statutes above referred to made it the duty of the State Board of Land Commissioners, under the facts and circumstances of this case, to offer the lease of said lands at auction to the highest bidder, and the Board, in refusing to do so, failed in the performance of an act which the law enjoins as a duty resulting from its official position. In refusing to do so, its action ran counter to the provisions of the Constitution and statutes.

The judgment of the district court awarding the respondent a writ of mandate to compel the State Board of Land Commissioners to offer the lease of said lands to the highest bidder is affirmed, with costs to the respondent.

RICE, C. J., and MCCARTHY, and DUNN, JJ., concur.

BUDGE, J., did not sit at the hearing, and took no part in the decision.

(34 Idaho, 1)

FELTHAM v. BLUNCK et al. (No. 3319.)

(Supreme Court of Idaho. May 25, 1921.)

1. Judgment \Leftrightarrow 787—Deed to correct mistake effective as of date of original deed as against intervening judgment creditors.

A deed to correct a mistake in a former deed, given for a valuable consideration takes effect as of the date of the original deed as against intervening judgment creditors of the grantor.

2. Judgment \Leftrightarrow 787—Deed to correct mistake takes effect as of date of original deed, though grantor insolvent.

This is true, even though the grantor is insolvent at the time of the correction deed.

3. Husband and wife \Leftrightarrow 129(4)—Wife, who is husband's grantee, held not estopped to correct mistake in deed as against intervening creditors.

Where a husband conveys real property to his wife for a valuable consideration, and a mistake is made in the description, she is not estopped, in favor of judgment creditors of her husband, if she acts promptly to correct the mistake upon learning of it.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Frank Feltham against Louis A. Blunck and another to quiet title. From a decree for defendants subject to a lien, they appeal. Reversed and remanded.

Richards & Haga, of Boise, for appellants.
Elliott & Healy, of Boise, for respondent.

MCCARTHY, J. Respondent brought this action to quiet his title to 40 acres described as the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, of the N. W. $\frac{1}{4}$, of section 17, T. 3 S., R. 1 W., B. M., relying on a sheriff's deed issued by virtue of a sale under execution, after judgment recovered, May 16, 1914, against appellant's former husband, Louis A. Blunck, in the sum of \$468.60, for work which respondent had done for Blunck upon the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 17. He alleges in his complaint that the deed to the land in suit, made March 3, 1913, by Blunck to appellant, then his wife, was made to hinder, delay, and defraud creditors, and prays that it be set aside.

Defendant Louis A. Blunck filed a disclaimer of any interest in said land, and did not join in the appeal to this court.

Appellant, Florence M. Blunck, answering, alleges title in herself to the 40 in question under a deed of March 3, 1913, which deed she claims to be merely a correction deed of a deed made to her March 25, 1912, in which the intent was to convey it to her, but which, through a mistake in the description, described other land, not owned by the grantor. There is no evidence that

the mistake was other than an honest one, or that there was any collusion between Blunck and appellant. The consideration for the deed of March 25, 1912, was her act of deeding, on the same date, the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 17, to Jas. L. Northrop and Charles W. Northrop, in the dissolution settlement of a partnership between Blunck and the Northrops. She had acquired this last-mentioned 40 acres as a prenuptial gift from Blunck, by deed of November 1, 1910.

At the beginning of 1911 Blunck and Charles Northrop formed a partnership for the development of 200 acres of sagebrush land—the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 17—into orchard. This land included the gift 40 and the 40 in suit. By the terms of an agreement dissolving said partnership on March 26, 1912, the Northrops were to get 100 acres, including the gift 40, and Blunck 100 acres including the 40 in suit. Appellant conveyed the gift 40 to the Northrops. To induce her to do this, Blunck agreed to convey to her the 40 in suit, and with this intention executed the conveyance of March 25, 1912, in which the mistake in description occurred. The gift 40 was at that time in sagebrush, except for a few acres that had been cleared. Under the terms of the dissolution agreement Blunck was to clear, level, and put this 40 into orchard. On April 12, 1912, respondent entered into a written agreement with Blunck to do this work, performed it, was not paid, brought suit, recovered judgment, levied on the 40 in suit, and so obtained the sheriff's deed under which he claims.

The trial court found that at the time appellant conveyed her gift 40 to the Northrops, and Blunck made the conveyance of March 25, 1912, the value of the gift 40 was about \$2,000, and the value of the 40 in suit was about \$8,000; also that the conveyance of the land in suit, March 3, 1913, left Blunck insolvent.

Appellant testified that she had the mistake in the deed corrected within a week after she discovered it, that she did not know respondent performed the work for Blunck upon which the judgment claim was based, nor that Blunck had agreed to put the gift 40 in orchard as part consideration of the dissolution agreement. In 1911 Blunck and Northrop took care of the original gift 40 the same as all the rest of the land, treating it as one body. The land in suit was put in orchard in 1911 by Blunck and Northrop operating as the Blunck Northrop Orchard Company. Appellant admitted she knew that respondent was working on the land at that time. The claim for that particular labor was placed in judgment by respondent, and paid by Northrop. Appellant was on the land only once in 1912. She did not superintend the orchard, or any part of it, in 1912, but

Blunck looked after all of it. She had no knowledge of what Blunck told others about the forty acres in suit. Blunck did not talk business with her. Respondent testified that in 1911 he plowed, leveled, and put in orchard 160 acres of the partnership tract for the Blunck Northrop Orchard Company. In 1912 Blunck told respondent that he owned the land in suit, and asked him for an estimate on certain buildings to be erected on it, saying that he was going to make it his home. Respondent did not know about the arrangements between Blunck and appellant, and believed he could hold the land which Blunck claimed to own. He would not have done the work on the gift 40 otherwise because he regarded Blunck as poor pay, for the reason that he could not get his money from him for the work done for the company. Respondent knew what land Blunck got on the dissolution agreement with Northrop. He did not testify that he examined the record, or knew or relied upon what the record showed as to the title of the land in suit.

The trial court found that appellant was negligent in failing to discover the mistake in the deed of March, 1912, and in permitting the record title to remain in the name of Blunck until March, 1913; also that the deed of March 3, 1913, from Blunck to appellant, was for a grossly inadequate consideration, and that he was insolvent at the time, and concluded that the deed was in fraud of respondent so far as the value of the 40 in suit exceeded the value of the gift 40. The decree was that title be quieted in appellant subject to a lien in favor of respondent in the amount of his judgment.

In her answer, after denying the material allegations of the complaint, under the designation of affirmative defense, appellant set up her deed, and prayed for judgment, quieting title in her and removing the cloud caused by respondent's judgment and deed. Treating this so-called affirmative defense as a cross-complaint, respondent answered it. Before this answer was filed respondent's counsel had filed a note of issue, asking that the case be set for trial, and by stipulation the parties took the deposition of George H. Van De Steeg, Esq., a material witness for appellant. Counsel for appellant moved to strike the answer to the so-called cross-complaint, because: First, it was not a cross-complaint; and, secondly, new issues were raised by said answer, as to which Mr. Van De Steeg's testimony would be material, and it was impossible to secure another deposition or his oral testimony, for the reason that he was then in active military service. The trial court denied the motion to strike, and this is assigned as error. We do not think this point is well taken, because: First, the part of appellant's pleading which she designated as affirmative defense was in reality a cross-complaint and subject to answer; and, secondly, a reading of Mr. Van De Steeg's

deposition convinces us that it covers his entire knowledge of the transaction, and nothing would have been gained by taking a further deposition.

Appellant's other assignments of error may be divided into the following heads: First, that the court erred in finding that the conveyance of March, 1913, was fraudulent as to respondent; and, second, that the court erred in finding that appellant was negligent, and in concluding that she should therefore be estopped.

The first question is: Was the conveyance of March, 1913, in fraud of respondent's rights under C. S. § 5433, which reads as follows:

"Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

It is contended that it was, because: First, Blunck was insolvent when he made it; and, second, the value of the property conveyed was grossly in excess of the value of the consideration flowing from the appellant. Under C. S. § 5435, the question of fraudulent intent is one of fact, and a transfer cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. *Rodgers v. Boise Ass'n of Credit Men*, 33 Idaho, —, 196 Pac. 213; *Moody v. Beggs*, 33 Idaho, —, 196 Pac. 306. But when a debtor, being insolvent, conveys all his property without consideration the inevitable result is to hinder and delay his creditors. As in all other cases, he is held to intend the natural consequences of his acts; thus the logical inference is that he intended to delay and hinder his creditors, and, in the absence of circumstances which rebut that inference, the conveyance will be held in fraud of them. *Moody v. Beggs*, supra. So, if the debtor, being insolvent, conveys all his property to one creditor, its value being grossly in excess of the amount of the indebtedness, the conveyance will be treated as voluntary as to the excess, and the logical inference being that he intended to delay and hinder his other creditors, to the extent of such excess, it will be so held. Accordingly the property will be impressed with a lien in favor of the other creditors to that extent. *Wright v. Craig*, 40 Or. 191, 66 Pac. 807; *Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786; *Herschfeldt v. George*, 6 Mich. 456; *Boyd v. Dunlap*, 1 Johns. Ch. (N. Y.) 478; *Lyon v. Haddock*, 59 Iowa, 682, 18 N. W. 737; *Bates v. McDonnell* (C. C.) 31 Fed. 588. The trial court's finding that Blunck was insolvent at the time of the conveyance in March, 1913, is borne out by the evidence. At that time, while respondent had not obtained his

judgment, the contract out of which the claim arose was in existence, the claim had thus been initiated, and this would be sufficient to give respondent the proper standing to attack the conveyance as in fraud of his rights. *Potts v. Mehrmann* (Cal. App.) 195 Pac. 941. If the property had belonged to Blunck at the time of the conveyance in March, 1913, it would have been invalid as in fraud of respondent's rights.

[1, 2] However, Blunck had agreed for a valuable consideration to convey this very property to appellant in March, 1912, and had given her a deed with that intent. A mistake was made in the description of the property. From the time of the transaction of March, 1912, appellant was the equitable owner of the property, and Blunck held the naked legal title in trust for her. Appellant had the right to have the mistake corrected by a court of equity, and what a court of equity would do the parties had a right to do themselves, and with the same effect. *Hutchinson v. C. & N. W. Ry. Co.*, 41 Wis. 541, at page 551. The respondent had no right to object to the conveyance of the property in March, 1912, on the ground of inadequacy of consideration or any other ground, because: First, it is not shown that Blunck was insolvent at that time; and, second, the respondent's claim had not been initiated at that time. Such conveyance was not in violation of his rights. If the mistake in the original deed had been corrected by a decree of a court of equity the correction would have taken effect as of the date of the original deed, and have defeated any claims of judgment creditors of Blunck against the property which arose after its delivery. *Rhodes v. Outcalt*, 48 Mo. 367; *Wall v. Arrington*, 13 Ga. 88; *Wyche v. Greene*, 11 Ga. 159; *Burke v. Anderson*, 40 Ga. 535; *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185; *Chapman v. Fields*, 70 Ala. 403; *White v. Wilson*, 6 Blackf. (Ind.) 448, 39 Am. Dec. 437; *Burgh v. Francis*, 19 Rev. Rep. Eng. 275; *Hutchinson v. C. & N. W. Ry. Co.*, supra; *Finch v. Winchelsea*, 24 Eng. Rep. Full Repr. 387; 1 Story, Eq. Jur. (13th Ed.) 165. The reason for this holding is that the judgment creditor stands in the shoes of the debtor, and his rights cannot attach to anything which the debtor did not own. A trust arises in favor of the grantee similar to the trust which arises where one party pays the consideration and the other party wrongfully takes title in his own name. There is no reason in principle why the same rule should not be applied where the grantor corrects the mistake in the description by a voluntary deed without the intervention of equity, if the evidence clearly shows, as here, that there was an honest mistake, and that the purpose of the subsequent deed is to correct it. *Hutchinson v. C. & N. W. Ry. Co.*, supra. It has been held that where the

first deed is void because not executed in accordance with law a later deed will not pass title as of the date of the original one. *Barr v. Schroeder*, 32 Cal. 609; *Walters v. Mitchell*, 6 Cal. App. 410, 92 Pac. 315; *Scaplen v. Blanchard*, 187 Mass. 73, 72 N. E. 346. These cases are distinguishable from one like the present, where the original deed was executed in accordance with all the requirements of law and the mistake was merely one in the description. In *Johnston v. Jones*, 1 Black, 209, at page 224, 17 L. Ed. 117 at page 121, it is said:

"If there were any mistake in the original deeds, of which Johnston had a right to avail himself, the remedy should have been sought by a proceeding in chancery had for that purpose, with all the proper parties before the court. The agreement of the parties themselves that there was such error; and a deed made in pursuance of that agreement, cannot affect the rights of third persons."

In that particular case the third person happened to be a purchaser. If the court meant that in all cases a distinction should be drawn between the effect of a decree correcting the error and a voluntary conveyance correcting it we think that, for reasons given above, such distinction is not well taken. We conclude that the deed of correction of March, 1913, took effect as of the date of the original deed in March, 1912. The conveyance cannot be set aside nor impeached as a conveyance in fraud of respondent's rights unless the appellant is estopped by her conduct to assert her title against him. This brings us to the second main question.

[3] The second contention is that appellant is estopped to assert her title to the land free of a lien in respondent's favor, because: First, she was negligent in not discovering the mistake in the description; and, secondly, because after the deed of March, 1912, she permitted Blunck to manage and control the property as his own. The decree of the trial court upholds this contention. Appellant asserts that an estoppel could not arise against her because she could not have made a valid contract to subject her separate property to the payment of her husband's debt, and the law will not permit an estoppel to bring about that result. In support of this contention her counsel cite *School Dist. v. Twin Falls Co.*, 30 Idaho, 400, 164 Pac. 1174, holding that an estoppel can never be invoked in aid of a contract which is expressly prohibited by statutory provision. This case simply holds that an estoppel cannot be invoked to prevent the denial of power of a municipal corporation to enter into such a contract. The rule would apply only to a case where a party sought to enforce the contract of a married woman entered into by him knowing that she was a married woman, and thus under a disability. That a married woman may be estopped to set up her rights in her separate property where she has know-

ingly permitted the record and apparent ownership of the same to exist in her husband has been held by this court. *Grice v. Woodworth*, 10 Idaho, 459, 80 Pac. 912, 69 L. R. A. 584, 109 Am. St. Rep. 214; *Boise Butcher Co. v. Anixdale*, 26 Idaho, 483, 144 Pac. 337; *Chaney v. Gauld Co.*, 28 Idaho, 76, 152 Pac. 468. It is held by the great weight of authority that where a married woman's separate property stands of record in the name of her husband she is estopped in favor of a creditor of the latter, who extends credit to him on the strength of the record title, only in case she knew that the title stood in his name. *Huot v. Reeder Co.*, 140 Mich. 162, 103 N. W. 569; *Trenton Banking Co. v. Duncan*, 84 N. Y. 221; *Woolsey v. Henn*, 85 App. Div. 331, 83 N. Y. Supp. 394; *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153; *Southern Bank v. Nichols*, 235 Mo. 401, 138 S. W. 881; *Blake v. Meadows*, 225 Mo. 1, 123 S. W. 868, 30 L. R. A. (N. S.) 1; *Stegall v. Stegall*, 90 Va. 73, 17 S. E. 756; *Mayer v. Kane*, 69 N. J. Eq. 733, 61 Atl. 374. Such is the holding of this court in *McKeehan v. Vollmer-Clearwater Co.*, 30 Idaho, 505, 166 Pac. 256, Ann. Cas. 1918E, 1197. In cases where it is held that she is estopped it appears that she did know that the title stood in her husband's name. *Goldberg v. Parker*, 87 Conn. 99, 87 Atl. 555, 46 L. R. A. (N. S.) 1097, Ann. Cas. 1914C, 1059; *Mertens v. Schlemme*, 68 N. J. Eq. 544, 59 Atl. 808; *Boise Butcher Co. v. Anixdale*, supra; *Chaney v. Gauld*, supra. The same principle applies to a case like the present where the title stands in the husband's name after an intended conveyance to the wife for a valuable consideration, because of a mistake in the description. It appearing in this case that the wife did not knowingly permit the title to her land to remain in her husband's name and acted promptly to correct the mistake as soon as she discovered it, there is no ground for raising an estoppel against her in that regard. It is further contended, however, that she is estopped because she permitted him to manage her land. This fact would not estop her, unless the claim was based upon a transaction from which she or her property received some benefit, as in *Boise Butcher Co. v. Anixdale*, supra. The mere fact that the work done on the gift 40 by respondent was in fulfillment of Blunck's contract with the Northrops by which Blunck got the land in suit is not sufficient to make the doctrine of that case applicable. Certainly appellant could not be estopped by oral statements Blunck made to Feltham, claiming to own the land, which she did not authorize, and of which she had no knowledge.

"To authorize the finding of an estoppel in pais, against the legal owner of land, there must be shown, we think, either actual fraud, or fault or negligence, equivalent to fraud on his part, in concealing his title; or that he was silent when the circumstances would impel an

honest man to speak; or such actual intervention on his part, as in *Storrs v. Barker*, as to render it just, that as between him and the party acting upon his suggestion, he should bear the loss." *Trenton Banking Co. v. Dun-can*, supra, 86 N. Y. at page 230.

The sorts of conduct on the wife's part which will work an estoppel are stated in *Blake v. Meadows*, supra, as follows:

"If she permit or encourage her husband to hold himself forth as the owner of property, if she voluntarily put the title to her property in him, thus knowingly clothing him with the indicia of ownership, or by conscious acts acquiesce in his apparent ownership, knowing, or having good cause to know, that he is using the property to obtain credit, or if she conspire with him to that end, or if (when applied to for information) she lie, deceive, or mislead, it is not unreasonable to estop her to claim the property when such claim makes her husband insolvent.

Applying the principles above set forth to the facts, shown by the evidence in this case, we find no conduct on the part of appellant which estopped her to assert her ownership of the land as against respondent. The decree should have quieted title in appellant free and clear of any claim or lien in his favor. The decree is reversed, and the case remanded, with instructions to enter findings and decree in accordance with this opinion. Costs awarded to appellant.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

(58 Utah, 270)

STATE v. RICKENBERG. (No. 2644.)

(Supreme Court of Utah. June 2, 1921.)

1. Criminal law §1024(2)—State can appeal from discharge of defendant on objection to evidence because of insufficient information.

Under Comp. Laws 1917, § 9208, subd. 1, authorizing appeal by the state from a judgment on demurrer to the information or indictment, an appeal by the state from the judgment discharging the jury and dismissing the defendant when the introduction of evidence was objected to, on the ground the information was insufficient to charge an offense, was taken in time.

2. Indictment and information §110(31)—Information charging act was "willfully" done includes charge it was knowingly done.

An information charging that defendant willfully had in his possession intoxicating liquor is sufficient to charge a violation of Comp. Laws 1917, § 3343, making it unlawful for a person knowingly to have in his possession any intoxicating liquors, since the term "willfully" is equivalent to knowingly (quoting *Words & Phrases*, First and Second Series, "Willfully").

3. Indictment and information §110(2)—Words of similar import may be used instead of words of the statute.

Though it is ordinarily more prudent on the part of the pleader to charge an offense in the exact words of the statute, especially where they are sufficiently comprehensive and adequately describe the offense, words of similar import may be used where they clearly and intelligibly convey the same meaning.

4. Criminal law §1134(3)—On appeal by state important practice question can be decided, though unnecessary to determination.

On appeal by the state from a judgment dismissing defendant on sustaining objection to the information and denying leave to amend it, the question of the right to amend the information is an important one of practice, and will be determined, though the original information was sufficient.

5. Indictment and information §161(5)—Information may be amended after plea if offense is not changed.

Under Comp. Laws of 1917, § 8781, authorizing amendment of an information in form or substance by leave of court after defendant had pleaded to the merits or during the trial, the prosecution is entitled to amend the information by inserting the word "knowingly" in the description of the acts constituting the defense to make it conform to the statutory definition, which at most was only an amendment as to form, since an amendment of either form or substance is permissible, so long as it does not change the nature of the offense.

Appeal from District Court, Salt Lake County; L. B. Wight, Judge.

Henry Rickenberg was charged with having unlawful possession of intoxicating liquor. From a judgment dismissing the case, the State appeals. Reversed and remanded.

E. A. Rogers, Dist. Atty., of Salt Lake City, for the State.

Hancock & Barnes, of Salt Lake City, for respondent.

THURMAN, J. The questions presented on this appeal relate, primarily, to the sufficiency of the information upon which the defendant was brought to trial. The information reads as follows:

"Henry Rickenberg, having been heretofore duly committed to this court by Henry C. Lund, a committing magistrate of said county, to answer to this charge, is accused by Frank S. Richards, district attorney for the Third judicial district of the state of Utah, Salt Lake county, by this information, of the crime of having possession of intoxicating liquor, committed as follows, to wit: That the said Henry Rickenberg, at the county of Salt Lake, state of Utah, on the 28th day of September, A. D. 1920, did then and there willfully, unlawfully, and feloniously have in his possession intoxicating liquor, to wit, whisky; the said Henry Rickenberg being then and there a persistent violator of title 54, section 3343, Compiled Laws of Utah 1917, he having hereto-

fore, to wit, on the 27th day of June, 1919, in the city court of Salt Lake City, before Henry C. Lund, city judge and ex officio justice of the peace in Salt Lake City, Salt Lake county, state of Utah, been convicted of having in his possession intoxicating liquor. Contrary to the provisions of the statute of the state aforesaid in such cases made and provided, and against the peace and dignity of the state of Utah."

Compiled Laws of Utah 1917, § 3343, defines the offense which the state intended to charge. The last sentence of the section reads:

"It shall be unlawful for any person within this state *knowingly* to have in his or its possession any intoxicating liquors, except as in this title provided." (*Italics ours.*)

The defendant was arraigned and pleaded not guilty. The case afterwards came on for trial. A jury was impaneled and a witness sworn for the state. In response to a question by the state's attorney the witness stated his name, whereupon the attorney for the defendant objected to the introduction of any evidence on the alleged grounds that the information does not state facts sufficient to constitute a felony, or any public offense. The sufficiency of the information was challenged by the defendant on the specific ground that the act charged as an offense was not alleged to have been done "*knowingly*," as required by the statute above quoted. The trial court sustained the objection. The state's attorney then requested leave to amend the information by inserting therein the word "*knowingly*" next before the words "*having possession of intoxicating liquors*," and also by inserting the same word next before the word "*willfully*." The court refused the request for leave to amend, and upon motion of defendant's attorney dismissed the case and discharged the jury, from which judgment the state appeals.

[1] Compiled Laws Utah 1917, § 9208, subd. 1, provides that the state may appeal from a judgment for defendant on a demurrer to the information or indictment. The record shows that the appeal was taken in time.

[2] Appellant contends that the court erred in sustaining respondent's objection to the introduction of evidence and also in refusing appellant's request for leave to amend the information. In support of its contention appellant insists that the information states facts sufficient to constitute the offense defined in the statute above quoted; that the word "*willfully*" is of similar import as the word "*knowingly*," and is the same in substance and effect. Many authorities are cited in support of this contention. See especially *Ex parte Cowden*, 74 Tex. Cr. R. 449, 168 S. W. 539; *State v. Muller*, 80 Wash. 368, 141 Pac. 910; *Fry v. Hubner*, 35 Or. 184, 57 Pac. 420. The following excerpts from *Words and Phrases*, which are supported by numerous

cases, illustrate the almost universal trend of judicial opinion. We quote *from* volume 8, pp. 7474 and 7475:

"*'Willfully'* is equivalent to '*knowingly*.'"

"The term '*willfully*' implies that the act is done *knowingly*."

"The word '*willfully*' implies, on the part of the wrongdoer, knowledge, and a purpose to do the wrongful act."

"*'Willfully*,' as used when saying that an act was willfully done, implies that the act was done by design; done for a set purpose; and it would follow that it was *knowingly* done."

"*'Willfully*,' as used in connection with an act forbidden by law, means that the act must be done *knowingly* or intentionally, and that the act was committed with knowledge, and that the will consented to, designed, and directed the act."

"In common parlance '*willfully*' is used in the sense of '*knowingly*,' as distinguished from '*accidental*' or '*involuntary*.'"

"A '*willful* failure' to comply with the provisions of the mine law means that there must have been some knowledge that the party was violating it; some knowledge which should have induced him not to do what he did do; some knowledge of the fact."

"An indictment for perjury which charged that the defendant '*feloniously, willfully, and corruptly* did depose,' etc., but omitted the word '*knowingly*,' is not bad on account of the omission of such word, though it is used in the statute."

"The word '*willfully*' as used in the statute punishing perjury, the same being '*a false statement willfully made*,' is synonymous with '*knowingly*.'"

Many other pertinent paragraphs might be quoted from the pages referred to.

In the Second Series of Words and Phrases, vol. 4, at page 1304, we find the following:

"The word '*willfully*' implies the doing of an act *knowingly*, and with stubborn purpose."

"A '*willful* act' is one that is done *knowingly* and purposely."

See other paragraphs in the same connection.

As before stated, these paragraphs seem to be supported by abundant authority cited in connection therewith, many of which cases we have carefully examined and find that they faithfully support the next.

In our view of the law, both from the standpoint of reason and authority, the question is hardly debatable. To say that a thing can be willfully done without knowing it is, on its face, paradoxical, and manifestly contradictory and untenable.

[3] It is quite true that it is ordinarily more prudent on the part of the pleader in charging an offense to use the exact words of the statute, especially where they are sufficiently comprehensive and clearly and adequately describe the offense; but it is elementary doctrine of universal recognition that words of similar import may be used where they clearly and intelligibly convey the same meaning.

We are of the opinion that the information was not vulnerable to the objection made by respondent, and that his objection to the introduction of evidence by the state should have been overruled. In view of the conclusion reached, it is manifest that the court erred in discharging the jury and dismissing the case.

[4] As this is an appeal on the part of the state, involving an important question of practice, it is necessary to determine whether or not the court erred in refusing leave to amend the information.

[5] The proposed amendment in the case at bar had no tendency to alter the nature of the offense charged in the information. It imposed no additional burden upon the defendant, nor deprived him of any legal or constitutional right. As we have shown by the authorities cited, there was no substantial change or alteration in the meaning of the language employed. At most it was only an amendment as to form offered by the pleader, apparently out of a superabundance of caution, in order to conform to the exact language of the statute. Comp. Laws Utah 1917, § 8781, as far as material here, reads:

"An information may be amended * * * in any matter of form or substance at any time before the defendant pleads thereto. It may also be amended in any matter of form or substance by leave of court at any time after the defendant has pleaded to the merits, or during the trial."

It thus appears the statute expressly authorizes an amendment to an information whenever it is deemed necessary, either before or after the defendant enters his plea. If after, it must be by leave of court. The amendment may be as to matter of substance as well as to matter of form. It does not follow that the prosecutor by amendment can alter the nature of the case. He cannot substitute one offense for another; nor can he by amendment charge an offense where it is impossible to determine from the original information what offense was attempted to be charged. We believe it to be fundamental in the law of pleading and practice, in both civil and criminal procedure, that an amendment is not permissible if it changes the nature of the cause of action or offense, as the case may be. This limitation, however, relates solely to the subject of amendments and has no relation to the right or power of the prosecutor to dismiss as to one information and by leave of court file another based upon the same preliminary examination.

In a belated brief filed by respondent, and just received by the writer, the following cases are cited: *State v. Pay*, 45 Utah, 411, 146 Pac. 300, Ann. Cas. 1917E, 173; *State v. Sheffield*, 45 Utah, 426, 146 Pac. 306; *State v.*

Hilberg, 22 Utah, 27, 61 Pac. 215; *State v. Thompson*, 31 Utah, 228, 87 Pac. 709; *State v. Jensen*, 34 Utah, 166, 96 Pac. 1085; *State v. Woolsey*, 19 Utah, 486, 57 Pac. 426. What application these cases have to the instant case and why they are called to our attention is not explained in the brief. We cite them for what they are worth.

The judgment is reversed and the cause remanded, with directions to the trial court to proceed as the court may be advised in accordance with Compiled Laws Utah 1917, § 9212.

CORFMAN, C. J., and WEBER, GIDEON, and FRICK, JJ., concur.

(58 Utah, 262)

STATE v. HITESMAN. (No. 3648.)

(Supreme Court of Utah. June 1, 1921.)

1. Criminal law § 553, 554—Jury not required to accept defendant's explanation or testimony of his witnesses as to possession of stolen property.

Though a jury may not arbitrarily ignore or disregard credible evidence, it need not blindly accept every statement that one who is accused of larceny may make in his own exculpation in explanation of his possession of recently stolen property, and may refuse to give credence to such statements or to those of defendant's witnesses, if, in view of all the facts and circumstances, they seem unreasonable or not well founded in fact.¹

2. Larceny § 68(3)—Guilt of defendant in whose possession stolen car had been found held for jury.

In prosecution for automobile theft, in which defendant claimed to have purchased the car, which had been found in his possession, the question of defendant's guilt held for the jury.

Appeal from District Court, Salt Lake County; H. M. Stephens, Judge.

Fred Hitesman was convicted of grand larceny, and he appeals. Affirmed.

J. W. Rozzelle, of Salt Lake City, for appellant.

Harvey H. Cluff, Atty. Gen., and W. Hal Farr, Asst. Atty. Gen., for the State.

FRICK, J. The defendant was convicted of grand larceny, and appeals. Only one assignment of error is argued in the brief, namely, that the district court erred in refusing to direct the jury to return a verdict of not guilty.

The defendant was charged with having stolen a Ford car. The evidence, briefly stated, shows: That one Albert White owned

¹ *State v. Gurr*, 40 Utah, 162, 120 Pac. 209, 39 L. R. A. (N. S.) 320.

the car in question; that on the 24th day of May, 1920, he was using it, and, at about 10 o'clock a. m. left it standing in front of one of the principal business establishments on Main street, in Salt Lake City, while he went into the establishment to transact some business; that after remaining in the establishment for about 20 minutes he returned to the street and found his car missing; that he did not see the car again until the 21st day of June following, when he found it in defendant's possession; that when he inquired of the defendant respecting his possession the defendant claimed that he had bought it from a person, naming him, and that he had obtained a bill of sale for the car from such person; that when the bill of sale was produced it was from some person other than the one named by the defendant, and whom the defendant said he did not know, would not be able to identify, and did not know his whereabouts or business. The police officers were notified by Mr. White and the defendant was arrested and held for trial. At the trial, the foregoing, with other facts, were made to appear on behalf of the state. The defendant also produced evidence in his own behalf from which it was made to appear that he had bought the car and had paid for it perhaps about 60 per cent. of its value.

[1, 2] Nothing could be gained by stating the evidence in detail. It must suffice to say that, if the jury believed the evidence of the state and the legitimate inferences which they had a right to deduce from the facts and circumstances in evidence, then they were justified in returning a verdict of guilty. If, upon the other hand, the jury had believed the evidence of the defendant and his witnesses, they would have been justified in finding him not guilty. In this connection defendant's counsel, with some vigor, insists that some evidence was produced on behalf of the defendant which was not directly controverted or denied by the state, and that for that reason the jury had no right to ignore or disregard that evidence. The difficulty with counsel's contention is that when, as here, a defendant has it entirely within his own power to make certain statements or explanations concerning his possession of recently stolen property, and the state is powerless to meet the statements categorically, no one who would be willing to disregard the truth could be convicted of theft where there were no eyewitnesses to the taking. While the law is to the effect that a jury may not arbitrarily ignore or disregard credible evidence, but must consider all the evidence, they, nevertheless, need not blindly accept every explanation or statement that the one who is accused of the larceny may make in his own exculpation. The jury, in considering all the facts and circumstances in evidence, may refuse to give credence to defendant's state-

ments or explanations, or to those of his witnesses, if such statements or explanations, in view of all the facts and circumstances, seem unreasonable or not well founded in fact. Where, as here, property recently stolen is found in the possession of the accused, it is for the jury to say whether his explanations and statements respecting that possession are satisfactory or otherwise. See *State v. Gurr*, 40 Utah, 162, 120 Pac. 209, 39 L. R. A. (N. S.) 320, where the question is considered and the authorities supporting the foregoing statement of the law are collated.

A careful consideration of the facts and circumstances of this case has forced upon us the conclusion that no prejudicial error was committed by the trial court, and that the judgment should be, and it accordingly is, affirmed.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(58 Utah, 255)

JAKUES v. JAKUES. (No. 9622.)

(Supreme Court of Utah. June 1, 1921.)

1. Divorce \S 303(1)—Modification of decree as to custody of children discretionary with court.

Under Comp. Laws 1917, \S 3000, the court may exercise a sound legal discretion in determining whether a divorce decree awarding custody of infant children to paternal grandmother shall be modified in respect to the custody and control of the children, on application of mother, notwithstanding section 3004, providing that the mother shall be entitled to the care, control, and custody of minor children under the age of 12, unless it shall be made to appear in court that the mother is an immoral or otherwise incompetent or improper person, since such statutes should be considered and construed together.

2. Divorce \S 312—Judgment, on application to modify decree as to custody of children, not disturbed, in absence of showing of abuse of discretion.

The Supreme Court should not interfere with judgment of district court on application for modification of divorce decree in respect to custody of children, under Comp. Laws 1917, \S 3000, unless it is made to clearly appear that the court abused its discretion.

3. Divorce \S 303(1)—Refusal to modify decree awarding infant children to paternal grandmother held not abuse of discretion.

Refusal to modify decree awarding custody of infant children to father's mother on application of mother, who had remarried, under Comp. Laws 1917, \S 3000, held not an abuse of discretion, notwithstanding section 3004.

4. Appeal and error \Rightarrow 1071(3)—Finding unsupported by evidence harmless, in view of immateriality.

On mother's application to modify decree awarding infant children to paternal grandmother, insufficiency of evidence to support a finding that the mother consented that the children be placed in the care of the grandmother held immaterial, on appeal from refusal to modify decree, since no prejudice resulted from the finding; it not being essential to the conclusions reached by the court.

5. Divorce \Rightarrow 303(1) — Mother's consent to awarding of children to paternal grandmother not controlling on subsequent application for modification of decree.

That mother, on being granted a divorce, consented that infant children be awarded to their paternal grandmother, was not controlling on mother's subsequent application for modification of decree as to custody of children.

Appeal from District Court, Davis County; A. E. Pratt, Judge.

Action by Kathryn P. Jaques against Henry A. Jaques. A decree was rendered granting plaintiff a divorce and awarding custody of infant children to defendant's mother. Plaintiff's motion to modify the decree in respect to custody of children denied, and plaintiff appeals. Affirmed.

Jos. E. Evans and C. R. Hollingsworth, both of Ogden, for appellant.

De Vine, Howell, Stine & Gwilliam, of Ogden, for respondent.

FRICK, J. On July 28, 1920, the plaintiff filed a motion, supported by affidavits, in the district court of Davis county, to modify a certain decree entered by said court on March 4, 1916, in which plaintiff was granted a divorce from the defendant, her former husband, in which the mother of defendant, the grandmother of the two children, was awarded the "sole, care, custody, and control" of said children.

The record discloses that plaintiff and defendant were married in Davis county in May, 1909; that as the issue of said marriage two children were born, one, a girl, born August 31, 1910, and the other, a boy, born April 23, 1913; that plaintiff obtained a divorce from the defendant upon the ground of cruel treatment; and that she thereafter, on December 7, 1918, married her present husband, a Mr. Reece, with whom she is now living at Rawlins, Wyo.

The application to modify said decree was made pursuant to Comp. Laws Utah 1917, § 3000, which reads as follows:

"When an interlocutory decree of divorce is made, the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable; provided, that if any of the children have attained the age of ten years

and are of sound mind, such children shall have the privilege of selecting to which of the parents they will attach themselves. Subsequent changes, or new orders, may be made by the court in respect to the disposal of the children or the distribution of property, as shall be reasonable and proper."

The defendant and the grandmother resisted the application in the district court, and, after a full hearing, said court refused to modify the decree, and entered judgment that the children remain in the care, custody, and control of the grandmother. From that judgment the plaintiff appeals.

Plaintiff insists that the district court erred in denying her motion and in refusing to award the children to her. At the hearing considerable evidence was produced both in support of and in opposition to plaintiff's application. The court found that the grandmother and the plaintiff are both fit and proper persons to have the care, custody, and control of the two children. In view of that finding, and in view of our statute (Comp. Laws Utah 1917, § 3004), plaintiff's counsel vigorously contend that the district court erred in refusing to award the children to their client. Section 3004 reads as follows:

"In the case of the separation of husband and wife having minor children, the mother of said children shall be entitled to the care, control, and custody of all such children; provided, that if any of said children have attained the age of twelve years and are of sound mind, such children shall have the privilege of electing to which of the parents they will attach themselves; provided further, that if it shall be made to appear to a court of competent jurisdiction that the mother is an immoral or otherwise incompetent or improper person, then the court may award the custody of said children to the father or make such other order as may be just."

[1] In our judgment the provisions of sections 3000 and 3004 must be considered and construed together, and when so considered and construed the district court, before whom the application is made under section 3000, may exercise a sound legal discretion in determining whether the application for a change of the custody and control of the children should be made or not. Where, as here, a divorce is granted to one of the parents of children of tender age, and at such time a proper disposition respecting the care, custody, and control of such children is made by the court and such children are placed in the care, custody, and control of one of the grandparents, where they are being properly reared, educated, and provided for, the court may well hesitate before ordering the care, custody, and control of the children changed. This is especially true where, as here, the children seem attached to their grandmother and express a desire to remain with her. While it is true that after examining all of

the evidence, all of which is preserved in the bill of exceptions, and basing our judgment upon the record alone, the writer, as well as at least some of his Associates, would have felt inclined to grant plaintiff's motion, yet merely to judge the matter in the light of the printed record is not conclusive. The trial court had before him all of the interested parties, the witnesses, and the children, and in hearing and seeing them, and in communicating with them personally, could much better judge of the weight and effect that should be given to their statements, or to the statements of any one of them, than can the members of this court. Then, too, the court could judge more accurately than can we what force or effect should be given to certain circumstances which are disclosed by the record and which it is not necessary to specifically mention here.

[2, 3] In view of what has just been said, this court should not interfere with the judgment of the district court in such cases, unless it is made to appear with at least considerable clearness that the court abused its discretion in the premises. After a careful perusal of the record, and after thoroughly considering plaintiff's contention, we are unable to say that the district court abused the discretion vested in it, and hence we may not interfere with the judgment.

[4, 5] It is also assigned as error that the court found that at the time the divorce was granted "the plaintiff consented that said children might be given into the care and to the custody and control of their paternal grandmother," for the reason that there is no evidence to support such finding. We are of the opinion, however, that the court was justified in making said finding as an inference or deduction from certain facts and circumstances in evidence. Assuming, however, that such were not the case, yet, in view that the finding is not controlling—indeed, is not essential to the conclusions reached by the district court—no prejudice resulted to the plaintiff from the finding.

There are two other findings complained of, neither of which is prejudicial to plaintiff's rights in the premises. There was, however, some evidence, both direct and inferential, in support of those findings.

We have refrained from referring to the evidence, or stating it even in substance, for the reason that nothing whatever could be gained by doing so. Nor is it necessary to discuss the law further. Where, as here, the question affects the care, custody, and control of children of tender ages, much must be left to the sound legal discretion of the district court. That court having exercised that discretion in accordance with law, we should not interfere, unless we can point to some matter or thing indicating that that court has abused its discretion in the premises.

We are unable to do that in this case, and

hence we are required to affirm the judgment. Such is the order.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(58 Utah, 276)

WATSON v. ODELL et al. (No. 3576.)

(Supreme Court of Utah, May 5, 1921. Rehearing Denied June 24, 1921.)

1. Brokers \S 48—Plaintiff held not to have earned commission on pending sale within defendant's offer.

Where defendants had offered to pay plaintiff a stated commission out of the proceeds of a pending sale by a corporation to purchasers procured by plaintiff, proof that the purchasers and the corporation did not enter into a contract of sale, but that defendants, who were stockholders, entered into a contract with the purchasers for the sale of bonds to be issued by the corporation, which transaction was never consummated because of failure of the purchasers' attorney to approve the contract, does not show that plaintiff had earned the commission which defendants agreed to pay.

2. Sales \S 1(1)—Ordinarily "sale" means transfer for money.

A "sale" is ordinarily understood to mean a transfer of property for money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

3. Brokers \S 43(2)—Cannot recover on quantum meruit.

In view of the statute requiring a contract for commission to be in writing, a broker can recover a commission only by virtue of a contract, he cannot recover on a quantum meruit.¹

4. Brokers \S 48—Broker employed by special contract providing for payment from proceeds of sale can only recover thereunder, and cannot recover for procuring purchaser.

A broker who was employed by a special contract to sell the property of an irrigation company for a stated commission to be paid from the proceeds of the sale can recover only under his special contract, and cannot recover for procuring a purchaser ready, willing, and able to buy or with whom his principal made the contract, as would be the case if his employment were general.

5. Brokers \S 57(1)—Special contract for stated commission at fixed price does not authorize percentage commission on sale at less price.

A broker employed by a special contract to sell the property at a stated figure for a fixed commission, not a percentage of the sale price, is not entitled to the agreed commission nor to a proportionate commission on a sale at a less price.²

¹ Case v. Ralph, 133 Pac. 640.

² Little v. Fleischman, 35 Utah, 566, 101 Pac. 304, 34 L. R. A. (N. S.) 1182; Fritsch v. Hess, 49 Utah, 76, 162 Pac. 70.

6. Brokers \Leftarrow 49(2)—Not entitled to commission where contract with purchasers required approval of attorneys, who refused to approve the same.

A broker is not entitled to a stipulated commission for negotiating a sale of property at a fixed price where the contract between his principal and the purchasers required the approval of the purchasers' attorney, and the attorney refused to give such approval.

Appeal from District Court, Salt Lake County; Wilson McCarthy, Judge.

Action by Edward H. Watson against George T. Odell and others to recover a commission for procuring a purchaser for the property of an irrigation company. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 53 Utah, 96, 176 Pac. 619.

Ball, Musser & Robertson, of Salt Lake City (Ogden Hiles, of Salt Lake City, of counsel), for appellant.

Dey, Hopbaugh & Mark, Walton & Walton, and Ray & Rawlins, all of Salt Lake City, for respondents.

WEBER, J. The averments of the complaint are in substance: (1) That on and prior to June 15, 1915, the Richlands Irrigation Company was a Utah corporation; (2) that the corporation owned certain water rights and real estate, consisting of an option to purchase 20,000 acre-feet of water from the Deseret Irrigation Company, a preference right under the Carey Act of 10,800 acres of land in Millard county, and certain water rights and reservoir sites; (3) that the Richlands Company represented to plaintiff that it desired to sell its holdings to any one who would pay \$260,000 for them; (4) that defendants employed plaintiff to find purchasers ready, able, and willing to purchase the same, and promised to pay plaintiff \$30,000 commission for his services; (5) that plaintiff procured certain persons ready, able, and willing to purchase the property defendants had for sale and brought the sellers and prospective purchasers together, and that the persons so found by plaintiff "offered to purchase from said Richlands Company the property it desired to sell as aforesaid at the price at which it had proposed to sell to the plaintiff"; (6) that after various conferences between the proposed purchasers and defendants these defendants proposed to the purchasers that, instead of conveying the land and water rights and having the consideration therefor paid to the corporation, it would be better to adopt the scheme proposed in the triparty agreement of May 20, 1916, attached to the complaint as Exhibit A; that as part of the transaction embodied in Exhibit A, dated May 20, 1916, "in consideration of the contract which he [plaintiff] had theretofore made with said corporation and of

his rights thereunder, and of his services in procuring said proposed purchasers," the individual defendants agreed with plaintiff to pay him \$30,000 as a commission; (8) that the proposed purchasers, after making the contract aforesaid, continued at all times, ready, able, and willing to comply with the terms of the contract and to pay defendants the sum of \$260,000, but defendants failed, neglected, and refused to procure the Deseret Irrigation Company to transfer and deliver to the Richlands Company, refused to secure the execution by the State Land Board of a Carey Act contract, failed to cause the Richlands Company to issue bonds, and was therefore unable to comply with the terms of its contract with the purchasers.

Exhibit A, which is attached to the complaint, and is also found in the bill of exceptions, was executed May 20, 1916, with George T. Odell, D. B. Macintosh, and W. C. Alexander as parties of the first part, the Deseret Irrigation Company, a corporation, party of the second part, and Ernest Shields, George T. Franck, Robert P. Franck, and Thomas C. Hickman, of San Diego, Cal., the proposed purchasers, parties of the third part. The first parties agree: first, to cause a certain agreement between second parties and the Richlands Company, as modified, to be ratified, adopted, and confirmed by resolution of the board of directors of the Richlands Company; second, to secure within 30 days from date the execution by the State Board of Land Commissioners of Utah a Carey Act contract between the state of Utah and the Richlands Company in form satisfactory to the legal firm of Story & Steigmeyer, of Salt Lake City, substantially in the form of Exhibit B, attached to the agreement, and to cause the Richlands Company's board of directors to adopt a resolution authorizing and directing the proper officers of the corporation to execute said Carey Act contract on its part, "provided first parties shall not be liable for breach of this covenant if they make an effort in good faith to obtain such a contract from the state and are unable to accomplish such purpose"; third, to cause said Richlands Company to issue its 6 per cent. bonds dated July 1, 1916, in the sum of \$300,000, payable in 10 series, one of which shall mature July 1, 1917, and one annually thereafter and to secure said bonds by mortgage or deed of trust in favor of Columbia Trust Company, of Salt Lake City, Utah, as trustee, upon all the assets and property of the company; fourth, to cause the Richlands Company to purchase all of its outstanding stock except 5,000 shares of preferred stock and 5 qualifying shares of its directors for the consideration of \$80,000, payable: (a) \$13,300 cash; (b) the promissory note of the Richlands Company payable

to W. C. Alexander as trustee, secured by pledge of bonds of said first series, for \$12,600; (c) serial bonds of the Richlands Company to be issued aggregating \$49,100. "Second party agrees to extend each payment on contract of January 10, 1916, and the contract referred to is otherwise changed and modified. Third parties agree that within five days after first parties have fully performed the covenants by them to be kept and performed to the satisfaction of said Story & Steigmeyer they will purchase and pay for in cash at par bonds of the Richlands in the aggregate principal amount of not less than \$28,000, of which \$25,000 shall be used for making the cash payments to first and second parties."

Attached to the agreement is a form of state land contract, paragraph 16 of which provides that, if within one year from the execution of the contract the State Engineer shall determine and first party (the state of Utah) shall so notify second party (Richlands Company) that a drainage system is necessary for the reclamation of the lands of said segregation, then within the period fixed in the contract for the construction of works second party shall construct such drainage system according to the specifications approved by the State Engineer of Utah.

The defendants answered the complaint, and after admitting the matters of inducement, and that certain contracts had been entered into between plaintiff and defendants, denied all other allegations in the complaint.

Upon these issues a trial to the district court, sitting without a jury, resulted in findings against plaintiff's contentions and in favor of defendants, upon which judgment was duly entered from which plaintiff appeals.

On March 7, 1916, plaintiff and the Richlands Company entered into a written agreement by which all former agreements and extensions thereof between plaintiff and the Richlands Company relating to the sale of the project were canceled. It was stipulated that the following commission contract would be recognized "so long as the Richlands Irrigation Company deals with the late J. D. Mollison's associates under extensions granted said Richlands Irrigation Company by the Deseret Irrigation Company." The sale price of the property and assets of the Richlands Company was fixed at \$260,000, payable as follows: \$25,000 cash; \$40,000 with 6 per cent. interest on or before one year from date of first payment; \$195,000 in nine equal installments with interest on whole amount unpaid to be paid annually, commission to Watson (plaintiff herein) to be \$30,000, payable \$10,000 out of the first cash payment of \$25,000, \$5,000 out of second payment of \$40,000, \$5,000 out of each of the third, fourth, and fifth installments

when paid. It was further provided that in event of the sale of the Richlands project (not including contract for purchase of Deseret water) to the late J. D. Mollison's associates the following price and commission would be recognized: Price, \$87,500, with 6 per cent. interest on all deferred payments, from which a commission of \$12,500 would be paid from the installments paid, pro rata as made.

On May 10, 1916, the plaintiff and the individual defendants W. C. Alexander, A. L. Hoppaugh, C. L. Cundick, R. E. Mark, D. B. Macintosh, and George T. Odell entered into a written agreement with plaintiff as follows in substance:

"In the event of the closing of the pending sale of the Richlands Irrigation Company's holdings to Mr. Shields and his associates from California, we, the undersigned, stockholders of the Richlands Irrigation Company, hereby agree to pay you as commission the sum of \$30,000.00, said amount to be paid as follows: \$10,000.00 out of the first payment of \$25,000.00 and \$5,000.00 out of each of the following four payments as they are respectively made."

The contract of May 20, 1916, being Exhibit A of the complaint, was introduced in evidence by plaintiff. The contract referred to was ratified and approved by the board of directors of the Richlands Company and also by the stockholders of that corporation.

On June 23, 1916, Shields and his associates wrote to Moody, Alexander & Watson saying they had had a conference with Mr. Steigmeyer and understood that the deal was off, and that, as the deal seemed to have fallen down, they demanded reimbursement for the costs and expenses to which they had been put.

A letter dated July 1, 1916, from George T. Odell, one of the defendants, to the secretary of the State Land Board, was introduced in which he spoke of two plans that had been before the Land Board regarding the Richlands project. He said he had always been in favor of adopting the first plan, which involved an expenditure of \$100,000 or less, while the second plan would mean an expenditure of \$300,000 or \$400,000. He also said that, inasmuch as the delay beyond the 15th of June has "put our San Diego friends" in a peculiar mood, "which, I judge from our correspondence received, has caused them to waver and so it may be possible that they will call their side of the deal off, which they have a right to do after the 15th of June," and he suggested that no additional work be commenced or expense incurred until officially advised by the Richlands Company.

On this record, together with other evidence that will be referred to hereinafter, plaintiff demanded judgment for \$30,000.

The controlling question in this controversy arises out of the letter of May 10, 1916,

signed by the individual defendants, who therein agreed to pay plaintiff \$30,000 out of expected payments "in the event of the closing of the pending sale of the Richlands Irrigation Company's holdings to Mr. Shields and his associates from California."

[1] What is meant by pending sale? The only price at which plaintiff had been authorized to sell was for \$260,000, with a commission of \$30,000, as shown by the company's contract of March 7, 1916, with plaintiff. The record is devoid of any proof that as a part of the scheme of May 20 the individual defendants, by their agreement of 10 days before, agreed to pay plaintiff \$30,000. They agreed to pay \$30,000 out of payments when made, and that the money due plaintiff should be paid to a trustee to be named by him. These individual defendants agreed that at the termination of the pending sale plaintiff should receive his commission of \$30,000 in the amounts and at the times specified in the sale contract for \$260,000. Appellant insists that the defendants had the triparty agreement of May 20th in mind when the contract of May 10th was entered into. That is an inference that is not warranted by the evidence. No proof was produced that any sale was pending except the one plaintiff was authorized to negotiate for \$260,000. Nor was there any proof that these individual defendants, or any of them, were then engaged with Shields and his associates in the negotiations which culminated in the agreement of May 20th. Plaintiff himself testifies that he wanted the contract of May 10th for his own protection, and that at the time it was made he thought the sale was for \$260,000.

[2] The fact that a sale for a definite amount of money is mentioned in the agreements of March 7th and May 10th indicates that no such cumbersome, conditional, and unenforceable contract as that of May 20th was in contemplation of the individual defendants when they signed the agreement of May 10, 1916. A sale is ordinarily understood to mean a transfer of property for money. Pope, Legal Definitions, 1437. Ultimately the contract of May 10th, if successfully consummated, would eventuate in the receipt of money by the stockholders, but nevertheless it is fanciful and far-fetched to speak of the agreement as a sale. Assuming that plaintiff was employed by the individual defendants by the contract of May 10th, that, nevertheless, was not a general employment. Both by the contract of March 7th and the correlated agreement of May 10th his employment was special, on definite, special terms—a definite sale price of \$260,000; a definite commission of \$30,000 payable pro rata as the purchase price would be paid. No commission was payable except in the event of the consummation of a sale, and no commission was payable except

as the purchase price was paid. These contracts required more from the plaintiff than merely to find purchasers able, willing, and ready to buy. The actual payment of the purchase price was required, and only as the purchase price was paid were the commission installments due and payable.

In his complaint plaintiff alleges that he was employed by the Richlands Company to find a purchaser for the Richlands holdings at \$260,000, and that both the corporation and the individual defendants agreed to pay him a commission of \$30,000. He further pleads that he procured persons ready and willing to buy and able to pay \$260,000. The allegation as to having procured purchasers or persons able, willing, and ready to buy, has no support in the record unless entering into the contract of May 20th and the statement therein contained that the parties of the third part were "ready and willing to purchase stock and other securities of the said Richlands Irrigation Company on the terms hereinafter stated" be accepted as evidence that the third parties were able and willing to buy the Richlands property for \$260,000. If plaintiff had furnished such persons and defendants had refused to deal with them or had insisted upon some other terms, plaintiff might be entitled to pay for his services. But there is no such evidence.

[3] The contract of March 7th was signed by the corporation alone; that of May 10th by the stockholders; the contract of May 20th by Odell, Macintosh, and Alexander, evidently acting for the company. Under our statute, the plaintiff could recover a commission only by virtue of a contract. He could not recover as upon a quantum meruit. *Case v. Ralph*, 188 Pac. 640. Moreover, the \$30,000 was to be paid only out of the proceeds of the sale when received. There never were any proceeds of a sale. Whatever plaintiff's rights to payment for services may be, he cannot, under the evidence in this case, recover on his special contract, because he never complied with the terms of that contract.

Nor does the evidence justify the inference that defendants, or any of them, refused to proceed with the contract of March 7th, or that they preferred the triparty agreement to a \$260,000 sale.

[4] Plaintiff must therefore rely upon his special contract, not upon a general employment.

The line of demarcation between the principles applying to the rights of a broker under a special contract and to his rights under a general employment is clear and distinct. As stated in *Karr v. Moffett*, 105 Kan 692, 185 Pac. 890:

"The ordinary rule that a real estate agent is entitled to his commission when he procures a purchaser who is ready, willing, and able to buy, or when he brings a buyer and seller to-

gether who make a bargain on different terms than those theretofore dictated to the agent, does not apply when the agent's commission is governed by a special contract between him and his principal."

In the opinion on rehearing of *Karr v. Moffett*, 106 Kan. 379, 187 Pac. 683, the Supreme Court of Kansas said:

"Appellee sued for an ordinary real estate dealer's commission, alleging that he had earned it in the usual way. * * * The proof of existence of the special contract was surely an effective way of disproving that the defendants owed the plaintiff for services under an ordinary real estate dealer's contract, such as would entitle the agent to the usual commission when he had brought buyer and seller together, whereby they consummated a sale on terms agreeable to each other, 'when he had been the procuring cause of the sale,' as the stock phrasing in such cases is expressed."

In *Murphy v. W. & W. Live Stock Co.*, 26 Wyo. 455, 189 Pac. 857, it is said:

"Where, by the contract of employment, the commission is made dependent upon certain conditions or contingencies, as upon the actual consummation of a sale, or the full payment of the purchase money, or a specified part thereof, such as an agreed first payment, or a net price to the owner, these stipulations will govern, and a fulfillment of performance of the prescribed conditions is generally essential to the right to compensation."

In *Lindley v. Fay*, 119 Cal. 239, 51 Pac. 333, it is said:

"The evidence * * * tends to show an agreement to pay commissions out of the first money received, and no money has ever been received. Under such a contract, the broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms. There must be a sale and a first payment to entitle him to recover. It is so nominated in the bond."

Under the contract of March 7th the commission was to be paid out of proceeds of sale when received, and unless a payment be made no commission would be due. "It is so nominated in the bond."

In *Clark v. Asbury* (Tex. Civ. App.) 134 S. W. 286, a broker sued upon an express contract. He produced a customer able and willing to buy upon different terms. Holding that the broker must recover, if at all, upon the written contract sued upon, the court said:

"In *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40, 23 S. W. 244, where the contract with the broker was to sell for cash, and he produced a customer who was willing to buy the land and pay one-half cash and execute vendor's lien notes for the remainder, and the broker had arranged to sell these notes for cash, it was held that this was not a sale in compliance with his contract to sell for cash.

"In *Thornton v. Stevenson*, 31 S. W. 233, it was held that, where a broker was to sell prop-

erty at a certain price and discussed the sale with a party who afterwards purchased from the owner at a different price, he could not recover his commissions in a suit on his contract. In a suit for commissions on a contract, the recovery must be confined to the contract itself. *Edison v. Saxon*, 30 S. W. 958, 959. These are sound propositions of law, and a broker who sues upon a contract, and not upon quantum meruit, cannot recover unless he shows compliance with the contract, or unless he was prevented from carrying out the same by the seller. *Owen v. Kuhn, Loeb & Co.*, 72 S. W. 432. Giving an agent exclusive agency does not, of itself, preclude the owner from making a sale. *J. I. Case Threshing Machine Co. v. Wright Hardware Co.*, 130 S. W. 729; *Dole v. Sherwood*, 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 731. And if the owner make a sale upon other and different terms from those set forth in his contract with the agent, it cannot be said that the agent has made a sale in compliance with the terms of said contract; and if in such case he is entitled to any compensation, it must be upon quantum meruit, and not upon contract."

See, also, *Murray v. Rickard*, 103 Va. 132, 48 S. E. 871; *Edwards v. Baker*, 39 Cal. App. 755, 180 Pac. 33; *Columbia Realty Co. v. Alameda Land Co.*, 87 Or. 277, 168 Pac. 64, 440; *Cremer v. Miller*, 56 Minn. 52, 57 N. W. 318; *Van Norman v. Fitchette*, 100 Minn. 145, 110 N. W. 851.

[5] It is argued that the price fixed in the March contract was only a basis for future negotiations between the owner and the purchasers. If the selling price was only a basis for future negotiations, why would not the \$30,000 mentioned as a commission be equally subject to fluctuation? Would a sale for \$30,000 entitle the broker to the whole amount as a commission? But the contract is definite as to the sale price. It plainly says the price is \$260,000 out of which the stipulated commission of \$30,000, not a percentage, shall be paid. *Toulmin v. Miller*, 3 Times Rep. 836, an English case cited by appellant's counsel, seems to uphold their contention, but, as the facts are not stated in the opinion, what seems to be obiter dictum to the effect that "the mention of a specific sum * * * is merely given as the basis for future negotiations, leaving the actual price to be settled during the course of the negotiations," is not persuasive, and if on authority of that case it is claimed that under such a contract as that between plaintiff and the Richlands Company the price is merely a basis for future negotiations, we do not agree with the proposition thus advanced.

In *George v. Howard*, 4 D. L. R. 257, the contract was that Howard, the seller, would sell his hotel, except personal effects and stock, for \$40,000, and pay George, the agent, 5 per cent. commission. The court held that as a matter of interpretation, "in the light of the surrounding circumstances," the con-

tract was not to pay a commission on \$40,000, but on the "purchase price," whatever that might ultimately be fixed at, accompanied by a statement that the basis of the negotiation was to be a price of \$40,000. Plaintiff secured a purchaser for \$34,000. This amount was accepted by the owner, the sale completed, and the broker was held entitled to the 5 per cent. commission.

In the case of *Little v. Fleishman*, 35 Utah, 568, 101 Pac. 984, 24 L. R. A. (N. S.) 1182, is announced the general rule that, when the broker procures a purchaser ready, able, and willing to buy for the price and on the terms satisfactory to his employer, he did all that was required of him. The broker's contract in *Little v. Fleishman*, supra, shows the inapplicability of that case to any question involved in this controversy. The proposition that was submitted by Fleishman, the employer, to Little & Little, the brokers, was this:

"You are given exclusive authority to sell for me the following property," situated in Salt Lake City, "for the sum of \$33,000.00, upon the following terms, to wit: \$25,000.00 cash, balance thirty days. In the event of a sale at any price agreed upon I agree to pay the regular commission, which is five per cent. on amounts up to \$2,500.00 and one and one-half per cent. on amounts in excess thereof. This order good till 5 p. m. to-day."

Within the stipulated time a customer was procured who was ready, able, and willing to purchase on the terms specified, and who entered into a contract with the owner for the purchase of the property. Though the sale was not consummated, because of the owner's inability to furnish a sufficient abstract of title, the broker was held to be entitled to his commission.

Fritsch v. Hess, 49 Utah, 75, 162 Pac. 70, is also not apposite to any issue in the instant case.

[6] As we understand the argument of plaintiff's counsel, it may be summarized: Defendants in writing employed plaintiff, a real estate broker, to procure a purchaser for the Richlands holdings. Purchasers were produced by plaintiff who were ready, willing, and able to purchase same on terms specified. Defendants entered into a binding written agreement of sale with the purchasers, the terms being satisfactory to all parties concerned, and which contract was substituted for the proposition to sell for \$260,000. By the contract of May 20, 1916, the Richlands holdings were actually sold to the purchasers, and defendants are estopped as against plaintiff to say that the transaction was not a sale of the Richlands holdings. The reasoning is logical. The argument is sound, and it would be unassailable were it not founded upon what to us appears to be a misconception of what the ultimate facts are. The employment of plaintiff was

not general. He had a special contract with the Richlands Company and with the individual defendants, if he was employed by the latter at all. That the proposed purchasers produced by plaintiff were ready, able, and willing to buy on the terms of the contract of March 7, 1916, is not established by the evidence. The contract of May 20, 1916, was not, in our opinion, a contract of sale. It was not an enforceable contract. It was executory and conditional. It provided that, if within a year the State Engineer should determine a drainage system to be necessary for the reclamation of the segregated lands, the Richlands Company should construct such drainage system according to the specifications approved by the State Engineer. As we understand the evidence, the State Land Board would not enter into a contract waiving the drainage clause. Mr. Alexander, the secretary of the Richlands Company, testified that the State Land Board required the drainage provision in the contract; that after May 20, 1916, Story & Steigmeyer, attorneys for Mr. E. J. Shields and his associates, had advised him that they would not approve a contract containing the drainage features. The triparty contract contained a clause providing that the Carey Act contract between the state and the Richlands Company must be "in form satisfactory to the legal firm of Story & Steigmeyer, of Salt Lake City, expressed in writing." How could it be the fault of defendants that a contract satisfactory to Story & Steigmeyer was not obtained from the state when they could not procure a contract with the drainage features omitted and when Story & Steigmeyer had informed defendants that they would not approve a contract containing the drainage clause? The contract of May 20, 1916, being, therefore, executory and conditional, never having been consummated, not a dollar having been paid thereon, plaintiff was not entitled to the \$30,000 commission that was payable to him in the event only of the purchase price being received by the defendants. Being dependent on the approval of the attorneys for the third parties to the contract, the triparty agreement was only tentative and conditional. It was not binding on the parties and was not carried into effect. The execution of such a contract does not give to the broker a right to compensation. 9 C. J. 603.

In *Halprin v. Schachne*, 21 Misc. Rep. 519, 47 N. Y. Supp. 711, affirmed in 25 Misc. Rep. 797, 54 N. Y. Supp. 1103, it is held that, where a broker for the sale of real property brings parties together but a contract made by them is by its terms conditional upon the subsequent approval of the attorney for one of them who fails to approve the broker is not entitled to commission. The court says:

"This shows that in law this agreement is made upon a condition, and is dependent upon

the performance of that condition; and, if the condition is not complied with, no obligation thereunder arises, and no rights thereunder attach. The rule of law is that a broker is entitled to his commission when the minds of the parties have met on every material particular of the transaction. Here, in this case, however, the minds of the parties in regard to the transaction have never met, because the validity of the contract was made dependent upon the condition that the defendant's attorney approve of the contract. The defendant's attorney never approved of the contract. In that event the contract and the whole transaction was to be null and void to the same effect as if no transaction whatsoever had been agreed upon and entered into between the parties. For that reason the condition upon which the broker's commission depended, and which entitled him in law to recover, was never fulfilled, and he is not entitled to recover."

Among other cases supporting the doctrine above announced are these: *Hawkins v. Green* (W. Va.) 104 S. E. 279; *Merritt v. Lillyblade*, 57 Wash. 159, 106 Pac. 621; *Condict v. Cowdrey*, 139 N. Y. 273, 34 N. E. 781; *Sullivan v. Milliken*, 113 Fed. 93, 51 C. C. A. 79; *Rhodes v. Wetherill*, 236 Pa. 66, 84 Atl. 860; *Ward v. Kennedy*, 51 Misc. Rep. 422, 101 N. Y. Supp. 524; *Id.*, 122 App. Div. 890, 106 N. Y. Supp. 1149; *Brown v. Keegan*, 32 Colo. 463, 76 Pac. 1056; *Cameron v. Ayers*, 175 Cal. 662, 166 Pac. 801.

We think the findings of fact and conclusions of law of the trial court were right, and that the record contains no errors justifying a reversal.

The judgment is therefore affirmed, with costs.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

(186 Cal. 1)

MILLER v. LERDO LAND CO. (L. A. 5926.)

(Supreme Court of California. June 3, 1921.)

Trusts — 31—Brokerage contract held not to create express trust.

A contract giving plaintiff the right to sell defendant's land, plaintiff to receive one-third of the proceeds, but having no interest in the land, held not to create an express trust in plaintiff's favor, and a judgment directing defendant to sell the land and pay plaintiff one-third of the proceeds within a given time in default of which the land was to be sold by a receiver was unwarranted.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by C. E. Miller against the Lerdo Land Company. Judgment for plaintiff, and defendant appeals. Reversed.

Anderson & Borton, of Bakersfield, for appellant.

Nathan Newby, of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment in an action to quiet title to and declare a trust in certain lands situated in Kern county, Cal. We quote and adopt the following statement of facts from the opinion rendered in this case by the District Court of Appeal and written by Mr. Justice Knight:

"This is an appeal by the defendant, Lerdo Land Company, a corporation, from a judgment in which it was decreed that said Lerdo Land Company holds legal title to 1,390.08 acres of land situate in Kern county in trust for the purpose of selling the same and accounting to plaintiff for one-third of the gross selling price of any and all of said lands until finally disposed of. Said judgment further decreed that said land be sold by said Lerdo Land Company within six months from the date of the entry of judgment, at the rate of \$150 per acre, unless plaintiff consents in writing to a sale for a less sum, and in the event of a failure on the part of said Lerdo Land Company to sell such land within that period that it be sold by a receiver (who was named in the decree) at public or private sale, for the highest price obtainable, for cash or on time, subject to the confirmation of the court, and that from the proceeds of said sale the costs shall first be deducted, and the balance divided, one-third to the plaintiff and two-thirds to the defendant.

"The controversy arises over two written agreements between the parties, the first of which is dated October 2, 1912, and the second, which is supplemental to the first, is dated May 29, 1913. The first agreement is quite elaborate and comprehensive, and it will therefore necessitate paraphrasing or merely stating the substance of many of its provisions.

"By its terms respondent was given the exclusive right to sell, within three years, 6,481.03 acres of land situate in Kern county belonging to appellant, providing 1,500 acres or more were sold by the end of the first year, and 4,000 acres by the end of the second year. The land was to be sold in tracts of 10 acres or more, except lots in town sites. The sale price was to be \$150 or more per acre. If the land sold for \$150 per acre, respondent was to receive one-third and appellants two-thirds of the selling price, and if it sold for more than \$150 per acre the surplus was to be equally divided. The town-site lots were to be sold under a special arrangement, which it is not necessary to mention here in detail. Provision was also made for selling on deferred payments, in which event a special arrangement was made for the time when respondent should receive his pro rata. It was also provided that respondent should enter immediately upon a selling campaign, and that during the life of the contract he should not engage in the business of selling any other land subdivision without appellant's written consent.

"Appellant agreed to commence and to continue with the development of water wells on the property sold, and as the property was developed to equip said wells with casings.

pumps, motors, etc., in order to supply the land sold with water for irrigation. It was provided that a certain quantity of water should be supplied for each 160 acres of land. Said agreement also contained the following provision: 'Provided always, however, that if it shall be ascertained and determined by the first party (Lerdo Land Company) in the drilling of wells upon any portion of the lands that water cannot be discovered, produced, and developed for the irrigation of the same in adequate quantities, and at reasonable cost, then and in that event the first party shall in writing notify the party of the second part to that effect, and shall describe the lands upon which it has been ascertained and determined that it is not practicable to develop and deliver water in adequate quantities and at such reasonable cost, and such lands so described in such notice shall thereupon be removed from the terms of this agreement, and shall cease to be affected hereby or included herein.' Provision was also made for an extension of the time to sell the land if the sales were retarded by the failure to develop water.

"On May 29, 1913, a supplemental agreement was entered into, by the terms of which it was provided: 'Whereas, the parties hereto did on the 2d day of October, 1912, enter into a certain indenture of agreement whereby the party of the second part was constituted the agent of the party of the first part for the purpose of selling its lands known as the "Lerdo lands," consisting of about seven thousand (7,000) acres in the county of Kern, state of California, for the consideration and upon the conditions therein expressed, a copy of which said agreement is hereby referred to and made a part hereof; and

"Whereas said agreement provided among other things that the parties thereto might mutually agree to except and release from said agreement any of said lands included therein, should it be determined that it would not be profitable to develop water upon said lands or sell the same:

"Now, therefore, this agreement is to witness that the parties hereby mutually agree that the following described lands shall be withdrawn from the operation of said agreement: [Here follows the description of the land.]

"It is further understood and agreed that in consideration of the withdrawal of said lands, and of the waiver by the party of the second part of his commissions as provided in said indenture of agreement, that the party of the second part shall be entitled to the equal one-third of the selling price of any and all of said lands hereinabove described, to be paid at the times and in the manner and according to the terms of sale of the remaining two-thirds interest in said lands or any thereof at whatever date said lands or any thereof shall or may be sold, without deduction on account of any mortgage or other lien or incumbrance made, done, or suffered by the party of the first part, its successors, agents, or assigns; provided, however, that said lands shall not be sold at less than \$150 per acre except with the consent of the party of the second part in writing first had and obtained.'

"The supplemental agreement was dated and signed in duplicate by respondent on May 29, 1913, and transmitted by him to the president

of the appellant company. On September 28, 1913, one of the duplicates was returned to respondent, duly signed by appellant, and the other duplicate was retained by appellant.

"It was the finding of the court that the supplemental agreement of May 29, 1913, was obtained from the respondent through the representations of the president and secretary, respectively, of the appellant company, to the effect that 'in order to relieve the defendant from the obligation to develop water for the irrigation of certain portions of the Lerdo tract, the said defendant desired to withdraw, by mutual consent of the plaintiff and defendant, portions of said Lerdo tract described in the sales contract dated October 2, 1912, from the operation of said contract,' and that it was further represented to respondent 'that so much of the purchase money that might be received from the sale of said land to be withdrawn as would be necessary would be used for the development of the remainder of said Lerdo Tract, by the installation of an efficient irrigation system, and that, unless sold as oil land said development would have to be postponed indefinitely.' The court further found 'that on and after the 29th day of May, 1913, plaintiff and defendant treated the lands described in said contract as having been withdrawn from the operation of the sales contract dated October 2, 1912, and no attempts were made to sell any of said land for agricultural purposes after May 29, 1913; * * * that defendant never at any time drilled any wells or attempted to drill any wells upon said land or to install any irrigation system thereon for the purpose of irrigating said land solely for the reason that said land had been withdrawn from sale for agricultural purposes by said contract dated May 29, 1913.' And the court further found that the installation of an irrigation system on said withdrawn land would have cost the defendant a sum in excess of \$30,000, of which expense the defendant was relieved by said contract dated May 29, 1913.

"No sales of the land under the supplemental agreement of May 29, 1913, were made, and on March 24, 1914, appellant caused to be served upon respondent a notice to the effect that said supplemental agreement was not the corporate act of said Lerdo Land Company, nor was it ever authorized or approved by it, and therefore was not binding upon it. This action was filed by respondent on April 6, 1915."

We are of the opinion that the decree of the trial court cannot be sustained for the reason that neither the pleadings nor proof justify that portion of the findings and decree determining that a trust exists in the lands. Respondent's rights under the contract of May 29, 1913, are that he shall receive one-third of the selling price of any and all of the said lands; that this one-third of the selling price shall be paid to respondent at the times and in the manner and according to the same terms as the remaining two-thirds are paid to appellant; that there shall be no deduction on account of any mortgage or other lien or incumbrance made, done, or suffered by appellant, its successors or assigns. It is apparent from a recital of the substance of the provisions that the contract

conferred upon respondent nothing more than a right to one-third of the proceeds when the lands are sold. There is a distinction between an interest in the land itself and an interest in the money obtained from the sale of the land. *Green v. Brooks*, 81 Cal. 328, 332, 22 Pac. 849. In the cases of *Green v. Brooks*, supra, and *Hannah v. Canty*, 175 Cal. 763, 167 Pac. 373, cited by respondent in support of the theory that a trust exists, the person claiming to be the beneficiary of the trust was, in effect, one of the purchasers of the land in question and had a direct interest therein. The contract relied upon by respondent, however, does not, by any possible construction, purport to pass a present interest in the lands to respondent nor to provide for the holding of the lands or any interest therein for the benefit of respondent, nor is there anything from which any such intention can fairly be inferred. There is, therefore, no express trust, and respondent does not contend that any other kind of trust exists. It is clear from the uncontradicted evidence that the appellant corporation refused to part with any interest in the lands, and it follows that the decree imposes upon the parties terms not within the purview of their agreement in that it compels appellant to sell the lands, although appellant is still the sole owner thereof. The decree creates further rights in favor of respondent by depriving appellant of the right to control the terms of the sale and placing the same in the hands of a receiver despite the fact that the parties contemplated and stipulated that appellant should determine all the conditions of sale, with the single proviso that the price should not fall below \$150 per acre.

It is unnecessary to discuss the several other points raised upon the appeal, for the sole object of the action is to declare a trust in the lands. It having been determined that no trust exists, respondent's action necessarily fails.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

(186 Cal. 32)

WILLIAMS v. BULLOCK TRACTOR CO.
(L. A. 5583.)

(Supreme Court of California. June 3, 1921.)

1. Pleading §403(3)—Deficiency in complaint cured by answer.

In an action to recover purchase money paid for a farm tractor, the failure of the complaint to refer to the fact that a written agreement of sale was entered into, accompanied by a written warranty, was immaterial, where the deficiency was supplied by the averments of the answer.

2. Sales §267—Complaint in action for purchase price held to contain irrelevant matter.

Where a written agreement of sale and warranty expressly excluded all implied warranties, so that the written contract became the measure of liability, averments of the complaint, in an action to recover purchase price, as to oral statements and general advertising representations by defendant's agents, upon which plaintiff relied, were irrelevant and immaterial matters.

3. Pleading §403(3)—Complaint to recover purchase price held sufficient when supplemented by averments of answer.

A complaint, in an action to recover purchase price paid for a farm tractor, supplemented by averments of the answer, held sufficient after rejecting surplusage, although there was no direct allegation that the tractor failed for lack of suitable material; durability averments as to defects and weaknesses sufficiently implying such failure.

4. Appeal and error §268(1), 719(6)—Sufficiency of evidence not reviewable, where no specifications of insufficiency assignment of errors or exceptions.

Appellant cannot object to the sufficiency of the evidence to sustain findings, where the bill of exceptions contains no specifications of insufficiency, nor any assignments of error or exceptions reserved.

5. Appeal and error §241—Motion as to evidence insufficient to warrant review of sufficiency of evidence.

Although motions to strike out portions of testimony and to dismiss complaint and give defendant judgment and the insufficiency of certain parts of evidence to sustain certain findings are alleged, there is insufficient assignment of errors of law occurring on the trial to warrant review of the evidence, where no objection of general insufficiency of evidence to sustain any findings material to a judgment under the term of contract of sale involved was contained in such motions.

6. Sales §285(4)—Timely notice of defects waived by seller's conduct.

Literal compliance with requirements of warranty in a contract of sale, requiring immediate written notice if the tractor sold failed to work well after three days' trial and immediate return of the tractor, in which event the price was to be refunded, held waived by seller's acts, where delivery was never actually made or accepted by the buyer, and seller's agents were unable to put the tractor in proper condition, and the buyer was entitled to recover the purchase price.

7. Sales §440(3)—Evidence that warranted machine was in good condition long after rejection held inadmissible.

In an action to recover the purchase price of a farm tractor, testimony of witnesses who inspected the tractor long after the attempt to operate it, and after the buyer's attempted rescission for breach of warranty, to the effect that they discovered nothing wrong with it, etc., was inadmissible, where there was no showing that the tractor remained in same

(193 P.)

condition as when it was previously tried out, and, as it was the seller's duty to make the tractor work satisfactorily upon demand within a reasonable time, such evidence was immaterial to the buyer's right to recover.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Annie P. Williams against the Bullock Tractor Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondent.

SLOANE, J. This appeal is taken from a judgment for plaintiff to recover from defendant \$1,280, with interest and costs, on account of money paid by plaintiff to defendant on a contract of purchase of a gasoline farm tractor, which contract was rescinded by plaintiff for failure of certain conditions and warranties of the contract.

The action was tried on an amended complaint and answer thereto. The amended complaint sets forth in general terms the agreement of the plaintiff to buy, and of the defendant to sell, a certain tractor, known as a "16-10 H. P. creeping grip gasoline tractor, complete, at and for the sum of \$1,156.25," and that the plaintiff then and there, on or about January 26, 1916, paid to said defendant said sum of \$1,156.25 for said tractor. It is further alleged that the defendant thereafter, on or about the 4th day of February, 1916, delivered the tractor at plaintiff's ranch, near Victorville, in the county of San Bernardino, Cal., and then and there, for a period of about three days, attempted to operate said tractor on plaintiff's said ranch; that the attempt to make the tractor work failed because of structural defects, breakage of parts, excessive heating of engine, faulty adjustment of the machinery, etc.; that during all the times while said defendant, through its agents and servants, was operating and in charge and control of said tractor, it represented to plaintiff and assured plaintiff that said tractor would operate satisfactorily when the same was properly adjusted and when certain new parts were added thereto; that the defendant then left the tractor with plaintiff with the representation that it would work satisfactorily on the replacement of certain minor parts, which were to be supplied by defendant and sent to the ranch; that the tractor was left by defendant in the field at plaintiff's ranch in charge of plaintiff's mechanics; that thereafter plaintiff attempted to operate said tractor but was unable to make it work, and on February 10 again notified defendant of such fact, and defendant thereupon sent to plaintiff at her ranch certain parts for the engine and a new

carburetor representing that with such new parts the tractor would work satisfactorily; that plaintiff thereupon made further attempts to operate the tractor, with the result that the engine became overheated, the parts broken and out of adjustment, although carefully and competently managed and controlled by plaintiff's mechanic; that complaint was again made to defendant, who, on or about March 13, 1916, sent a mechanic to the ranch to adjust, repair, and overhaul the tractor, and that said mechanic worked about eight hours on March 13, and again on March 14, in an attempt to put the tractor in working order but was unable to do so, and said mechanic left said tractor at plaintiff's ranch and the same has not been moved and could not be moved or operated since; "that at the time defendant's said mechanic worked on said tractor said mechanic found that the engine was worn and could not be made to operate without being entirely overhauled and partially rebuilt; that other bearings on said tractor were entirely worn out; that the oil feeders were broken; that the piston rings were entirely worn out and the cylinders were worn; that the gear wheels were not true; that the brake was broken; that certain oil cups were omitted; that the piston bearings on the crank shaft were worn; that the cam on the exhaust arms was out of adjustment and numerous other defects existed on said tractor; that said mechanic was unable to repair said tractor or make it operate"; and at all times and up to the commencement of this action said defendant has failed and refused to attempt to repair, overhaul, or adjust said tractor, and plaintiff alleges that said tractor cannot be repaired, overhauled, or adjusted or made to operate or run for any considerable period of time or at all, and cannot be made to do the work represented by defendant to the plaintiff as aforesaid, or to do the work for which it was manufactured by the defendant; that the consideration for the said sum of \$1,156.25, paid by the plaintiff to the defendant, has wholly failed; that on or about the 8th day of April, 1916, the plaintiff served notice of rescission, notified defendant that the tractor was at plaintiff's ranch where left by defendant's mechanic, subject to the order and control of defendant, and demanded the return and payment to plaintiff of said sum of \$1,156.25, and that no part of said sum has been repaid.

There was a second count in the complaint to recover the sum of \$1,156.25 as money had and received by the defendant to and for the use of the plaintiff. The court on the trial found the facts for the plaintiff, as above stated, substantially as alleged in the complaint, and gave judgment for plaintiff for the amount named, from which judgment the defendant appeals.

In stating the issues presented by the complaint there has thus far been no reference to terms of contract or conditions of sale upon the breach of which plaintiff's right of rescission may rest.

The facts pleaded in the complaint in this regard were certain representations by defendant's agents, made orally and by printed advertising matter, relating to the qualities of the tractor. It is alleged that as an inducement to the contract the agents of defendant guaranteed that the tractor was of the latest model, would run and operate continuously, pulling a load and maintaining a speed of $2\frac{1}{2}$ miles per hour; that it would operate in a field, pulling not less than three plows, turning a 14-inch furrow, 8 or 10 inches deep; that it would plow 6 or 8 acres a day; that it was free from defects in construction and was entirely suitable and fit for farm work; together with many other enumerated qualities of excellence. It is further alleged that plaintiff had no knowledge of or experience with tractors, and relied on the representations of defendant's agents, and that defendant was aware of that fact.

[1] No reference is made in the complaint to the fact that a written agreement of sale was entered into between the parties, accompanied by a written warranty signed by the defendant, and which, it is contended, contains the conditions of the sale and limits the liability of the defendant. However, this contract and warranty was set out in full by defendant's answer, and entered into the issues presented to the court on the trial as completely as though pleaded by the plaintiff. The deficiency in this respect of plaintiff's pleading was therefore supplied by the averments of the answer. *Shively v. Semi-Tropic, etc., Co.*, 99 Cal. 259, 33 Pac. 848; *Daggett v. Gray*, 110 Cal. 169, 42 Pac. 568; *Sav. Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Flipp v. Ferry*, 127 Cal. 654, 60 Pac. 434.

The contract and warranty alleged by the answer and proven on the trial are in words and figures as follows:

"Order for 'Creeping Grip' Gasoline Tractor.
"To Bullock Tractor Company, Chicago, Ill.,
U. S. A.

"The undersigned, of Victorville post office, county of San Bernardino, state of California, rural route No. —, hereby purchase of you, subject to all the conditions of agreement and warranty printed on back of this order, and made a part hereof: To be shipped to A. P. Williams, R. R. station, Victorville, Cal., via Santa Fe. Quantity 1. Size 16-10 H. P. 'creeping grip' gasoline tractor complete, and agrees to pay freight on same from Los Angeles, Cal., U. S. A., and to settle for said tractor by payment of (1,156.25) eleven hundred fifty-six and twenty-five hundredths dollars as follows: Cash.

"It is expressly agreed that this order shall not be countermanded, and that said tractor shall remain and be held by the undersigned as your exclusive property until the purchase

money shall have been paid in full; and that said tractor or any part of same shall be and remain personal property in whatsoever manner it may be annexed to realty. This order is given subject to acceptance by the Bullock Tractor Company.

"Signed and dated the 28th day of January, 1916.

"[Signed] Annie P. Williams, Purchaser.

"Dated at Chicago, Ill., —, 191—.

"Accepted, Bullock Tractor Company,

"By —.

"Recommended for acceptance by A. O. Michael.

"Warranty.

"Bullock Tractor Company' (a corporation) warrants its 'creeping grip' tractor herein described to be well made of good materials, and durable if used with proper care.

"Said company agrees to furnish, free of charge, any part that may prove defective within one year; said company may at its option require the return of such defective part, freight or express prepaid, to the factory for inspection and examination, and assumes no responsibility when the machine, or part returned, indicates misuse or neglect of alterations or repairs made outside its factory. If upon three days' trial, with proper care, the tractor fails to work well, the purchaser shall immediately give written notice to the Bullock Tractor Company, at Chicago, Ill., and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it.

"If the trouble is due to defective material or workmanship, the total cost of sending the expert shall be borne by the company; otherwise the purchaser shall pay said expense. If the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction.

"Use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it, and a fulfillment of this warranty.

"This warranty cannot be changed or abridged, and excludes all implied warranties.

"Bullock Tractor Company."

[2] It may be conceded, under this agreement and warranty and the express stipulation therein that the agreement "excludes all implied warranties," that this written contract is the measure of defendant's liability as to the quality and utility of the tractor, and that the averments of the complaint as to oral statements and general advertising representations on the part of the defendant's agents, upon which plaintiff relied, are irrelevant and immaterial matter. *Remsburg v. Hackney Mfg. Co.*, 174 Cal. 799, 164 Pac. 792. However, it is expressly guaranteed by the contract that the tractor is well made and of good materials, and

urable, if properly cared for "and durable if used with proper care," and it is provided that "if upon three days' trial, with proper care, the tractor fails to work well, the purchaser shall immediately" notify the tractor company, which shall "send a competent man to put the machine in good working order," and "if the tractor cannot be made to work well the purchaser shall immediately return it to said agent, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction."

[3] We think the pleadings thus supplemented by the averments of the answer present sufficient facts to maintain a cause of action upon the conditions for recovery of the purchase money as set out in the written contract and warranty after rejecting all other representations pleaded as surplusage.

Although there is no direct allegation in the complaint that the tractor failed for lack of suitable material and durability, the averments as to its numerous defects and weaknesses sufficiently imply such failure.

The findings of the trial court, while covering the irrelevant matter pleaded as to oral representations of the qualities of their tractor, are ample as to the lack of quality and durability of the tractor and failure of the defendant to put it in working condition, to support plaintiff's rescission and demand for repayment of the purchase money.

The court finds:

That "said tractor was neither well made of good materials nor was it durable if or when used with proper care"; that it could not be operated "because it was improperly constructed and built, and was not made of good materials and was not durable"; that at times "said tractor would not develop sufficient power to move its own weight, and the plaintiff after ten days was unable to plow with said tractor to exceed two acres; that said tractor in said time wore out the piston rings; that the main bearings of the drive shaft became worn; that certain oil pipes and feed pipes became broken and disconnected; that the clutch collars were entirely worn out; the engine when run became excessively hot and it was necessary to stop said engine and allow it to cool off so that the same would run at all; parts and portions thereof became loosened and broken, and said tractor would not pull the load that would be pulled by an ordinary two-horse team; that during all of said time said tractor was properly lubricated with oil, was furnished proper fuel and proper oil, and had and was given by plaintiff proper care in all respects."

[4] The appellant is not in a position here to object to the sufficiency of the evidence to support the findings, in that the bill of exceptions contains no specifications of insufficiency, or any assignment of errors or exceptions reserved. *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Smith v. Meade*, 38 Cal. App. 173, 171 Pac. 815.

[5] Neither do we think there is sufficient assignment of errors of law occurring on the trial to entitle appellant to a review of the evidence. Motions were made and overruled at the close of the trial, which it is claimed were substantially a motion for nonsuit. These included a motion to strike out portions of the testimony and to dismiss the complaint and give judgment for defendant, and insufficiency of certain specified parts of the evidence to sustain certain findings is alleged, but no objection of general insufficiency of the evidence to sustain any of the findings material to a judgment under the terms of the contract and warranty was contained in the motions.

The greater portion of appellant's voluminous briefs, however, is devoted to discussion of the conflicting evidence, and we have considered the same, with the result that we find ample testimony to support the findings. Nearly all the probative facts relating to the condition and operation of the tractor given with considerable detail in the findings, are, in substance, a synopsis of the testimony of plaintiff's witnesses.

There can be no question, under the findings and evidence, that the trial court was justified in its conclusion that the tractor was not well made of good materials or durable in use, or that the plaintiff, if she acted in due time and on proper notice to the defendant, was justified in rescinding the contract and demanding a return of the purchase money.

[6] Appellant, however, claims that notice of the unsatisfactory condition of the tractor was not given in compliance with the contract, that the rescission was not made within the time stipulated, and that no return of the tractor was made to defendant's agents.

It was stipulated under the agreement of warranty that—

"If upon three days' trial, with proper care, the tractor fails to work well the purchaser shall immediately give written notice to the Bullock Tractor Company, at Chicago, Ill., and to the agent from whom it was purchased, stating wherein the tractor fails, and when the purchaser desires us to send a competent man to put it in good working order, shall allow reasonable time therefor, and render necessary and friendly assistance to operate it."

And further:

"If the tractor cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded."

And also that—

"Use of the tractor after three days, or failure to give written notice to said company and its agent, or failure to return the tractor as above specified, shall operate as an acceptance of it, and a fulfillment of this warranty."

There was no literal compliance with these requirements. But so far as time may have

been of the essence of the agreement, this was waived by the acts of defendant. Delivery of the tractor was at no time actually made, or accepted, by the plaintiff. Defendant's agents undertook personally to deliver the tractor at plaintiff's ranch and put it in operation. It arrived in their charge in a crippled condition on the 3d of February. On the 4th it was repaired and adjusted, and during the 4th, 5th, and 6th defendant's agents were in charge attempting to make it work. They were not successful, and on the last date named plaintiff stated to said agents and servants that said tractor was not satisfactory and refused to accept it. It was however, left at the ranch, and plaintiff's sons, one of whom was experienced in mechanics and with motors and machinery, attempted to put it in operation. The findings are that they handled it skillfully and with due care. They were unable to get any better results for the reason of the defects as found by the court, and on February 9th, within three days after defendant's agents had left it, after their own futile experiments, plaintiff "notified the defendant in writing that said tractor was not satisfactory," and called attention to its defective and broken condition, and requested that a mechanic be sent immediately to put it into commission. Thereafter plaintiff sent certain new parts, including a carburetor that did not fit. The machine still not operating, defendant sent a mechanic on March 13th, who worked on the tractor unavailingly for about two days and then abandoned it because he did not have parts and material sufficient to make the necessary repairs. No further attempt was made by defendant to put the tractor in a condition to operate, and after waiting until the 8th of April, 1916, the plaintiff in writing again notified defendant that the tractor would not work and gave notice of rescission of the contract, and that the tractor was at the ranch where defendant's agents had left it and was subject to defendant's orders, and demanded repayment of the purchase money.

There were further negotiations, but no substantial repair of the tractor. A further notice of rescission and demand for return of the purchase money was made on May 12th. Plaintiff had never accepted delivery of the tractor, and notice to defendant and its agents that they would find it where they had left it and that it was subject to their orders was a sufficient return of any possession plaintiff had.

Under the pleadings, evidence, and findings the plaintiff was entitled to recover.

[7] The more serious question of error arises upon the exception of defendant to the ruling of the trial court excluding from the evidence the depositions of certain of defendant's witnesses. The testimony thus offered was of witnesses who inspected the tractor long after the attempt to operate it and after

the rescission by plaintiff, and was to the effect that on such inspection they discovered nothing wrong with the tractor, and after some slight adjustments were able to operate it satisfactorily. Such testimony could only be admitted after a showing that the tractor remained in the same condition as when it was previously tried out. Although there was evidence that it had been left standing where it was when plaintiff rejected it and had not been used since, we have looked in vain for any affirmative showing that it had not been overhauled or changed.

In any event, it was the duty of the defendant under the contract to make the tractor work satisfactorily upon demand and within a reasonable time, and evidence that some months later defendant's witnesses were able to operate it with slight repairs is immaterial to plaintiff's right to recovery. Moreover, the evidence was cumulative; the defendant having had the advantage of the testimony of its agents who sold the machine and who tested and repaired it on the attempted delivery as to its condition at that time.

Many of the points involved in this appeal are covered by the opinion of Mr. Justice Hart in *Ventura Mfg. Co. v. Warfield*, 37 Cal. App. 147, 174 Pac. 382, an action strikingly similar to this in its facts and in the issue presented on appeal. Judgment for plaintiff was affirmed and a petition for hearing in this court was denied.

The judgment herein is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; WILBUR, J.; SHAW, J.; LAWLOR, J.

(186 Cal. 7)

CITY OF SAN BERNARDINO v. CITY OF RIVERSIDE et al. (L. A. 5925.)

(Supreme Court of California. June 3, 1921. Rehearing Denied June 30, 1921.)

1. Waters and water courses §34—Original rights to waters in streams based on common law.

The original rights to the waters in the streams in California are those which by the common law were vested in the owners of the land abutting upon the stream under the doctrine of riparian rights, and such rights are attached to the land as parcel thereof, and are private property.

2. Waters and water courses §127—Doctrine of "appropriation" stated.

Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting landowners are not divested thereby until the period of prescription has run in favor of the appropriator; and appropriation does not confer title immediately, as if by grant from the state, except when it

affects lands belonging to the state or the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appropriate—Appropriation.]

3. Waters and water courses §79—Rights in stream are protected against diversion of underground waters.

Where a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the stream will be protected against a depletion thereof by adverse diversions of such underground waters, although there may be a point of distance from the stream at which a diversion of such underground water will have so little effect on the stream that it will not be actionable, it being ordinarily a question for the trial court whether this is true in the case before it.

4. Waters and water courses §101, 107(2)—Rule as to reciprocal rights in "percolating waters" stated; unreasonable taking of underground waters enjoined.

The rule in regard to "percolating waters" is that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon so long as such taking works no unreasonable injury to other land overlying such waters; that, if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole; and that each may apply to the courts to restrain an injurious and unreasonable taking by another, and to have the respective rights adjudicated, and the use regulated, so as to prevent unnecessary injury and restrict each to his reasonable share.

5. Waters and water courses §101, 107(1)—Rule as to right to take "percolating waters" outside of watershed of underground basin stated; owner of overlying land may have right to subterranean waters adjudicated though he does not use the waters.

No one, not even the owner of overlying land, has the right to take water for any purpose out of a watershed over an underground basin or general underground water supply, if such taking will deprive of water any lands within the basin; and while the owner of overlying land who does not use such water thereon, and whose land is not injured by an exportation of the water to outside lands, has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right, and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of supply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Percolating Waters.]

6. Waters and water courses §190—City located in watershed over underground basin has water rights only as appropriator, and not as administrator of water rights of its inhabitants.

Under Civ. Code, § 1410, as amended, a city situated in a watershed over an underground basin or reservoir has no rights in the waters thereof as being subject to public use for the common benefit of its inhabitants or owners of the overlying lands, on the theory that the city is the administrator of such public use and has become substituted to the individual rights of owners for the benefit of all, but such water is private property, and the city's rights are only those of an appropriator.

7. Waters and water courses §140—Prior appropriator entitled to have his rights declared superior.

When a conflict arises between two appropriators of water, and their rights are otherwise equal, the prior appropriator, under Civ. Code, § 1414, will prevail so far as the conflict extends; and in an action to quiet title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators.

8. Waters and water courses §145—Appropriator may change place or character of use or place where water is taken.

With regard to water rights by appropriation, the appropriator may change the place or character of the use or the place from whence the water is taken out of the source, provided others are not injured by the change, and this rule applies to the taking of underground as well as surface waters.

9. Waters and water courses §152(11)—Judgment in action between cities as to water rights should not undertake to provide for future use.

In action between city lying in watershed over underground basin or water supply and a city and water company situated outside of the watershed, as to rights in the water in the watershed, *held* that, as the parties had the rights of appropriators only, the judgment should not undertake to provide for future apportionment of the waters of the artesian basin, but should definitely determine the existing rights of the parties.

In Bank.

Appeal from Superior Court, San Bernardino County; Frank G. Finlayson, Judge.

Action by the City of San Bernardino against the City of Riverside and another. From the judgment, both parties appeal. Reversed and remanded.

Byron Waters, C. O. Haskell, Ralph E. Swing, and William Guthrie, all of San Bernardino, for plaintiff.

Henry Goodcell, of San Bernardino, and W. G. Irving and Miguel Estudillo, of Riverside (Samuel C. Wiel, of San Francisco, of counsel), for defendants.

SHAW, J Both parties have appealed from the judgment.

The city of San Bernardino is situated in what is known as the San Bernardino artesian basin, and the lands comprising it overlie a part of the subterranean water of said basin. The dispute in the case arises from the fact that both parties are taking such subterranean waters, the plaintiff taking them for the use of its inhabitants for domestic and other purposes, and the defendants taking them to be transported to the city of Riverside and the vicinity thereof for irrigation and domestic use, said region being entirely outside of the said basin and of the watershed which supplies water thereto. The complaint asks that the claims and rights of each of the parties be determined and adjudicated, and that the defendants be enjoined from diverting water from said basin for use upon lands not situated therein or in the watershed tributary thereto.

The answer sets up the several claims of the defendants to the water aforesaid, and denies that plaintiff has any paramount rights thereto. The defendants also filed a cross-complaint, asking that their rights to take water from said basin should be determined and adjusted.

The court made elaborate findings in the case, covering 300 pages in the printed transcript. Judgment was thereupon rendered, declaring the respective rights of the several parties in the water of the said basin. It was stipulated between the parties that—

"Whatever judgment may legally be entered as based on the findings of fact may be entered regardless of whether the findings, or any of them, are or are not embraced in the pleadings as filed."

The appeal is presented upon the judgment roll alone, and, in view of the aforesaid stipulation, our consideration of the case may be limited to a review of the findings, conclusions of law, and judgment. The facts hereinafter stated are set forth in the findings.

The San Bernardino artesian basin is a plain, sloping generally toward the southwest. It is about 25 miles long from northwest to southeast, and 10 miles wide. It is bounded on the northwest, north, and east by high mountains, and on the west, south, and southeast by hills or higher lands. At the southwest, near the town of Colton, there is a gap in the hills and higher lands, through which the water falling on the watershed, of which the basin is the lower part, escapes, partly by streams on the surface and partly by seepage through the sands, gravels, and soil beneath. The gradient of the surface of the basin from the foot of the mountains toward this outlet varies from 25 to 50 feet per mile. Near the center there are level spaces which, prior to any artificial drainage, were swamps or

marshes. It is probable that the basin was originally a lake, and that its present condition is the result of the gradual filling of the bed in the course of ages by detritus washed down from the adjacent mountains. The material of the basin is composed of boulders, gravel, sand, and soils of varying textures.

As the lake bed gradually filled, the torrents from the mountain canyons changed their courses from time to time, forming underground strata or waterways of coarser material, in which water percolates more freely than elsewhere. The material also lies in strata of varying permeability. In the adjacent mountains there are several canyons, in each of which a small stream generally flows in the dry season, and from each of which a large stream flows when there is a heavy rain upon its watershed. Of these the largest are Santa Ana river, at the easterly end, and Lytle creek, at the northwest. At the mouth of each canyon, where it emerges from the mountains, there is the usual debris cone of the coarser materials, such as boulders and gravel. In these cones a large portion of the water of the respective streams sinks and disappears.

The Santa Ana river and Lytle creek are the only streams that continue flowing on the surface as far as the outlet, and not infrequently in the dry season they also disappear before reaching it. The porous material filling the bed of the ancient lake is at least 1,000 feet in depth in some places. The outlet, it is believed, was originally a narrow gorge, which has become filled to the surface with material sufficiently impervious to water to serve as a dam and prevent the escape of water below the surface to any great extent. The whole mass of underlying strata composing this basin is saturated with water. The upper stratum is soil of a closer texture than the strata beneath. This overlying cap confines the water to the porous strata below, and the gradient of these formations causes a hydrostatic pressure therein. This pressure forces to the surface a large part of the water, beginning near Harlem springs, six miles from the outlet, and forms a stream known as Warm creek. This stream gradually increases in volume in its course toward the outlet, at which point, before any artificial depletion of the waters of the basin, there was ordinarily a flow amounting to 3,500 inches of water. A smaller creek of similar origin, called Town creek, is tributary to Warm creek. Both pass through the city of San Bernardino. As early as 1869 a well was sunk in the basin, in which the water rose to the surface and flowed out as a stream. From that time until the present it has been a common custom for persons owning land over this basin and desiring water to obtain the same by means of such

artesian wells. There are now between 2,000 and 3,000 of them, and by means thereof large quantities of water are taken from the underground supply. Owing to the large number of these wells the pressure in the strata has decreased, so that many of them do not flow over the surface, and pumps are used to raise the water.

Before proceeding to the specific questions presented, we deem it advisable to state some general principles of law on the subject of the waters of streams and artesian basins, which must be kept in mind in the consideration of the case.

[1] 1. The original rights to the waters of the streams in this state are those which by the common law were vested in the owners of the land abutting upon the stream, under the doctrine of riparian rights, as it is commonly termed. *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Hudson v. Dalley*, 156 Cal. 628, 105 Pac. 748; *Palmer v. R. R. Comm.*, 167 Cal. 165, 138 Pac. 997. Such rights are attached to the land as parcel thereof, and, of course, are private property. It is not necessary here to state the doctrine more fully, since there are no serious differences between the parties concerning it. We do not speak in this case of the public rights of navigation and fishery in navigable waters.

[2] It follows in consequence of this fact that all other present existing rights in the waters of streams have been acquired in some manner from the owners of such abutting lands, either by prescription, by contract, or by condemnation. Appropriation under the Civil Code is but another form of prescription, and the original rights of the abutting landowners are not divested thereby until the period of prescription has run in favor of the appropriator. This is a matter of some importance, for the effect of the Code provisions has been greatly misunderstood, especially by the general public and in public discussion. It is often erroneously assumed that such "appropriation" confers title immediately, as if by grant from the state. This is not true, except when it affects lands belonging to the state or the United States. *Palmer v. R. R. Com.*, 167 Cal. 172, 138 Pac. 997.

[3] When a stream runs over porous material saturated with water, and the underground waters support the stream, either by upward or lateral pressure, or feed it directly, persons having rights in the stream will be protected against a depletion thereof by adverse diversions of such underground waters if they are injured thereby. There may be a point of distance from the stream at which a diversion of such underground water will have so little effect on the stream that it will not be actionable. It is ordinarily a question for the trial court to determine whether or not this is true in the par-

ticular case before it. These matters are considered as applied to differing conditions in *Los Angeles v. Pomeroy*, 124 Cal. 617, 57 Pac. 585, *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. 115, *Hudson v. Dalley*, 156 Cal. 626, 105 Pac. 748, *McClintock v. Hudson*, 141 Cal. 279, 74 Pac. 849, and other cases, and will be adverted to herein in connection with the rights of Riverside Water Company.

The law of so-called "percolating" waters presents the principal questions in issue in this case. These waters are almost invariably found in permeable material of more or less density, in such as sand, gravel, and boulders intermixed, in which the water will move readily by the force of gravity. The original title to such water was in the owner of the land in which it is found, under the elementary rule that the title and ownership of land extends to the center of the earth, and includes everything within the cone having the superficial boundaries of the land for the base and the center of the earth for its vertex. The transfer of the land by the government to the individual passed this title, and gave the landowner the right to all the water therein. Originally in this state it was assumed that this title was absolute, and that each landowner could take out as much of such underground water as he pleased, regardless of the effect thereof on other lands, provided he took it on his own land, and without a malicious intent to injure others. But the immediate effect of such taking of water out of such land usually is to draw out the water from the surrounding land into the void or depression caused in the water plane in the land from which it is taken, and this, if continued, lowers the subsurface water plane in the vicinity thereof, and eventually, to a greater or less extent, throughout the basin in which the lands are situated. If there is artesian pressure therein, this will reduce the pressure. In this manner the owner of one tract of land in such basin could take such water from another tract without an actual trespass thereon, and thus an injury could be done which the owner of the other tract could not prevent by any lawful physical means, and a resort to the courts was necessary. In cases presenting these facts the original assumption of absolute ownership in such water was held untenable under the conditions existing in this state, and the doctrine that the respective rights of owners of land in the waters percolating or lying beneath the surface are reciprocal and correlative as to each other was adopted. *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Newport v. Temescal W. Co.*, 149 Cal. 535, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; *Burr v. Maclay, etc., Co.*, 154 Cal. 428, 98 Pac. 260; and other cases.

[4] With regard to such landowners, these cases hold that each owner of land overlying the same general underground supply of water may take such water on his own land for any beneficial use thereon, so long as such taking works no unreasonable injury to other land overlying such waters; that, if the natural supply is not sufficient for all such owners, each is entitled only to his reasonable proportion of the whole, and that each may apply to the courts to restrain an injurious and unreasonable taking by another, and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share.

[5] With respect to other parties who take for use on lands outside the watershed of the basin, it is now established by said decisions that no one, not even the owner of overlying land, has the right to take water out of the watershed for any purpose, if such taking will deprive of water any lands within the basin; that, while the owner of overlying land who does not use such water thereon, and whose land is not injured by an exportation of the water to outside lands, has no right to enjoin such exportation, he may nevertheless apply to the court for a judgment declaring his own right to be paramount, and that such exportation is subordinate to his own right, and enjoining the taker from making an adverse claim to the water, or from taking it in such quantities or in such a manner as to destroy or endanger the source of supply. *Burr v. MacLay, etc., Co.*, 154 Cal. 436, 98 Pac. 260. With respect to such cases—

"The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction."

2. The court finds, and the judgment declares (clause 7) that the city of San Bernardino has the right to take and use in its public water service 100 inches of water from the natural surface flow of Lytle creek; that it also has the right (clause 6) to take from the subterranean waters such quantity of water as may be necessary for useful purposes beneficial to the several parcels of land which it owns overlying the basin, including Lugo park and Meadowbrook park, subject to future regulation as to the quantity to be taken; that Meadowbrook park is riparian to Warm creek, and that the city of San Bernardino, as owner thereof, is entitled to use thereon so much of the water of said creek as may be reasonably required, subject to future regulation as to quantity (clause 14).

Also (clause 10) that the defendant River-

side Water Company, subject to prior rights of others to take water from Warm creek above its own intake, is entitled to take perpetually the entire natural flow of the creek at its point of intake, except as such flow may be diminished by water rightfully taken from the basin by the wells of the other parties to the action; that when said natural flow into its canal, at the intake thereof, during the months from April to October, inclusive, falls below an average aggregate of 2,710 inches, said company, while taking the whole flow of the creek, may also take from said basin into said canal, by means of wells, enough additional water to maintain an average aggregate flow of 2,710 inches therein, but, in effect, that all of the water so taken by wells must be used, so far as necessary, for irrigation and domestic use on certain 10,387.35 acres of land outside the basin, but not exceeding for use in irrigation, at any time, the quantity required to irrigate the crops and trees growing on said lands, according to a certain schedule of quantities allowed per acre for various kinds of crops and trees stated in the findings and judgment. It is entitled to take for these purposes all the natural flow of the creek when it exceeds 2,710 inches. It is also entitled (clause 15) to the reasonable use of the waters of Warm creek on certain lands riparian thereto which it owns, subject to future regulation by the court.

The court finds and adjudges (clause 11) that the city of Riverside is entitled to take from the basin for municipal uses and for its inhabitants an annual average flow of 282 inches. It is declared that the word "inch" when referring to water, is used in the findings and judgment to designate a continuous flow equal to "one-fiftieth of a cubic foot of water per second of time." For the sake of brevity, we use the word with the same meaning in this opinion.

3. In so far as the above-stated provisions of the judgment purport to declare the present rights of the three parties to the action to take and use the water in question away from the lands in which they lie, they do not appear to be injurious to any of them under the conditions found and adjudged to be now existing. Each party, as will be hereinafter more fully shown, is claiming such water solely as an appropriator of water necessary to supply a public use of which it is the administrator. The court finds and the judgment declares that, up to the time of the trial, there was at all times more water coming into the artesian basin, and included in the surface streams and underground waters thereof, than was required to supply all the needs of all the parties, and all the rightful diversions of all other parties therefrom. While this condition continues there can be no unreasonable injury to any one from the continued

taking in quantities no greater than has been taken heretofore. In dry years they might be compelled by necessity to bore more wells, or to put in more pumps, or substitute more powerful ones, in order to obtain the supply now in use, but this must be considered no more than a reasonable requirement, at least under the conditions existing in that part of the state, so long as this process does not result in using quantities of water exceeding the quantity that would be restored to the basin, in excess of the use, during succeeding wet years.

For these reasons we do not deem it necessary to discuss extensively the objections of any of the parties to the judgment so far as it operates only on the aforesaid existing rights and relates to existing conditions. In other parts of the judgment the court below undertook to provide for future conditions and contingencies, to authorize further and additional takings of water from the basin in the future as the needs of future conditions might require, and to establish a mode for the regulation and administration of the waters of the basin by the court by proceedings in this action after judgment. In our opinion, these parts of the judgment are so far erroneous that the entire judgment must be reversed, and the cause remanded for further proceedings. As will hereinafter be shown, the requirement that the Riverside Water Company must deliver the water it takes from the basin by wells exclusively to the 10,387.35 acres of land to which it has been heretofore delivered, is also erroneous. We proceed to the considerations of the provisions last mentioned.

4. The defendants earnestly object to the provisions of the judgment regarding the existence of a "surplus" or "deficiency" as therein defined. Clause 16 thereof defines the words thus:

"The word 'surplus' used in this judgment means, and for all purposes of this judgment shall be deemed to mean, that condition of the San Bernardino artesian basin which exists when the average annual feed to the basin or water crop, that is, all water which rightfully and properly reaches and replenishes the basin, exceeds, for any year or period of years, the aggregate of all the artificial rightful drafts, together with all the natural drafts, made on said basin during the same period; and a 'deficiency,' as that word is used in this judgment, exists during such times as there is not a surplus, as herein defined."

It is further adjudged (clause 13) that there now exists in said basin a "surplus" of water, as thus defined; and (clause 12) that, while any such surplus exists, and so long as it continues, each of the parties may take for any beneficial purpose from said basin by wells "such quantities of water, even though in excess of the quantities hereinbefore specified, as such parties may deem reasonably necessary or proper, but not for

waste," except that the Riverside Water Company must not take water therefrom by wells when it is not taking all of the natural flow of Warm creek. This provision is declared to be effective, "anything hereinbefore to the contrary notwithstanding."

It seems clear that, if the surplus exists, as both findings and judgment declare, and while it exists, the taking of additional water by either party can cause no substantial injury to either of the other parties, so far as their respective rights as owners of overlying lands, or as owners of the adjudged rights to take by means of wells the stated quantities aforesaid, are concerned, provided such additional taking is not allowed by continued use to ripen into a right superior or equal to the rights so adjudged, or to their rights as owners of overlying lands. The judgment contains other provisions which we think must be so construed as to prevent either party from claiming that a continued taking of such additional water shall give any right superior or equal to the rights as owners of overlying land, or to the present rights to take by means of wells. The judgment reserves in the court jurisdiction to determine, at any time, and from time to time, of its own motion, or on motion of either party, whether there is or is not a surplus, and thereupon to make such order or judgment as may be appropriate as to the quantity of water to be taken from the basin, or as to the use to which it may be applied, by any party or parties to the action, during such times as there shall not be a surplus in the basin. Neither party could, by such additional taking or use, obtain any right that would avail against this reserved power of the court, or that could be set up in opposition to any order the court should make in the proper exercise of that power. It should, however, have made an express declaration to that effect, instead of providing it by implication arising from the reservation of power. The case, in this respect, falls within the doctrine stated in *Burr v. Maclay R. W. Co.*, as aforesaid.

The rights of the Riverside Water Company to the natural flow of Warm creek are not fully protected by these provisions. The findings show that it has rights relating to the waters of said creek of two sorts, both of which are perhaps prior and paramount to the rights of the other parties hereto to take water from said basin for public use. The first is the right to take the entire natural flow of the creek. The second arises from the depletion of the natural flow by the taking of water from the basin by the other parties hereto and others, subsequent to the inception of its own right in the stream, and is the right to take, by means of wells bored in the basin, enough water to augment the depleted natural flow, so as to produce in its canal a total flow of 2,710 inch-

es during specified months. These rights should be declared to be paramount to the rights of the other parties hereto if the findings justify that conclusion. The judgment erroneously assumes, apparently, as matter of law, that the respective rights of the parties to take water for public use are coequal. See on this point, post, subd. 7. While the surplus continues, the condition of the respective parties as to their right to take water from the basin or public use is substantially the same as that of several appropriators from a surface stream having more than enough water for all. No injunction should issue against the taking of water while the supply is ample for all. But the respective priorities of each water right should be adjudged, so that, if in the future the supply falls below the quantity necessary for all, he who has the prior right may have his preferred right protected.

We are of the opinion that the aforesaid definition of the word "surplus" prescribes an impractical and unworkable plan for the determination of the question, whether there is or is not a surplus. The court must first ascertain "the average annual feed" to the basin from water "rightfully and properly" reaching it and "replenishing" it, for any year or period of years. This obviously refers to the "average annual" rainfall on the watershed, and to the part thereof which reaches and replenishes the basin. The findings show the difficulties attending this inquiry. The annual rainfall has varied from 37.51 inches in 1883-84 to 7.49 inches in 1898-99. The average annual rainfall at San Bernardino from July 1, 1871, to July 1, 1916, was 16.2 inches per year. From 1893-94 to 1899-1900, the yearly average was only 11.09 inches. The water which sinks into the debris cones and percolates underground toward the outlet moves at the rate of only 2 miles in a year, and it is several years before it reaches the points where Warm creek rises, and where the wells of the parties are located. Hence neither the rain of a wet year nor the decrease in a dry year becomes manifest in the water level at Warm creek and at the wells in question for several years afterward.

There are no practical means of ascertaining the total annual rainfall on the watershed. No records are kept, except in San Bernardino and a few other places. We may judicially take knowledge that the amount varies greatly in different parts of the watershed; that in the high mountains it will usually greatly exceed the fall in the basin; that cloudbursts may occur in one of the canyons when there is a mere sprinkle in other parts of the range, and that, even in a general storm, the rain may be heavy at one place and light in others without any cause except the course of the winds, the conformation of the mountains, and the like,

and that a slight change in the direction of the wind will materially affect the rainfall in the different places affected. During the period from 1881 to 1916, the rainfall at San Bernardino was 16.41 inches, and that at Riverside 11.02 inches. The two cities are about 20 miles apart, on the same general plateau, and with about one hundred feet difference in elevation. To ascertain with even approximate accuracy the rainfall on the entire watershed for any year a large number of additional daily records must be kept, and great expense must be incurred therefor.

The actual increase to the waters of the basin in any one year cannot be measured by the rainfall for that year. During a heavy general rain a large proportion of the precipitation flows down from the canyons in the channels of the surface streams and through the outlet of the basin without ever sinking below the surface. It is impossible to measure these flood waters. Such a flood may constitute the major portion of the seasonal rainfall. In another season the rains may come more regularly and evenly, but in the same quantity, so that a very large portion of it sinks into the basin, and none runs off. In the drier seasons the rain may practically all evaporate, and none of the waters thereof reach the basin. The amount of such evaporation cannot be measured. It will vary from time to time, according to the humidity or aridity of the atmosphere, and the amount of sunshine.

From these facts, all of which appear in the findings, it is apparent that the first factor in the computation of the surplus, the amount of water rightfully and properly reaching the basin, cannot be ascertained.

The other factor, the "artificial rightful drafts" upon the basin, could not in any event be computed or ascertained without extraordinary expense. The average amounts taken by the three parties to this action are ascertained and stated in the findings. But these comprise much less than half of the drafts that may be "rightful." Other companies and persons take and carry away to outside lands about 6,000 inches. In addition to this exportation, between 2,000 and 3,000 wells are operated by owners of land in the basin to obtain water for use upon their respective tracts of land. None of these exporters and users is a party to this action. The amount thus taken for overlying lands would naturally vary greatly from day to day and from time to time. There is no means of compelling the persons concerned to keep accounts of the quantities taken. The parties to this action have no right to enter the premises of such users to measure the water taken. The ascertainment of the amounts taken in any one year, or at all, is, therefore, practically impossible for either party.

If such deficiency were actually ascer-

tained, and an order were made apportioning to each party its proper reduction on account thereof, it would not prevent the exhaustion of the water in the basin. The order would bind no one except the three parties to this action. Other persons are taking from the basin, presumably by right, a much larger quantity of water than is taken by the parties. The order would have no effect upon any of them. If their needs were greater, as would be probable in a dry year, they would naturally take more than before, and it is certain they would take no less. Thus the exploitation of the water of the basin would proceed, and its exhaustion would ensue, from the excessive use by other persons, while the respective parties would be restrained by this order. If such exploitation continued for 5 years uninterruptedly under claim of right, with the knowledge of the parties hereto and to their injury, such adverse use would ripen into a right to do so perpetually as against these parties. Civ. Code, § 1007; *Katz v. Walkinshaw*, 141 Cal. 135, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Burr v. Maclay, etc., Co.*, 254 Cal. 436, 98 Pac. 260; *Barton v. Riverside W. Co.*, 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331. Thus it appears not only that such an order would be practically ineffective, but also that it would endanger the rights of all the parties.

5. In addition to the above-stated rights adjudged in favor of San Bernardino, the judgment declares (clause 8) that said city is entitled to take perpetually from the basin by means of wells, for municipal uses and for the use of its inhabitants, quantities of water which, together with the quantity it obtains from Lytle creek, will be sufficient to supply to each inhabitant an average of 200 gallons daily, and also to irrigate crops and trees grown on privately owned lands within the city at the rate of 1 inch to every 4.5 acres in citrus fruits; 1 inch to every 2.66 acres in alfalfa and garden crops; 1 inch to every 10 acres in grain; and 1 inch to every 6 acres in deciduous fruits, all to be measured at the point of delivery on the land.

This provision is objectionable, on the ground that it is uncertain in regard to the quantity of water to which the right is given thereby; that it "fails to attain the certainty necessary to an estoppel" upon a part of "the subject of the litigation." *Riverside W. Co. v. Sargent*, 112 Cal. 233, 44 Pac. 560. In that case the judgment of the lower court was that the defendant had the right to take water by a certain dam and ditch "to the extent of the full capacity of said ditch." This, it was said, was too uncertain, because of the fact that the carrying capacity of the ditch, its size, and grade, was not shown by the record. In the present case the findings show the present population of San

Bernardino, but there are no data from which to ascertain the number of acres of land therein grown in the specified crops from time to time. The population is expected to increase, and the area of such land will fluctuate materially from year to year. The object of the provision evidently was to provide for more water in the future, as the need increased. It is impossible, for these reasons, to ascertain from anything in the findings or judgment the extent of such increase, and hence the amount of water the plaintiff may be entitled to under this clause cannot be determined.

There is no finding expressly to the effect that said city has ever acquired the right, as against the defendants, to take additional quantities of water from the artesian basin by means of wells, except such as it may have by reason of its being the owner of lands overlying the basin for use on such land, which, of course, does not include the right to take it for public use. The findings and judgment suggest that the theory of the court below was that the fact that the city itself was situated within the basin gave it the right to take water therefrom for any public use which, as a municipality, it has the power to administer. As this proposition is also involved in the consideration of the further right given by clause 9 of the judgment treated in the next following subdivision of this opinion, we will not further discuss it here.

[8] 6. The next objection of the defendants is to clause 9 of the judgment, declaring that the city of San Bernardino is entitled to take perpetually from the basin, if required for any reasonable beneficial use, as much water as said city, as an owner of land in the city overlying the basin, and all private owners of such land within the city, as such owners of overlying land, shall be entitled, in the aggregate, to take from the basin; such taking by the city, however, to be subject to the supervision of the court both as to the quantity taken and as to the uses to which it is to be applied.

In support of this clause, and also of clause 13 aforesaid, allowing water to be taken when a surplus exists without limit as to quantity, the plaintiff advances the theory that the underlying waters of this basin are by law subject to public use for the common benefit of the overlying lands and of the inhabitants of the basin, or have become so by the acts of the parties interested therein, that the part of the waters pertaining to the lands within the city is set apart by law for the common public use of the owners of the land and other persons in the city, that the city has in some manner become the administrator of this public or common use in place of the landowners, and has become substituted to their individual rights for the benefit of all, and that, in that character, it may

at any time take from any part of the basin, whether the place of taking be inside or outside of the city, so much of the waters thereof as may then be necessary for such public use, not exceeding the aggregate quantity originally pertaining to the lands within the city. The court below, it is claimed, held to some theory of this nature, and framed these provisions in accordance therewith.

This theory is refuted by what we have already said. The ownership of the land, at common law, included all that lay within and under it. A grant of land by public authority to an individual without reservation carried with it title to all water lying therein, and vested in the grantee the absolute title to the water therein, as much so as to the earth and rocks and the trees growing thereon, subject only to the correlative rights of other landowners in such waters, under the maxim of the Civil Code that "one must so use his own rights as not to infringe upon the rights of another." Sec. 3514. The water was part of the land, and it was no more public property, or subject to public or common use, than was the land. This was true even under the Mexican law. *Lux v. Haggin*, 69 Cal. 331, 4 Pac. 919, 10 Pac. 674. We mention this because the land within the city of San Bernardino is a part of a Mexican grant.

The water in all these lands, therefore, is private property, and will remain private property until it is taken from the owners of the land and devoted to public use. It does not appear that this has ever been done, except in so far as the taking of waters of the basin by the plaintiff and defendants, respectively, by means of wells bored in land outside of the city, has drawn from the waters underlying lands within the city. This may have happened, but none of the owners of the land, so far as appears, have ever conveyed or transferred to any of the parties the right to take such water in that or any other manner. So far as such right has been acquired from them by prescription, it extends only to the quantity heretofore taken, and does not include the taking of an additional quantity in the future, and the dedication to public use of that which has been taken has not been made by such landowners, but by the party who has taken the water from them.

Neither the city of San Bernardino, or either of the defendants, aside from their respective rights acquired by prescription and by the estoppel against interference with an established public use under the doctrine stated in *Barton v. Riverside W. Co.*, 155 Cal. 515, 101 Pac. 790, 23 L. R. A. (N. S.) 331, and *Miller & Lux v. Enterprise, etc., Co.*, 169 Cal. 425, 147 Pac. 567, has ever taken any steps to acquire rights to take water from the basin except by acquiring tracts of land therein and boring wells in such land. The pur-

chase of the land conferred no water right upon the buyer except the right to take water for use on the land itself. The lands acquired by San Bernardino for this purpose, and the only land in which it has bored wells for such water, all lie outside the city. Consequently the acquisition of the land conferred no title to the rights of the owners of overlying lands within the city to take water for use on their respective tracts of land therein. It is suggested that the fact that the city issued bonds to raise money with which to buy these outside lands, and install its works to take water therefrom for public use in the city, and that the electors of the city approved the bond issue by a two-thirds vote at an election held for that purpose, operated as a transfer to the city by each owner of land within the city of the right to take the water for public use which he was entitled, as such landowner, to take from the basin, and as an agreement that it might be taken from the basin by means of wells on any land outside the city. We can see no connection whatever between the act of voting and the result claimed for it. No landowner could vote away another's right. There is nothing to show how many, if any, or who, of the landowners voted. The proceedings for the election presented no such question to the voters for decision. It is evident that the proceedings and vote are utterly without significance.

Our conclusion is that the several water rights in the basin pertaining to the lands in the city as overlying lands are not by law, and have not become, in fact, subject to public use by the city, or a part of the water rights which it owns.

7. Plaintiff contends that the rights of each of the parties to take water from the basin by wells are equal. This contention is based on the fact found by the court that there always has been, and still is, sufficient water in the basin to supply the parties and all others who take said waters with all the water they have heretofore taken. From this it is argued that neither party has injured any of the others by the diversion and use of such waters, that there has been no invasion by either of any right to the use of the waters by the others, and hence, that the respective uses have not been adverse as to each other, and the statute of limitations did not begin to run so as to start the period of prescription. As authority for this proposition they quote from *Anaheim, etc., Co. v. Semi-Tropic, etc., Co.*, 64 Cal. 192, 30 Pac. 626, the following passage:

"It is very clear that, while there was sufficient water flowing in the river to supply the wants and demands of all the parties, its use by one could not be an invasion of any right of any other; and as the court below found, as a fact, that, until within a year or two prior to the commencement of the action, there was sufficient water flowing in the river to supply

the wants and demands of all the parties, it is plain that the plaintiffs as against the owners of the Santiago Rancho have acquired no right by prescription."

They also cite to the same point *Alta, etc., Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217, and *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883. In the *Anaheim Case* both parties were exercising their rights to use the water of the river on riparian land. In such case the use by one is not adverse to the other unless he is using more than his share, to the detriment of the other. In the *Alta Company Case* the remarks on the subject are obiter. The point decided was that one who trespasses on land of another, and, while so doing, cultivates the land and irrigates it from a stream on which it abuts, does not thereby acquire any right to the water apart from the land, so that, when he is compelled to yield possession to the true owner, the prior use of the water by such trespasser does not give him a right thereto which he can convey to a third person.

In *Faulkner v. Rondoni*, the plaintiff had acquired his water right prior to any diversion of use of the water of the stream by the defendant. The defendant had, however, diverted and used the water continuously for a period of 5 years before the beginning of the action of plaintiff to quiet his title. There was enough water in the stream for both all the time, and the use by the defendant had not in any way interfered with the use by the plaintiff. The plaintiff's use was prior in time and, of course, it could not have been divested by a subsequent use which in no way affected his enjoyment thereof. The priority of the rights of either party in such cases could not become an important question until there was an interference by one of them with the use of the other. When that occurs the principle stated in section 1414 of the Civil Code, that "as between appropriators, the one first in time is the first in right," becomes applicable. It is a principle which applies as well to ordinary prescriptive rights as to rights of appropriation under the Code. *Hill v. King*, 8 Cal. 338; *Butte Co. v. Vaughn*, 11 Cal. 153, 154, 70 Am. Dec. 769; *Davis v. Gale*, 32 Cal. 33, 91 Am. Dec. 554.

[7] We understand the true rule to be that, when a conflict arises between two appropriators of water, and their rights are otherwise equal, the prior appropriator will prevail so far as the conflict extends. It necessarily follows that in an action to quiet his title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators.

We do not hold that the findings show that the diversions of water by the respective parties have not interfered with the diversion and use of water by the other parties.

On the contrary, the facts found indicate that the several diversions have interfered with each other. We do not take up this question, but leave the extent and effect of the interferences from the facts found, as well as the question of priorities, for the consideration of the trial court when the case is remanded for further proceedings.

[8] 8. As above indicated, the judgment appears to declare that the water to be taken by the Riverside Water Company from its wells bored in the basin cannot be used except for the irrigation of the particular lands to which it has been heretofore supplied, and must not exceed the quantity necessary to irrigate the same according to the above-mentioned schedule of quantities per acre for specified crops or trees thereon. It is at least susceptible of that construction. If so intended, it is to that extent contrary to law. It has long been settled in this state with regard to water rights by appropriation that the appropriator may change the place of use thereof, or the character of the use, without affecting his right to take it, and that other persons interested in the source from which it comes have no right to object to such changes. *Maeris v. Bicknell*, 7 Cal. 263, 68 Am. Dec. 257; *Davis v. Gale*, 32 Cal. 33, 91 Am. Dec. 554; *Ramelli v. Irish*, 96 Cal. 217, 31 Pac. 41. It is also settled that such appropriator may change the place from whence the water is taken out of the source, provided others are not injured by such change. *Ramelli v. Irish*, supra; *Barton v. Riverside W. Co.*, 155 Cal. 517, 101 Pac. 790, 23 L. R. A. (N. S.) 331.

In *Barton v. Riverside*, this doctrine was applied to the waters of this artesian basin. The reasons for the right to make the above changes are that, by his taking and devoting water to a beneficial use, the appropriator has acquired the right to take the quantity which he beneficially uses, as against others having no superior rights in the source, and that neither the particular place of use, the character of the use, nor the place of taking is a necessary factor in such acquisition. The change of place of taking becomes wrongful only in the event that others are injured thereby. These reasons are as well applicable to the taking of underground waters of any kind as to diversions from a surface stream, and we perceive no reason why the same rule should not apply equally to both.

9. We think it sufficiently appears from what we have already said that, with respect to the taking of water from the basin for the public uses which they respectively serve, the status of each of the parties hereto is that of an appropriator only. For that purpose neither party obtains any right to additional water by reason of its ownership of land within the basin, for the water rights arising from such ownership pertain exclu-

sively to the land, and are not devoted to public use by reason of such ownership. Whenever either party takes such water from the land and delivers it into its reservoirs, canals, or mains as a part of its water held for the public use, at that moment it becomes a mere appropriator of that water, and its rights thereto are no greater, as against the other parties, than would be the case if the water was taken out of land which it did not own.

As heretofore suggested, the court below was apparently of the opinion that the waters of this basin were by law subject to public use. Possibly in this connection it may have considered the legislative declaration on the subject in 1911, amending section 1410 of the Civil Code. The section, as amended, opens with this declaration:

"All water or the use of water within the state of California is the property of the people of the state of California."

Taken literally, this would include all water in the state privately owned, and that pertaining to lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use. See *Palmer v. R. R. Com.*, 167 Cal. 175, 138 Pac. 997. The Constitution expressly forbids it. Article 1, § 14. The water that pertained to or was contained in the lands of the state was already the property of the people when this amendment was adopted. The statute was without effect on any other property.

10. We do not attempt to declare from the findings what the respective rights of the several parties are to the waters in the basin, nor what judgment should be given with regard thereto. The findings state the facts at great length, and give many details which are evidentiary in effect and which might reasonably warrant the drawing of varying inferences therefrom. They are more comparable to a bill of exceptions summarizing the evidence, as such bills should, than to findings of ultimate facts. The determination of the material and controlling facts from such a mass of evidentiary facts is more properly the work of a trial court than of an appellate court. Furthermore, our conclusions upon the points we have treated are in so many particulars opposed to the apparent views of the learned judge who made the findings and rendered the judgment that we are by no means certain that additional evidence may not be necessary for the intelligent decision of some of the questions

involved in the case and presented by the facts found.

The briefs contain 1700 printed pages, and they discuss many minor points which we have not noticed. We do not consider them essential to any of the points we have decided, nor necessary for the guidance of the trial court in future proceedings. Our conclusions upon the more important questions may be summarized as follows:

[8] (a) With respect to the waters taken from the artesian basin for public use, each party stands in the character of an appropriator, and its rights therein are to be determined by the law relating to appropriators, and are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the landowner in water underlying his land.

(b) In this action the court should not undertake to provide for the future apportionment of the waters of the artesian basin or for the ascertainment of a surplus or deficiency, but should confine itself to the adjudication of the existing rights and priorities of the parties to the action in the waters involved. The judgment should state the quantity of water to which each party is entitled, and should not leave such quantity indefinite or dependent on future needs, events, or conditions.

(c) The judgment should not make any declaration of the right of any party to take in the future any water to which it has no present right.

(d) The plaintiff is not substituted to nor entitled to use the water or water rights of the owners of land within its limits unless it has acquired such right directly or indirectly from such landowners, and then only for use on the particular land of such owner.

(e) The measure of a water right acquired by taking and using the water extends only to the quantity actually theretofore applied to beneficial uses, and includes no right to take additional water in the future.

The judgment is reversed, and the cause remanded, with directions to the court below to make new conclusions of law and render a new judgment on the findings, in accordance with this opinion, and, if necessary to do so, to take additional evidence relating to, and make an additional finding upon, any point involved in the case, or, if the parties agree thereto, to try the entire case anew. Neither party shall recover its costs of appeal herein.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

(185 Cal. 763)

In re THOMPSON'S ESTATE. (L. A. 6354.)

(Supreme Court of California. June 1, 1921.
Rehearing Denied June 30, 1921.)

1. Wills \Leftarrow 293(6)—Person to whom copy of will was sent by testatrix cannot testify to contents.

Under Code Civ. Proc. § 1339, requiring the provisions of a lost or destroyed will to be proved by two credible witnesses where a testatrix sent a copy of her will to her sister stating that it was her last will, the sister could not testify to the contents of the will, but only to the hearsay declaration of the testatrix. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

2. Wills \Leftarrow 297(3) — Declarations of decedent cannot take place of witness in proving lost or destroyed will.

Under Code Civ. Proc. § 1339, providing that no will shall be proved as a lost or destroyed will unless its provisions are clearly and distinctly proved by at least two credible witnesses, declarations of the decedent cannot take the place of one of the two witnesses. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

3. Wills \Leftarrow 293(4) — Evidence of contents of revoked will admissible to show effect on earlier will though proved by only one witness.

Under Civ. Code, § 1297, providing that the revocation of a revoked will does not revive the earlier will unless such was the intention where a lost or destroyed will containing a revoking clause was revoked by cancellation or otherwise, evidence of its contents may be considered to determine its effect on an earlier will, though its contents are established by only one witness. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

4. Wills \Leftarrow 306 — Evidence held to support finding that revoking will was in existence when testatrix died.

Evidence held sufficient to warrant a finding that a lost or destroyed will relied on as revoking an earlier will was still in existence at the time of the decedent's death. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

5. Wills \Leftarrow 306—Contents of lost or destroyed will cannot be proved to establish revocation of earlier will except by two witnesses.

Under Code Civ. Proc. § 1339, relative to the proof of lost or destroyed wills, and notwithstanding Civ. Code, § 1297, providing that the revocation of a revoking will does not revive the first will, two witnesses are required to establish the contents of a lost or destroyed will which was unrevoked at the date of the testator's death for the purpose of showing revocation of an earlier will. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

6. Wills \Leftarrow 470—To be construed as a whole.

A will should be construed as a whole, and the intention of the testator derived from the whole instrument, and not from a single clause

thereof. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

7. Wills \Leftarrow 290—That revoking clause was in lost will and effective must be proved.

For a revoking clause in a lost and unrevoked will to be effective as such, it must be established that such clause was in the will and thus an effective part of the will. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

8. Wills \Leftarrow 181—Revoking clause is part of will.

The revoking clause of a will is a part of the will and is to be treated as such, and not as a separate instrument revoking the will executed under Civ. Code, § 1292. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

9. Wills \Leftarrow 296, 312 — Proper to try validity of two alleged wills at the same time; evidence as to revoking clause in lost will admissible.

In probate proceedings it was a proper course to try the validity of two alleged wills, the latest of which had been lost or destroyed at the same time, and evidence as to the revoking clause in the lost will was admissible, but its effect on the earlier will must be determined in view of the admissibility of the latter will to probate as a will. (Per Wilbur and Lennon, JJ., and Angellotti, C. J.)

10. Wills \Leftarrow 180—Revoking clause in lost will held not effective unless will effective.

Conceding that the contents of a will containing a revoking clause, though lost or destroyed and not susceptible of proof as a will by a single witness, can be established so far as it revokes former wills by one competent witness, the whole contents and purpose of the instrument must be considered in determining its effect, and where the lost will was practically identical with the first and amounted to little more than a republication, the revoking clause must be regarded as intended to be effective only on condition that the will becomes effective. (Per Sloane, J.)

Olney, Shaw, and Lawlor, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Proceeding to probate the will of Augusta Thompson. From a judgment admitting the last of two alleged wills to probate, the contestant appeals. Reversed, with directions.

Rehearing denied; Shaw, Lawlor, and Olney, JJ., dissenting.

Jas. W. Bell, of Los Angeles, for appellant.

L. G. Susemihl, of Santa Monica, and Samuel J. Crawford, of Los Angeles, for respondent.

WILBUR, J. Respondent, the sister of the deceased, filed a will dated May 13, 1908, for probate. The surviving husband, the appellant, filed a contest of this will on the ground that the will had been revoked by a later will executed November 25, 1916, which will

he alleged had been destroyed without the intention of reviving the former will. Thereupon the sister filed a petition for the admission to probate of the will of 1916 as a lost or destroyed will. She also answered the contest of the will of 1908 by denying that the will of 1916 had been destroyed with the intention to revoke the same. Appellant filed no formal contest to the will of November 25, 1916, but he appeared at the time of the hearing, presented evidence, and claimed that the existence of the lost will was not established by two witnesses, and opposed its probate on that ground.

The will of 1916 appointed the respondent executrix without bonds and left all the property of the testatrix to the respondent except a bequest of \$5 to the appellant, another \$5 to a brother of testatrix, and one of \$5 to a half-brother. The will also made certain provisions applicable only in the event that respondent predeceased her, which, because the sister survived the deceased, are immaterial. By the will of 1908 the respondent was made executrix thereof without bonds, and everything was given to the respondent except \$1 bequeathed to the appellant.

At the time of the trial the respondent contended that the will of 1916 could not be proved because there were not two witnesses to prove its contents as required by section 1339, Code of Civil Procedure. Respondent offered proof of the due execution of the will of 1908, and thereupon rested. The court took the position that the second petition of respondent for the probate of the will of 1916 was in effect an amendment of the original petition for the probate of the will of 1908, and therefore announced that the will of 1908 could not be admitted to probate.

Respondent thereupon stated her position thus:

"We are claiming under the first will absolutely, if your honor please. It cannot prejudice the contestant's right for me to say that when we submitted the copy, so-called copy, of what we thought we might be able to establish in accordance with the law of a lost or destroyed will, that we believed that both witnesses to the second will were still alive, and that we could prove it under the statute that requires a lost or destroyed will to be proved by two credible witnesses. We filed that and made that similar statement to his honor Judge Rives on the hearing of this first will."

[1,2] The court took the position that, if there was a later will, whether its terms could be proven or not, the first will was thereby revoked, and directed respondent to proceed with proof of the lost will. Respondent's counsel protested that they desired to rest with proof of the first will, and proceeded under protest to call B. G. Hurlburt, stating:

"There is only one witness we know of that could prove this will, and we will call that gen-

tleman. That is the only witness we have any knowledge of."

This witness testified to the contents and the due execution of the will of 1916. The only other witness testifying to the contents of the will of 1916 was the respondent, who was examined on that subject by the court. To this testimony respondent's attorney objected as follows:

"I would like to object to her positive testimony that she received a copy on the ground that it is hearsay and not the best evidence."

The objection being overruled, the court elicited the testimony of the witness to the effect that respondent had received a letter at Portland, Or., in 1916, from the testatrix inclosing a copy of the will of 1916, and stating that it was her last will. The letter itself had been destroyed. The statement that the inclosed copy of a will was her last will was merely a declaration of the testatrix so that the question presented here resolves itself into this: Can a lost or destroyed will be proved by the testimony of one witness who saw the original will and by evidence of the declarations of the deceased as to its contents? The fact that the decedent accompanied her declaration by a carbon copy of the will did not place the recipient thereof in a position to testify of her own knowledge as to the contents of the lost or destroyed will, which she had never seen. Her testimony would merely establish the hearsay declaration of the deceased. In this state the statute (section 1339, Code Civ. Proc.) requires two credible witnesses, and the testimony of the declarations of the decedent cannot supply the place of one of these witnesses. This was held by the Supreme Court of the state of Washington, under a similar statute, in *Estate of Needham*, 70 Wash. 229, 126 Pac. 429, and, as we agree with that decision the order admitting the will of 1916 to probate must be reversed. The will of 1916 should have been denied probate.

[3] The next question to be considered is whether or not the evidence of one witness to the due execution of the will of 1916, and to its contents is sufficient to show a revocation of the will of 1908, and thus to show that the will of 1908 was not the last will of the decedent, and hence, as the will of 1916 cannot be effectively established by probate, that the decedent died intestate. If the will of 1916 had been revoked by cancellation or otherwise the evidence of one witness to the contents of the will of 1916 would be sufficient to establish that it contained a revoking clause; for section 1297, Civil Code, declares that the revocation of a revoking will does not revive the first will "unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will." No doubt can be entertained that, where the second testamentary act is

revoked, evidence of the contents of the revoked will may be considered to determine the effect of such revocation upon an earlier will still in existence.

This is not a case where a will containing a revoking clause has been destroyed *animo revocandi*.

[4] The trial court found that the will of 1916 was in existence at the time of the death of the testatrix and was her last will. The finding is attacked by the appellant as not supported by the evidence. This finding is sustained solely by the declaration of the deceased and by the circumstances in the case. But the evidence is sufficient. This evidence is as follows: During her last illness the testatrix frequently stated to her nurse that she had left a will and that her papers were with her attorney, B. G. Hurlburt, and confirmed this statement only a few hours before her death on December 8, 1918. She further stated she desired her sister to have everything and did not desire her husband to have anything. The respondent testified that repeatedly between the date of the execution of the will up to July, 1918, the testatrix wrote to her stating that she wanted respondent to have everything and repeatedly referred to the will as still in existence.

As we have held in the *Estate of Sweetman*, 195 Pac. 918, decided February, 1921, the declarations of the deceased in connection with the other testimony were sufficient to sustain the findings of the trial court that the will was in existence at the time of decedent's death.

[5] The appellant, while contending that the evidence is insufficient to probate the will of 1916 as the last will and testament of the deceased, a contention which we have sustained, also contends that the proof of one witness that it contained a revoking clause is sufficient to establish the revocation of the will of 1908 by the will of 1916, although the latter cannot be probated as her will, and thus, by the failure to prove the will of 1916 as a will, and by its proof as an effective revocation of the will of 1908, to establish her intestacy. This position requires us to construe the law as to the proof of lost and destroyed wills and to determine what is meant by this phrase in section 1339, Code of Civil Procedure:

*"No will shall be proved as a lost or destroyed will * * * unless its provisions are clearly and distinctly proved by at least two credible witnesses."* (Italics ours.)

To state the proposition in somewhat different terms: Can a part of a lost or destroyed will be proved by one witness, i. e., the revoking clause, when the statute expressly forbids proving a lost or destroyed will by less than two credible witnesses? Or, to state the matter in terms more directly applicable to this case: Can the revoking clause of an unrevoked, lost, or destroyed

will be proved by one witness and given effect, when the statute (section 1339, Code Civ. Proc.) requires two witnesses to prove such a will? This question would seem to carry its own answer because of the axiom that the whole is the sum of its parts, unless the revoking clause in a will is in legal effect a thing apart from the will, as distinct as, and equivalent in legal effect to, a revocation by destruction, by cancellation or by an instrument executed with the formalities of a will (Civ. Code, § 1292), which, no doubt, operates *eo instanti*.

[6] Passing for the moment the construction of section 1297, Civil Code, as to the effect of the revocation of a will containing a revoking clause, a point to which we will recur, it is a violation of the most fundamental principle for the construction of a will to separate one clause from its context and give effect thereto regardless of the balance of the will. It is elementary that a will should be construed as a whole, and that the intention of the testator is to be derived from the whole instrument, and not from a single clause thereof.

In dealing with a revoking clause of a revoked will, we are dealing with a clause which has itself been revoked except as saved by the express statute on that particular subject (section 1297, Civ. Code), but in dealing with the revoking clause of an unrevoked will it has force because it is unrevoked, and a part of the last will of the deceased.

We will examine some of the authorities dealing with the subject of the revoking clause in a will with special reference to its provability, but before doing so it is well to remember that frequently the revoking clause of a will is the only clause capable of proof because it is the only portion clearly recollected by witnesses, and that some of the cases deal with such a situation. It is well to remember also that at common law and in most states there is no arbitrary rule with reference to the measure of proof required to establish a lost will, and hence the measure of proof for a revoking clause of such a will would be the same whether offered for probate or to defeat a prior will, while the contention here is that the will of 1916 is sufficiently proved for the latter, but not for the former, purpose. It is evident that general statements in opinions dealing with the subject, or even rules laid down with reference to the effect of a revoking clause, ought not to be considered determinative of the matter under our peculiar statute where an arbitrary rule exists with reference to lost and destroyed wills.

[7] In order that the revoking clause in this lost and unrevoked will should be effective as such, it was necessary to establish that such clause was in her last will, and thus an effective part of her last will. A will is usually "proved" by being offered for probate.

Can its terms be "proved" otherwise? As was said in the *Estate of Patterson*, 155 Cal. 626, 636, 102 Pac. 941, 944, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625:

"It has been held by this court that a will cannot be given in evidence as the foundation of a right or title, unless it has been duly probated. *McDaniel v. Pattison*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805; *Castro v. Richardson*, 18 Cal. 480."

In that case the court was discussing the result of the destruction of a last will and testament without the intention of revoking the same, and was considering the effect of the amendment of 1907 to section 1339, Code of Civil Procedure (Stats. 1907, p. 122), passed after the death of the testatrix. It was held that the will could be probated. In that connection it is said:

"Because of its destruction in her lifetime the probate court, under the law as it existed at her death, could not allow it to be probated, because there could be no legal proof of it. * * * If a will had been duly executed and had not been destroyed, but was filed for probate, and could not be probated because of lack of proof of its execution, the heirs would take the estate, and it would be deemed to vest in them at the death of the testatrix, although the right thereto could not be positively known until it was demonstrated by the failure of proof upon the trial of the petition for probate. The statute provides what evidence may be taken in proof of a will upon such a proceeding."

Where a will has been refused probate because of undue influence, the revoking clause cannot be subsequently proved to show revocation of a prior will. *Schouler on Wills* (5th Ed.) §§ 418, 419; *Laughton v. Atkins*, 18 Mass. (1 Pick.) 535; *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238; *Lyon v. Dada*, 127 Mich. 395, 86 N. W. 946. This is true even if it is shown in the latter case that the revoking clause was not obtained by undue influence, as the decision rejecting it for probate is conclusive between the parties. The effect of these decisions is that, where a will has been denied probate and the same parties are subsequently litigating the validity of a prior will, the validity of the revoking clause cannot again be relitigated. Applied to the facts of this case, these decisions would lead to the conclusion that, where a will had been offered for probate as a lost or destroyed will and had been denied probate, because of failure of proof, the adjudication between the parties as to the provability of the will and the validity of the revoking clause cannot subsequently be reopened in a case in which the revoking clause alone is put forward for the purpose of showing that a previous will has been revoked. If it is true that the denial of probate of the second will because of the lack of proof by two credible witnesses forecloses the question as to

the provability of the revoking clause for the purpose of opposition to the probate of the first will, then it would seem to follow that the will of 1908 in this case, having been duly proven, should be probated notwithstanding the fact that it has been shown by one witness that there was a revoking clause in the will of 1916, where, as here, the appropriate order is one denying the probate of the will of 1916 for lack of proof. We do not cite these decisions as decisive of the question here involved, but they point to the conclusion indicated.

[8] These cases at least make it clear that the revoking clause of a will is a part of the will, and is to be treated as such, and not as a separate instrument having the equivalent effect of an instrument executed with all the formalities required in the case of a will. Section 1292, Civ. Code. This will be made clearer by excerpts from the above opinions. In the case of *Laughton v. Atkins*, supra, it is said:

"When the question was first proposed, it struck us all as novel and singular that an instrument once offered to be proved as a will, and disallowed as such by the court of final jurisdiction upon the subject, should be imagined to be capable of being used afterwards for any purpose whatever, the effect of such a decree seeming to be to render the instrument entirely null and void; but the arguments we have heard and the authorities cited have satisfied us that the case was not so clear as we at first believed it, though upon a thorough examination of the arguments and authorities we are convinced our first impression was well founded. * * *"

After quoting the statutory law of Massachusetts, the court proceeded as follows:

"An instrument, then, to have the effect of a revocation of a will which devises real estate before made, must be in itself either a will or codicil, or some other writing of the deviser, signed in the presence of three or more witnesses. If the instrument propounded as a revocation be in form a will, it must be perfect as such, and be subscribed and attested as is required by the statute. An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will, for this substantial reason, that it cannot be known that the testator intended to revoke his will except for the purpose of substituting the other, and that it would be making the testator die without a will, though it was clearly his design not to do so. This principle has been settled by many decisions in the English courts of law and equity; their statute of frauds in relation to this subject being similar to ours. * * *"

"It is true the instrument is perfect in all its parts, and is accompanied with all the formalities prescribed by the statute; but it comes before us connected with a decree declaring that it is null and void in itself, so that it never had any legal force or being as a will. How, then,

can it be treated as such for the important purpose of revoking a former will? If the principle deduced from the cases cited is true, that all we can see of a design to revoke is indicative of a purpose to substitute this for the one revoked, then to give effect to the revocation, and to deny any effect to the dispositions of the will, would be to thwart the intentions of the testatrix. How can we know from the will itself that she would not have preferred that the first will should stand, rather than that the heirs at law should enjoy the estate? It is obvious she meant no good to them in either of the wills."

The Pennsylvania case above cited (Rudy v. Ulrich, *supra*) also emphasizes the injustice of giving effect to the revoking clause of a will when the balance of the will has been denied probate, and distinguishes, in that respect, a will containing an express revocation from an instrument of revocation, executed with the formalities of a will. The statute of Pennsylvania on the subject of revocation is similar to our own. Section 1292, Civ. Code. The Supreme Court of Pennsylvania in that case states its reasons for its conclusion that the revoking clause cannot be given effect separate from the will containing it, in part as follows:

"Act Assembly April 8, 1883, §§ 13, 14 (Pamph. L. 250), provides in effect that no will in writing shall be repealed otherwise than by some other will or codicil in writing, or by other writing declaring such repeal, executed and proved in the same manner as is provided in the case of an original will. There are two modes of revocation here pointed out, besides cancellation, obliteration, etc.: First, another subsequent will or codicil duly executed and proved; and, second, some other writing declaring the revocation. It is implied that this other writing is not a will; that is, an act of disposition or declaration of what a man intends as to his property after his death. There may be a separate written revocation, not intended to take effect as a will or codicil, which need not therefore be propounded to the register for probate. This is a very reasonable provision. A man may be absent from home at a distance from the place where his will is deposited, or it may be lost or mislaid, so that he cannot have access to it to cancel or destroy it. He may wish, however, simply to abrogate it without making another will, and so die intestate. In such case he may execute a paper declaring his intention, which, provided it is signed by him and proved by two witnesses, will be effectual. No probate of it in the register's office is necessary. No letters testamentary or of administration cum testamento annexo are required to be issued upon it. *But the case is different when the revocation is contained in what purports to be a will disposing of property. The words of the act point to this: 'other writing,' that is, writing other than a will. A subsequent will without a revoking clause as effectually repeals a prior will as with one. No doubt, as stated by the learned judge below, a will may be void in part and otherwise valid, or it may be wholly invalid. One bequest or devise may be good, whilst oth-*

*er parts may be avoided. But then it stands as a will for those parts which are good. [Italics ours.] * * ** If good as a will at all by the act of 1833, it revoked the former will. This is the technical difficulty. The substantial one is still more serious. It cannot be known with any degree of assurance, sufficient to justify a legal judgment, that where there is a clause of revocation in a will making a certain disposition of property, that the testator really intended to revoke a prior will making a different disposition, except for the purpose of substituting in place thereof that contained in the second will. It would be making the testator die without any will at all, when it was clearly his intention, as drawn from his executing a paper purporting to be a will, not to do so. * * * We know, however, that express clauses of revocation are inserted in most wills as a mere matter of form, the mere expression of which is inherently implied, as are many other parts, such as the direction that all just debts and funeral expenses shall be first paid and discharged. As evincing an intention on the part of John Yerkes to die intestate unless the will of 1869 went into effect, that paper, executed as it has been found under undue influence, the very act of execution not the free exercise of his own volition, was no ground upon which any legal judgment could be rested. The parol evidence of what took place at the time of the execution of the paper of 1869 did not help the case of the defendants. It had no tendency to show that unless that paper stood he wished only his lawful issue to have his property, according to the intestate laws, leaving his unfortunate illegitimate child wholly unprovided for. All that he said was that he wanted to make another will. If the execution of that paper was induced by the undue influence of Catherine Rudy, there is some difficulty in comprehending why this declaration made in her presence, and with the same view, is not within the same objection. There was no evidence to submit to the jury, either in the paper itself or any declaration made by him at the time, that John Yerkes had any other object in revoking the will of 1865 than to substitute the disposition made by the will of 1869 for it. He had no intention to die intestate, but the contrary. The case of *Barksdale v. Hopkins*, 23 Georgia, 332, relied on by the counsel for the defendants, is not to the point, and does not sustain his contention. It holds merely that, if a will is before a probate court for probate, and a second will is pleaded as a revocation of the first, the probate court may take notice of the second, although it may be that the second is one which has not been admitted to probate, and one which is not offering itself for probate; consequently the probate court may hear proof touching the execution of the second. That is a proposition, it seems, too clear to be doubted, but it has no application to the present case."

In *Stickney v. Hammond*, 138 Mass. 116, a testator had left two instruments of different dates, each purporting to be his last will and each containing a clause expressly revoking all wills theretofore made. The two instruments were alike, except that the later one contained a clause exempting the executor from giving sureties on his probate bond. The first will was dated June 14,

1877, and the second September 8, 1877. The first will was offered for probate, and the second will was offered in evidence for the purpose of showing its revocation. The September will had been finally refused probate because of the neglect of the parties interested therein to defend an appeal taken from the order probating the will. It was conceded that the September will could not be proved as a will because of such neglect and consequent denial of probate. The main distinction between the Massachusetts case and the case at bar is that in the Massachusetts case the parties interested in the second will failed to prove its contents, and in the case at bar the statute expressly prohibits the effective establishment of the contents of the second will. In dealing with this question the court made the following statement:

"It has heretofore been held that an instrument purporting to be a will, with a clause of revocation of former wills, *cannot be offered in evidence as a revocation only, without a probate thereof.* [Italics ours.] *Reid v. Borland*, 14 Mass. 208; *Loughton v. Atkins*, 1 Pick. 535; *Wallis v. Wallis*, 114 Mass. 510. And for this substantial reason, that it must be inferred that the testator intended to revoke former wills for the purpose of giving effect to the new disposition of his property which he had substituted for that in his former wills, and if, for want of proper execution of the subsequent will, its defective construction, or other sufficient cause, proper effect cannot be given to it, we are not to suppose that he designed to die intestate.

"We can find nothing to distinguish the case at bar from those heretofore decided, and the ground upon which they rest appears to us satisfactory. Indeed, the facts as they here appear illustrate the soundness of the rule. The testator had purported only to add a codicil to his will made in June, 1877, and then in existence, exempting the executrix therein named from giving sureties on her bond. The scrivener to whom he applied for this purpose preferred to write out a new will, making the change suggested, and no other. He accordingly did so, and it was executed by the testator on September 17, 1877. The testator manifestly had no intention to revoke the will of June, 1877, *except as he at the same time substituted therefor the instrument of later date, which differed from it only in a purely secondary matter.* [Italics ours.]

The distinction between an instrument of revocation and an express revocation in a will pointed out in the case last cited is thus stated in Redfield on the Law of Wills, p. 328:

"It is not important that a revoking will should make any disposition of the property bequeathed in the former will. It has been held in some of the American courts that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates proprio vigore and instantaneously as a revocation, and consequently that the destruction of the second will did not revive the former one.

This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably have this effect, so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another. And the revocatory clause is made dependent, in some sense, upon the subsequent will going into operation. And there is, ordinarily, no purpose of having the revocatory clause operate, except upon that condition. The whole instrument is therefore ambulatory, and, when destroyed, it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such destruction the former wills, if in existence, become revived."

It is true that the author is contending for the rule enforced in the common-law courts of England, rather than that enforced in its ecclesiastical courts, a matter still undecided in many common-law states at the time Redfield wrote his treatise, but the contention of the author is worthy of consideration in determining the proper construction of our statute, requiring two witnesses to prove a lost will, notwithstanding section 1297, Civil Code, more nearly conforms to the rule of the ecclesiastical courts, a matter that will be discussed later.

To recur to the question under discussion: The question is, as to the measure of proof of a lost document: What did the Legislature mean when it enacted that a lost or destroyed will could not be proved except where two witnesses testified to its contents? The question is: Did the Legislature by that enactment intend that a part of the will could be enforced without being proved, and therefore without having two witnesses to establish its contents? It seems clear that the Legislature had no intention of authorizing a part of a will to be established by one witness when it declared that two were essential to "prove" the will, where the whole will is provable by one witness as definitely as the part is proved. When the second will is considered in this case, it is considered for the purpose of defeating the probate of another will, and thus to establish a right, namely, the right of an heir to succeed to the property, and for this purpose probate is usually required.

[9] The proper course under our practice was to try the matter of the validity of the two wills at the same time. We do not consider that the evidence as to the revoking clause was inadmissible on such hearing. The reasons given in *Rudy v. Ulrich*, supra, would seem conclusive as to its admissibility upon such a cross contest, but the effect of the evidence when admitted upon the will must be determined in view of its admissibility to probate, as a will. That it has no

validity separate and apart from the will of which it is a part seems clear from the foregoing decisions; consequently we think the trend of our decisions as well as of those above cited is that the effect of the will is entirely dependent upon its provability in probate, and that the usual and proper course is to first probate a will before it can be considered as effective, and, if not so first probated, that the same measure of proof should be required as upon probate.

If the revoking clause of a will stands upon the same basis as the balance of the will, there could scarcely be room for doubt as to the foregoing proposition, but it is insisted that section 1297, Civil Code, declaring the result of the revocation of a revoking will, in effect provides that the revoking clause operates instantly upon execution of the will containing it, and that for that reason its existence can be proved by any competent evidence, thereby establishing the fact that the prior will was revoked as of the date of the revoking will. This view finds support in the department opinion in *Re Lones*, 108 Cal. 688, 690, 41 Pac. 771, 772, where it is said:

"The mere execution of a subsequent revocatory will ends the first will, and such will is not revived by the revocation of the last will unless it is revived by the terms of such revocation. What sort of a revocation it must be which can by its terms revive a prior will is shown by the first subdivision of section 1292 of the Civil Code."

As the view expressed in *Re Lones*, supra, is entertained by three of my Associates, it is evident that the matter is worthy of serious consideration, and to that point we will now direct our attention.

The point decided in *Re Lones* was that the prior will was not revived under the circumstances of that case where the parties relied upon circumstances to show an intent to revive the previous will. The point is decided in these words:

"By no act or manifestation of intent, in writing or otherwise, not executed with the formalities with which a will should be executed, would the will of 1856 have been revived upon the cancellation of the will of 1885."

The reference to subdivision 1 of section 1292 in the quotation above also shows the same conclusion. That subdivision is as follows (section 1292):

"Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

"1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. * * *

The statement of the court that the will operates instantly to revoke the prior will is obiter dicta, although true in legal effect

in every case except in the case of a lost or destroyed will. In other words, if the will remains effective and is probated, the former will is revoked thereby. On the other hand, if the will is revoked, the revoking clause is still effective. Hence it is not altogether inaccurate to say that the revoking clause operates eo instanti under section 1297, Civil Code.

A consideration of section 1297, Civil Code, requires some attention to the history of that legislation, and this involves the development of the English law. In the ecclesiastical courts it was held that the destruction of the revoking will animo revocandi did not re-establish the first will unless such was the intention of the testator, while the courts of common law held that the revocation of the latter will of itself revived the prior will. See discussion in Schouler on Wills (5th Ed.) § 413; also full discussion in *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Randall v. Beatty*, 31 N. J. Eq. 643; *Blackett v. Ziegler*, 153 Iowa, 344, 133 N. W. 901, Ann. Cas. 1913E, 115, 37 L. R. A. (N. S.) 291. Jarman in his work on Wills (English edition) states that up to the time of the enactment of the statute of wills the effect of the revocation of the revoking will was to re-establish the will revoked. 1 Jarman on Wills, 192. In England this rule was changed by section 22 of the statutes of wills, enacted in 1837. 1 Jarman on Wills, 192; Schouler on Wills (5th Ed.) § 413; *Pickens v. Davis*, supra. That section is as follows:

"Sec. 22. And be it further enacted that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." St. 7, Wm. IV & 1 Vict. c. 26, § 22, quoted in full in Schouler on Wills, supra.

Similar laws have been enacted in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, Virginia. *Pickens v. Davis*, supra; Am. Stat. Law, Stimson, §§ 2673, 2679, p. 360.

The Legislature of this state in 1850 enacted that the common law of England should control in all matters where not repugnant to our statute law and constitutional law. Stats. 1850, p. 219. Therefore, in the absence of any statutory provision in regard to the effect of the revocation of a revoking will, we would be involved in the same confusion that existed in the English courts, prior to the statute of wills, and the additional difficulty arising from the fact that no such distinctions as that between the ecclesi-

astical and common-law courts of England existed in this state. This confused state of the English law was carried into some of our states, and was duly settled in Iowa as late as 1911, where that court adopted the view of the ecclesiastical courts of England, and held that the effect of the revocation of a subsequent will containing a revoking clause was a question of the intent of the testator "to be gathered from admissible parol testimony." The question was also an open one in Massachusetts until 1883, when it was settled in *Pickens v. Davis* by adopting the rule in the English ecclesiastical courts. *Pickens v. Davis*, 134 Mass. 252, 253, 256, 45 Am. Rep. 322. See, also *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C, 906.

It was therefore expedient that the same Legislature that adopted the common law of England as a basis of our jurisprudence in enacting our statute of wills should enact a provision similar to the English statute of wills. Section 22, supra. This was done by section 11 of the act of 1850 (Stats. 1850, p. 178), since codified as section 1297, Civil Code. It is thus apparent that the reason for enacting section 1297, Civil Code, was to settle a question which was in doubt at the common law and which had been settled in England by the statute of wills in 1837. The purpose of this legislation was to determine the effect of a revocation of a revoking will. The statute does not in terms provide that the revoking clause of a will is different from the balance of a will in that it operates *eo instanti*. Of course, it could be held as a matter of construction that the effect of this legislation was to make the revoking clause operative at once. This, however, is entirely a matter of construction of the statute and is of no importance where no question as to the method of proving the revoking clause is involved, as already pointed out.

It should be observed, however, that the question of the method of establishing the fact that the second will contained a revoking clause is not involved in this legislation or in the decisions rendered under the common law, for the reason that both under the statute of wills and under the common law the contents of a lost or destroyed will could be proved in the same manner that any fact could be proved, and therefore no question could arise as to whether or not a revoking clause could be proved and given effect as such when the balance of the will could not be proved because of a statutory rule declaring that two witnesses are essential to the probate of a lost or destroyed will. However, the tendency of the English courts was to hold that the whole will must be proved; otherwise the part proven could not be given effect. That rule has been followed by some of the American courts, but the general rule is to the contrary, at least so it was stated

in *Thornton on Lost Wills*, §§ 110, 111. *Estate of Patterson*, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, supra.

The question we have to consider in the case at bar is the effect of a statute passed after the statute of wills and first enacted in 1851, providing that a lost will could not be established except by the testimony of two credible witnesses (Stats. 1851, p. 452, § 38) and the codification of that statute enacted in 1872 (Code Civ. Proc. § 1339).

Is it unreasonable in this condition of the law to say that, when the Legislature declared the will could not be proved except upon the testimony of two witnesses, the rule applied to every part of the will, when it is sought to make the same operative?

Granting for the moment that the revoking clause operates instantaneously to revoke the previous will, the question still remains: How are we going to establish that the will contained such a clause, by one or by two witnesses? So far as we have discovered, there is no case arising under a statute similar to ours, holding that, where the question of revocation is in dispute, the revoking clause of an unrevoked, lost, or destroyed will can be proved by less than two witnesses.

The statute in relation to the proof of a lost or destroyed will (section 1339, Code Civ. Proc.) should be construed with reference to its purpose and object. The purpose of requiring the proof of such a will by two witnesses is to prevent the fraudulent proof of a purported, but really nonexistent, will by the testimony of only one witness, on the theory that there is less likelihood of two witnesses committing perjury than one. But this policy applies with almost equal force to the revoking clause, which, if established, will as effectively defeat the intention of the testator as would a fraudulent will. To say that you can establish one part of a will for any purpose by evidence which is incompetent to establish the balance of the will works a manifest departure from the intention of the deceased in every instance where the question arises. This is shown by the case at bar. If we examine the whole of the subsequent will, it is manifest that the testatrix never intended to revoke the first will. What she really intended to do was to make a few slight changes therein, and yet, if we act under the rule contended for by the appellant, we must necessarily hold that the property of the decedent goes to her husband, in violation of her will twice expressed with all the formality provided by law.

Question at issue here not involved in English cases:

As already stated, at common law or under the English statute of wills the question involved here as to the amount of proof required to establish the revoking clause of a

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lost and unrevoked will could not arise. The text-books on English probate law make this plain. In Theobald on Wills, pp. 51, 52, it is stated that the contents of a lost will may be established by secondary evidence, including the declarations of the deceased. The contents of such will may be established by a single witness, and, "where it is impossible to ascertain the whole contents of the will, effect will be given to such portions as can be ascertained, if the court is satisfied that they substantially represent the intention of the testator." That author also states the rule with reference to a lost will as follows:

"A subsequent will is no revocation of a former one if the contents of the later will are unknown, or if, though it is known that the later will differed from the former one, it is unknown in what respect it differed"—citing cases; Theobald on Wills, p. 45.

In Powles & Oakley on Probate, another English text-book (page 120), it is said:

"The contents of a lost will may be proved by a single witness, even though interested, whose veracity and competency are unimpeached. When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved."

From the foregoing it is clear that the decisions of the English courts prior to the statute of wills are not authority upon the point involved here, and that the decisions subsequent to that statute cannot involve the question as to the proper measure of proof.

Effect of section 1297, Civil Code:

We conclude that it was foreign to the scope and purpose of section 1297, Civil Code, supra, to determine the effect of an unrevoked revoking clause of a will, and that whatever inferences are to be drawn therefrom with reference to the nonambulatory character of the revoking clause cannot overcome the more direct declarations of section 1339, Code of Civil Procedure, supra, as to the quantum of proof for a lost or destroyed will.

Further as to measure of proof:

A late case in Massachusetts (Giles v. Giles, 204 Mass. 383, 90 N. E. 595 [1909]), is worthy of consideration in connection with the subject of the effect of a revoking clause in a lost will. That court, it will be remembered, adopted the view of the English ecclesiastical courts as to the effect of a revoking clause a rule similar to our section 1297, Civil Code. Pickens v. Davis, supra. In Giles v. Giles, supra, the court considered the purpose of section 8, supra, Revised Laws, c. 135, providing for the method of revoking wills, which is similar to our section 1292, Civil Code. The question involved in the case is thus stated therein:

"The third issue was as follows: 'Was said instrument revoked by the said Charles E. Giles subsequently to the date, execution, and publication thereof by the making, execution, and publication of another will which has

been lost or destroyed, and its contents cannot be proved so that it can be propounded for probate. * * * The purpose of the statute [section 8, supra] is to prevent the revocation of a will by a writing, *without a strong proof of the execution and revocatory character of the writing as is required to establish a will.*" [Italics ours.]

The former decisions of the Supreme Court of that state on the subject are therein reviewed as follows:

"It is the law of this commonwealth that, 'when an instrument of revocation is in existence and capable of being propounded for probate, its validity should be tried by a direct proceeding instituted for the purpose in the probate court. Laughton v. Atkins, 1 Pick. 535.' Wallis v. Wallis, 114 Mass. 510. If such an instrument has been 'lost or destroyed, it cannot be admitted to probate without clear and satisfactory proof of its whole contents.' Davis v. Sigourney, 8 Met. 487. It was decided in Wallis v. Wallis, ubi supra, that, 'if it can be proved that a later will was duly executed, attested, and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation.' But Chief Justice Gray added: 'And it can be made available only by allowing it to be set up in opposition to the probate of the earlier will, in accordance with the practice established in the English ecclesiastical courts before the Declaration of Independence, and adopted by the courts exercising similar jurisdiction in New York and New Jersey.' Helyer v. Helyer, 1 Lee, 472; Nelson v. McGiffert, 3 Barb. Ch. 158, 164; Day v. Day, 2 Green Ch. 549. *This means that proof of its execution is to be made in the same way as if it were to be admitted to probate as a will.* Indeed, under our statute it takes effect in the same way and under the same requirements as to execution as a will that directly disposes of property. * * *

"We are of opinion that, under the R. L. C. 135, § 8, to show a revocation of a will by a writing, the proof that there is a 'writing, signed, attested, and subscribed in the same manner as a will,' must be of the same kind and quality as would be required to establish the writing as a will, except that proof of its contents, beyond the fact that they are revocatory, need not be given. We think it plain that, apart from the statute, proof by the declarations of the testator would not be competent." (Italics ours.)

It is true that in the foregoing decision the question of whether or not the contents of a revoking document must be established by two witnesses was neither considered nor decided, as it was not involved under the Massachusetts law. The language of the court and the general tenor and effect of the decision would point to the conclusion that under the Massachusetts statute that court would require the proof of the revoking clause of a lost will to be established by two witnesses if such proof was essential under their law to establish such a will for probate as is required in this state.

Does the particular will revoke the former will when considered as an entirety?

If we assume that a subsequent will may be considered as a revoking instrument, and therefore proved by one witness, it would be unreasonable to consider the revoking clause alone in determining the effect of the second will as an instrument of revocation. Such a construction would be opposed not only to the rule for the construction of wills, but of all other writings, which are to be construed as a whole to determine their legal effect. It is true that the authorities draw a distinction between a will which operated to revoke a former will because inconsistent therewith and a will that contains a revoking clause. This is pointed out in *Blackett v. Ziegler*, *supra*. That case holds that the latter operates *eo instanti*, and that the former only operates in case the will is in effect at the time of death. The court quotes with approval the following from *Page on Wills*, § 273:

"In the United States, in the absence of a statute on this subject, the decisions are by no means uniform. The better line of authority made a distinction between the cases where the later will contained an express revocation clause, and where it was merely inconsistent with the earlier will. 'There seems to have been material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have the effect to do away with its predecessor. Being cut off before having its disposition of property awakened into life, it could have no affirmative operation through its dispositions upon the estate.' Where such distinction is recognized, the destruction of a later will inconsistent with an earlier will, but containing no clause of express revocation, revives the first will. Where the second will contains a clause of revocation, it is held in many jurisdictions in the United States, in accordance with the distinction already given, that the destruction of the second will does not revive the first will."

In California, however, this distinction between a revocation by implication and an express revocation cannot well be drawn, for section 1296 of our Civil Code expressly provides that the will is revoked by a subsequent will containing provisions inconsistent with the previous will as well as by a will containing an express clause of revocation, and section 1297 declares the effect of the destruction of the revoking will. If the execution of an inconsistent will operates as a revocation

as well as and with equal force as a will containing an express revoking clause, as seems to be declared by section 1296, it would seem to follow, if we are to adopt the view that a lost revoking will may be proved as such by one witness, that the whole of an inconsistent lost will, containing no revoking clause, could be proven by one witness to establish a revocation of an earlier will. If this be true, with equal propriety the whole will can be proven in connection with and in explanation of an express revoking clause, and thus the court having the whole will before it would be able to say in the case at bar that the second will, taken as a whole, was really a codicil to the first, confirming its bequest, and devise to the sister. We do not hold that this can be done, but we are inclined to agree with Mr. Justice SLOANE that the revoking clause in the second will should be considered as a conditional revocation; that is, that the revocation is conditional upon the whole will being effective, and for that reason cannot be given effect unless the balance of the will is also given effect.

The order admitting the will of November 25, 1916, to probate is reversed, and the trial court is directed to admit the will of May 13, 1908, to probate upon the uncontradicted testimony of its due execution already in evidence; each party to pay its own costs on appeal.

We concur: ANGELLOTTI, C. J.; LENNON, J.

SLOANE, J. I concur in the conclusion reached by Justice WILBUR that there is insufficient proof of the revocation of the first will.

I am not satisfied, however, that an instrument purporting to be a subsequent will and containing apt language showing a present revocation of former wills may not be offered in evidence as independent proof of such revocation, and, when lost or destroyed, its terms of revocation be proved by a single competent witness. But I think that such an instrument, executed for the concurrent purposes of creating a new will and revoking an old one, is subject to a different construction as to its revoking clause than obtains in the interpretation of an instrument executed solely to revoke a former will.

It is held by many authorities, a number of which are cited in Justice WILBUR'S opinion, that where a testator couples the revocation of former wills with the publication of a new one, he declares his intention not to die intestate, and there is a strong implication that he only intends the act of revocation to take effect if the new will becomes operative; and it has therefore been frequently held that it is only after the subsequent will has been admitted to probate that it can be used as evidence of revocation

of former wills. *Stickney v. Hammond*, 138 Mass. 116; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 635; *Reid v. Borland*, 14 Mass. 208; *Laughton v. Atkins*, 1 Pick. (Mass.) 535; *Wallis v. Wallis*, 114 Mass. 510.

[10] But, conceding that the contents of such revoking will, though lost or destroyed, and not susceptible of proof as a will by a single witness, can be established as to a revocation of former wills by one competent witness, the whole contents and purpose of the instrument must be considered in determining whether it effects such revocation.

In the present instance Mrs. Thompson's second will was practically identical with the first in its disposition of her estate, and amounted to little more than a republication of the earlier will. It did contain express words of revocation of former wills, but it would be a very unjust and unreasonable construction of these words of revocation to hold that they were intended, in the event that this second will should fall of admission to probate, to defeat her twice-declared intention that substantially all her property should go to her sister.

In *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363, the testator, in order to correct the spelling in his holographic will already executed, had it copied and attempted to execute the copy as a will, and destroyed the original. The court says:

"From a consideration of all the facts in evidence, we are satisfied that the testator destroyed his holographic will, under the belief that the copy thereof executed by him was a valid will, and not with the intention of dying intestate as to his lands. * * * Being inefficient because of the want of attestation, a revocation of the prior will, made by the testator under a belief in its validity, is conditional, and not absolute, and, the condition having failed, the original is in law still the existing will of the testator, and is entitled to probate."

Redfield on Evidence states the doctrine to similar effect:

"It is only where a testator revokes a former will, upon the supposition that he has executed a subsequent valid will, which proves invalid, that the act of revocation is held incomplete." 1 Redf. on Wills, *308.

"Where the testator destroyed his will, believing it had already been revoked by a later will, which proved to be invalid, and there was no other evidence of his intent except his declaration made at the time that it was no use to keep it, as he had another, it was held the will was not revoked." Redf. on Wills, *330.

In *Stickney v. Hammond*, *supra*, the court says:

"The testator manifestly had no intention to revoke the will of June, 1877, except as he at the same time substituted therefor the instrument of later date which differed from it only in a purely secondary matter."

So here Mrs. Thompson undoubtedly had no purpose or intent to destroy the testamentary effect of her former will except on the condition that the later will would become effective. Therefore, whether the evidence as to the contents of this second will is excluded or admitted, there is insufficient proof that the first will was revoked.

If this conclusion is sound, as the majority of the Justices concede, I see no need for this court to go further in its ruling on this appeal. The learned and persuasive arguments of the conflicting opinions filed herein but emphasize the intricacies of the subject and lead me to adopt the prudent course suggested in the quaint text of Swinburne, in his work on Wills, who, three centuries ago, found himself in deep water in trying to reconcile the accumulated learning of that day on this subject. On page 977 of the seventh edition of his work he is quoted as saying:

"Surely this question, especially concerning the manner of revocation to be made in the second testament, is very difficult, and such as in the answering whereof the writers do fight among themselves mightily and do contradict one another very strongly, so that the victory is very doubtful, and very hard it is to know whither opinion is truer, or more commonly received. Others labouring to reconcile these contradictions and to pacify these contentions have waded so for fine and dainty distinctions that they seem to swim up and down, and float hither and thither. I know not whither, in a deep and bottomless sea of intricate and confused divisions; so that if a man would adventure to follow them to the End of their Voyage, he might well doubt whether ever he should obtain any haven or safe landing. Wherefore for mine own part I thought to wade no farther from the shore than I could find fast footing, and where I might be within the reader's reach."

OLNEY, J. I dissent. The leading opinion holds that, because under our statute two witnesses are required to establish the contents of a lost or destroyed will for the purpose of probating it so that it may stand as the testator's last will effectively disposing of his property, two witnesses are likewise required to prove that it contained a clause revoking former wills, when it is sought, not to probate the instrument, but merely to show the revocation of a former will made by it. This position can be justified only upon the theory that a probate of the instrument is necessary in order that the clause of revocation contained in it be operative, since the Code section requiring two witnesses to prove the contents of a lost instrument applies only to the probate of a will. But that the probate of an instrument of revocation is not necessary appears plainly from our Code. Section 1292, Civil Code, provides in terms that a will may be revoked by any instrument suitably executed, whether it be a will or not, and manifestly probate cannot be

required of an instrument that is not a will. The section reads:

"Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

"1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. * * *

It is in fact conceded that, if the instrument of revocation be not a will, the Code section requiring two witnesses for proof of the contents of a lost will can have no application, but it is said that this is not true when the lost instrument is a will. But why should there be any difference? It is not sought in either case to prove the instrument as a will, but merely as a revocation, a very different thing, and the effect and operation of the instrument as being a revocation is the same whether it be a will or not.

There would be ground for making a difference if the effect and operation of a revocation contained in a will were dependent upon the will finally becoming effective and operative as the testator's last valid will. There is but one method of establishing an instrument as a decedent's last valid and operative will, and that is the probating of it. If, therefore, the operation of a clause of revocation contained in a will were dependent upon the instrument appearing at the testator's death to be his last will, its probate would be necessary to show the revocation worked by it. But it is not the law of this state, or of the other states that have adopted the rule of the ecclesiastical courts, that the operation of a clause of revocation in a will is dependent upon the instrument continuing until the testator's death as his valid last will, unsuperseded and unrevoked. Section 1297, Civil Code, provides just the contrary. It reads:

"If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished."

If the revocation of one will contained in a second is still effective, although the second will is in turn revoked, such revocation is certainly not dependent on the second will appearing to be the last will of the testator. Right here is where fundamentally, as I see it, the leading opinion is wrong. It takes the position, in spite of the Code sections just quoted, that a revocatory clause in a will is ambulatory in effect like the disposing clauses of a will, and is not effective instantaneously with execution. Thus it is said:

"In order that the revoking clause in this lost and unrevoked will should be effective as

such, it was necessary to establish that such clause was in her last will, and thus an effective part of her last will."

And again:

"If the revoking clause of a will stands upon the same basis as the balance of the will, there could scarcely be room for doubt as to the foregoing proposition, but it is insisted that section 1297, Civil Code, declaring the result of the revocation of a revoking will, in effect provides that the revoking clause operates instantly upon the execution of the will containing it, and that for that reason its existence can be proved by any competent evidence, thereby establishing the fact that the prior will was revoked as of the date of the revoking will. This view finds support in the department opinion in *re Lones*, 108 Cal. 688, 690."

Following the latter statement, the opinion then goes on to question the view expressed in *Re Lones*.

It is novel doctrine, indeed, that a formal revocation of a will, whether it be contained in a later will or in an instrument not a will, does not operate upon the execution of the instrument, but is ambulatory in effect in those jurisdictions which, like ours, have adopted the rule of the ecclesiastical courts that the revocation of a revoking will does not revive the first will. What authority is there for such doctrine, and what do our Code sections (1292 and 1297, Civil Code) mean other than that a formal revocation operates instantly with the execution of the instrument by which it is declared, regardless of whether that instrument be a will or not?

The leading opinion admits that, if the will containing the revocation clause is in turn revoked, the revocation is yet effective, the instrument cannot be probated, and, if destroyed, two witnesses as to its contents are not required for the purpose of proving the revocation. Is this not an admission that the revocation was effective from the beginning, from the time of execution of the instrument, and that the operation of the revocatory clause is quite different from that of the clauses disposing of the testator's estate? Upon what other theory is it possible that the revocation is effective although the will as a will has in turn been revoked? And when a will revoking former wills has been destroyed and secondary evidence of its contents is necessary, why should two witnesses be required to prove its contents, if its destruction were not by way of revocation, and less than two be sufficient if it were? What has the intent with which the instrument was destroyed got to do with the matter? If it be sought to prove the instrument for the purposes of probate as a will, then two witnesses as to its contents are required, regardless of whether it was destroyed *animo revocandi* or not. On the other hand, if it be sought to prove the instrument for some other purpose than probate, as, for example, to defeat the probate of a former will by

showing its revocation, why should the secondary proof required of its contents vary according as its destruction was *animo revocandi* or not? The statute makes no such difference. It makes the effect of the instrument the same in either case; it works a revocation. The statute does make a difference in the secondary proof required according to the purpose for which it is sought to prove the instrument, and requires more in case it is sought to probate the instrument than where it is sought to prove it for some other purpose. There is here a rational and recognized distinction, and it is this and this alone which in my judgment the statute makes. And certainly proving an instrument, whether it be destroyed or not, for the purpose of showing a revocation of wills worked by it, is not proving it for the purpose of probating it.

The leading opinion admittedly cites no authority which directly supports its position, and presumably there is none. It does cite a number which it considers indirectly support its position. It would unduly extend this dissenting opinion—already too long—to discuss them. Suffice it to say that an examination of them all plainly discloses, in my judgment, that each and all go upon some point not present here and making this case radically different from them.

Nor is it the fact, as the leading opinion assumes, that there are no authorities directly in point. In a number of cases the distinction has been made between proving the contents of a lost will for the purpose of probating it, and proving the contents for the purpose of showing the revocation of an earlier will, and in one at least the exact question would seem to have been presented and decided. The rule of the English ecclesiastical courts was that two witnesses, or at least a single witness with corroborating circumstances, were required for the probate of a will. 3 Wigmore on Evidence, §§ 2045 and 2048. Yet in *Helyar v. Helyar*, 1 Lee, Ecc. 472, 161 Eng. Rep. 174, Sir George Lee, after considering the point, held that for the purpose of showing the revocation of one will by a later one, which had been lost or destroyed, the uncorroborated evidence of a single witness was sufficient for the purpose of establishing the contents of the second will operating as a revocation.

The syllabus in *Day v. Day*, 3 N. J. Eq. 549, correctly states the decision. It reads:

"If a prior will be revoked by a subsequent one, and both be improperly destroyed, the contents of the first instrument cannot be established as the testator's will, although the contents of the second will cannot be ascertained."

In *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170, the testator made two wills, one in 1832 and one in 1837. The first was offered for probate before the surrogate. The second had been destroyed, and proof

was offered of it in resistance to the probate of the first as having revoked it. Under the New York practice at the time, the chancellor alone, not the surrogate, had the power to receive proof of a destroyed will for the purpose of establishing it as a testamentary disposition of the decedent's property; that is, for the purpose of probate. The point was made that, the second will not having been so established, the surrogate, upon the proceedings for the probate of the first will, could not receive proof of the second for the purpose of showing that the first had been revoked. Concerning this point, the court said (page 164):

"The only remaining questions are as to the due execution of the subsequent will of 1837, and its effect upon the will of 1832. There is no doubt as to the jurisdiction and power of the surrogate to receive proof that the will of 1832 was revoked by a subsequent will of the testator, and that such subsequent will had been fraudulently destroyed, or that it was destroyed by the testator when his mind had become so impaired that he was incompetent to perform a testamentary act. The chancellor alone had the power to take proof of such a will for the purpose of establishing it as a testamentary disposition of the property of the decedent. But, in resisting the probate of the instrument propounded by McGiffert as the last will and testament of the decedent, the heirs and next of kin had the right to introduce any testimony which would be sufficient to satisfy the surrogate that the instrument propounded was not in force as a valid will at the death of the testator named therein."

The rule in Mississippi, as in some other states, is, or at least was, that a lost or destroyed will cannot be probated unless all its contents are duly proven. It was held, nevertheless, in *Vining v. Hall*, 40 Miss. 83, that although a destroyed will could not be established as a will because its contents could not be fully proven, yet the clause of revocation which it contained could be shown, and was effective as a revocation of a former will which it was sought to establish.

In Massachusetts itself, from whose Supreme Court the leading opinion quotes liberally, the distinction between proving a lost or destroyed will for the purpose of probate and proving it for the purpose of showing a revocation is made. The syllabus in *Wallis v. Wallis*, 114 Mass. 510, correctly states the ruling, and reads:

"When a will revoking a former will is in existence, it must be established in the probate court; but when it has been lost or destroyed, and its contents cannot be sufficiently proved to admit it to probate, it may nevertheless be availed of as a revocation in opposition to the probate of the will revoked by it."

Finally, there is the decision to which I have referred as exactly in point here. It is *In re Wear's Will*, 131 App. Div. 875, 116 N. Y. Supp. 304. There the probate of a will was resisted on the ground that it had been

revoked by a second will which could not be found. That it is exactly in point here is apparent from the following quotation from it:

"The objection urged on this appeal from the decree of the surrogate refusing probate to the first will is that the proof offered and received of the execution of the second will is inadequate. The appellant contends that the proof must be of the character required by sections 2621 and 1865 of the Code of Civil Procedure, entitling a lost will to probate. The requirement of this section is that the provisions of such lost will must be established 'by at least two credible witnesses, a correct copy or draft being equivalent to one witness.' We are of the opinion that this contention cannot be sustained. It is one thing to admit to probate a will disposing of a man's estate where the will cannot be found, and quite another thing to merely establish that a second will, revoking a former will, has been duly made and executed and left in the possession of the decedent. In the one case we are assuming to dispose of property in a manner different from that prescribed by law in the absence of a will, while in the latter case we are merely permitting the property to descend in the manner which the law designates. In the case now under consideration the execution and delivery of the will to the decedent was proved by Mr. Eckstein, who drew both wills, and who was a subscribing witness in both of them. He would have been entirely competent to have proved the execution of the will, if it had been found, the remaining subscribing witness being dead; and he was equally competent to prove the execution and delivery of the will to the decedent, not for the purpose of establishing a lost will, but to show that the will offered for probate was not the last will and testament of the decedent, and that such an instrument was executed and left in such a custody that the presumption is that it was destroyed with the intention of revocation, with the result that the decedent died intestate. We are of opinion that the authorities relied upon by the learned surrogate support his conclusions, and that the decree refusing probate to the will of June, 1900, was properly made."

But one point more. The leading opinion in more than one place states in effect that the question is whether a less proof or a different measure of proof is required to prove a part of a will—to wit, a clause of revocation of former wills—than is required for proof of the whole instrument. In my judgment no such question is presented. The question which is presented is: Does the statutory rule as to the proof required for the purpose of probating the instrument, i. e., establishing it as the testator's valid and effective last will and testament, apply when it is not sought to prove the instrument for that purpose at all? The point that I would make is that, where the instrument is offered for the purpose of probate, the rule of the Code of Civil Procedure as to the proof required for that purpose applies, but where it is not sought to prove it for that purpose, then the Code section—applying in terms only

to probate—has no application, and the general rules of evidence apply, and this, regardless of whether it is sought to prove the whole or only a part of the instrument.

It is easy in fact to suggest a case where in it is sought to prove the whole of a will and where as well the will purports to dispose of property, and where yet the measure of proof required for probate would surely not apply. The declarations of a deceased member of a family as to relationship are always admissible in pedigree cases. Suppose in such a case it was desired to prove that John Smith was the son of James Smith, and for that purpose it was sought to prove a declaration to that effect by a brother of James Smith, the declaration consisting in a will reading, "I hereby give my estate to John Smith, the son of my brother James Smith." The declaration is certainly competent and admissible, whether the instrument has been probated or not, whether it is entitled to probate or not, or whether the declaration is all of the will or is only a part. And yet surely the proof of such a declaration is not governed by the rules applicable to proving the instrument for the purpose of probate, although the thing proven is identically the same in each case, the execution by a certain person of a certain document. The reason why a different measure of proof applies in one case than in the other is that the purposes for which it is sought to prove the instrument are different. If it is sought to prove an instrument for the purpose of probating it as the duly executed and unrevoked last will of the testator, we have a special statutory rule applicable. If it is sought to prove it for any other purpose, there is no special rule applicable, and the general rules of evidence apply. This would seem perfectly plain and simple, and yet the leading opinion would seem to fail completely to appreciate and meet it.

Reference is made to the rule that in this state and in other states which provide by statute for similar probate proceedings a will may not be introduced in evidence as a muniment of title, or, for that matter, be used in any way as a muniment of title, unless it has been probated. But this rule has no bearing on the present discussion. It is, in fact, not a rule of evidence at all. It is but a corollary of the propositions: (a) That an instrument which purports to be a will does yet not operate to transfer title unless it is the valid last will of a decedent; and (b) that in this state there has been provided by statute a proceeding in rem, i. e., probate, by which alone the fact that an instrument is the valid last will of a decedent may be established. The result is that, on the one hand, unless the instrument has been admitted to probate, no amount of proof will suffice to give it operation as a muniment of title, and, on the other

er hand, if it has been admitted to probate, no other proof is required than proof of the order admitting it, and if such proof is furnished it is final and conclusive. The rule, then, that a will cannot be used as a muniment of title until it has been probated is not a rule of evidence, but one simply that a certain adjudication in rem is required to establish its character as the valid last will of a decedent. The point in connection with the present discussion is that by sections 1292 and 1297, Civil Code, a will does not have to be the valid last will of a decedent in order to operate as a revocation of former wills.

We concur: SHAW, J.; LAWLOR, J.

(52 Cal. App. 149)

IN RE SENG'S ESTATE.

MOELLERING et al. v. HASKINS.

(Civ. 3732.)

(District Court of Appeal, First District, Division 1, California. April 1, 1921. Hearing Denied by Supreme Court May 31, 1921.)

On Hearing in Supreme Court.

Courts 202(5) — Order of probate court fixing commissions for sale of real estate held not appealable.

Where several real estate agents were employed by executor under Code Civ. Proc. § 1559, to effect a sale, and one agent procured a bidder, and another agent subsequently procured a bidder at an advanced price, and the land was sold to the last bidder and the sale confirmed, the agent procuring the last bidder could not appeal from an order in the probate proceeding fixing the amount of commissions to be paid and providing that the first agent should receive 5 per cent. of the amount of his bid, and the agent procuring the subsequent bidder 5 per cent. of the difference between the first and second bids, as in probate proceedings appeals lie only as prescribed by statute.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Peter Seng, deceased. From an order fixing the amount of commissions of E. A. Moellering, J. A. Goodwin, and J. L. Haskins, as real estate agents for the sale of real property belonging to the estate, the first two named agents appeal. Appeal dismissed in the District Court of Appeal, and hearing denied in Supreme Court.

Fry & Jenkins, of San José, for appellants.

Maurice Rankin and Archer Bowden, both of San José, and H. W. A. Weske, of Santa Rosa, for respondent.

KERRIGAN, J. This appeal is from an order made in a probate proceeding fixing the amount of commissions to be paid to certain real estate agents for the sale of real property belonging to the estate.

The executor of the will of Peter Seng, deceased, employed the appellants Moellering & Goodwin, and also the respondent Haskins, all of whom were real estate agents, to effect the sale. The contract was entered into in conformity with the provisions of section 1559 of the Code of Civil Procedure, as amended by St. 1919, p. 1181. The respondent, Haskins, procured certain purchasers for the property for the sum of \$7,000. The bid of these purchasers was duly returned to the court, but before the hearing on confirmation appellants also procured a purchaser. The bid of this proposed purchaser was received too late to be returned, but at the hearing in open court he offered an increase of 10 per cent. over the returned bid, whereupon the sale was confirmed to him for the sum of \$7,700. The court thereupon found that 5 per cent. upon the purchase price secured for the property was a reasonable and proper amount to be allowed as a commission, and made the order, here appealed from, dividing such commissions on the sale between appellants and respondent, by giving to the respondent who procured the first bidder 5 per cent. on the sum of \$7,000, the amount of his bid, and giving to appellants, who procured the second (and successful) bidder, 5 per cent. on \$700, the additional amount procured.

It is the contention of the appellants that under the provisions of section 1559, Code of Civil Procedure, respondent is not entitled to the sum allowed him, or to any commission, but that appellants are entitled to the whole thereof.

Section 1559, Code of Civil Procedure, reads as follows:

"Any executor or administrator may enter into a contract with any bona fide real estate agent to secure a purchaser for any real property belonging to an estate, which contract shall provide for payment to such agent out of the proceeds of sale to any purchaser secured by him of a commission, the amount of which must be fixed and allowed by the court upon confirmation of the sale. If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so fixed and allowed by the court.

"By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale be made and confirmed."

It appears from the record that the court in making the order in the manner indicated followed the custom and practice which ob-

tains in Santa Clara county to the effect that the broker who brings in the bid which is returned is allowed his commission on the amount of such bid, and the agent who procures a subsequent bidder is allowed a commission on the amount which his bid exceeds that of the one returned; and respondents claim that appellants contracted with this custom in view, and are bound thereby. It is further contended by respondent that the order directing the payment of commissions to real estate agents is not an appealable order, and further, even assuming it to be such, that the amount to be paid is purely a matter within the discretion of the trial court, and for that reason it is binding upon the appellants. Appellants' claim is based upon a literal construction of section 1559 of the Code of Civil Procedure. As pointed out by respondent, under such a construction neither party would be entitled to a commission. Respondent procured a purchaser, but his bid was not confirmed as required by the statute; and appellants' bid does not meet the requirements of the provision for the reason that it was never returned.

Whatever conclusion might be reached as to what is the proper construction to be given to the act we do not deem material. Nor do we consider a discussion of the other points raised necessary; for it seems plain to us that appellants are in no manner aggrieved by the order appealed from. Neither the estate nor the heirs are complaining of the amount allowed respondent for his services; and, if appellants have any claim against the estate for services rendered, their remedy is an appropriate proceeding for its recovery. What benefits respondent may have secured under the order is no concern of theirs.

The appeal is dismissed.

We concur: RICHARDS, J.; WASTE, P. J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. The petition for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

We are satisfied that the order appealed from is not an appealable order. In probate proceedings appeals lie only as prescribed by our statutes, and an order of the character here involved is not among those specified as appealable. The appeal, therefore, was properly dismissed by the District Court of Appeal. Our denial of the petition is, of course, not to be taken as indicating any view on our part as to the correctness of the practice of the trial court in the matter of the fixing and apportionment of commissions of real estate agents under section 1559, Code

of Civil Procedure, or as to the allowance thereunder of a commission to an agent on account of a purchaser to whom the sale is not confirmed.

All concur.

(52 Cal. App. 333)

FERROGGIARO v. BOARD OF PUBLIC
WORKS et al. (Civ. 3717.)

(District Court of Appeal, First District, Division 2, California. April 29, 1921.)

1. Dedication \S 19(1)—Marking of streets on maps immaterial, where not dedicated and used as such.

Where certain streets were never dedicated and accepted or used as such, it was immaterial that they appeared as public streets on certain maps on file in the recorder's office.

2. Dedication \S 19(5)—Complete when owner files map showing streets and sells lots accordingly.

Dedication is complete when the owner of land files a map for record delineating certain streets and thereafter sells lots in accordance therewith.

3. Dedication \S 19(5)—Filing of maps insufficient, where no general sale of lots in accordance and streets not used as such.

Where certain streets had never been used as such during 54 years of plaintiff's occupancy, and the city made no attempt to show formal dedication or acceptance, but relied solely upon the filing of certain maps as an implied dedication, and evidence of only one sale in accordance therewith was offered, the rule that a dedication is complete when the owner of the land files a map for record delineating the streets and thereafter sells lots in accordance therewith was inapplicable.

4. Dedication \S 63(2)—Nonuser for statutory period works abandonment.

Under Pol. Code 1872, \S 2620, even if the filing of maps with certain streets delineated was a sufficient dedication, failure to use them as such for five years worked an abandonment; such statute being in effect during such period.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding by A. Ferroggiaro against the Board of Public Works and others. Judgment for plaintiff, and defendants appeals. Affirmed.

George Lull, City Atty., and D. S. O'Brien and Chas. S. Peery, Asst. City Attys., all of San Francisco, for appellants.

Devoto, Richardson & Devoto, of San Francisco, for respondent.

NOURSE, J. Plaintiff instituted this proceeding against the board of public works of the city and county of San Francisco, and the members thereof, and the city and county of

(198 P.)

San Francisco, a municipal corporation, to restrain them from interfering with his possession of a certain strip of land situated in said city and county and appearing upon the map thereof as portions of Keith street and Egbert avenue. The complaint alleges that plaintiff is the owner of a lot of land which is described therein by metes and bounds, being bounded in part by the two streets in question, and referring to a map of the Bay View Homestead Association alleged to have been filed in the office of the county recorder of the city and county of San Francisco June 19, 1872. As to that portion of the land designated upon the map as Keith street and Egbert avenue, it is alleged that plaintiff is the owner in fee, and that he has been in the open, notorious and continuous possession thereof through himself and his predecessors for a period of 50 years last past. A windmill and some outhouses are alleged to have been constructed and maintained on those portions of the land designated as streets during all the period of plaintiff's possession, and the injunction was sought to restrain the defendants from removing these structures. The defendants answered, alleging, among other things, that the portions of said streets in controversy are parts of open and public streets of the city and county of San Francisco, duly dedicated and accepted as such. The court found that the land upon which the structures were erected was a part of what was designated on the map of the city and county of San Francisco as Keith street and Egbert avenue, and that said streets were never dedicated as public streets and never accepted or used as such by the city and county of San Francisco or the public thereof. The court also found that plaintiff had been in the open, notorious, and continuous possession of said property for a period of 54 years last past, and that during said period the plaintiff and his predecessors had occupied and used said premises and maintained thereon the outhouses and the windmill which the defendants were endeavoring to remove. From the judgment in favor of the plaintiff which followed these findings the defendants appeal.

[1] During the course of the trial defendants offered in evidence certain pages of a map book from files of the county recorder containing what purported to be copies of a map of the Bay View tract filed for record on May 23, 1867, and of the map of the Bay View Homestead Association filed for record June 17, 1872. Plaintiff's objection to the introduction of this evidence on the ground that a proper foundation had not been laid was sustained by the court. Thereupon defend-

ants rested. It is now urged that the court erred in refusing to admit the map book in evidence, but even if error occurred it would not avail the defendants anything because the judgment must be affirmed upon the record. The trial court having found that the streets marked upon the map of the city and county as Keith street and Egbert avenue were never dedicated as public streets and never accepted or used as such, it is immaterial that they appeared as public streets upon the map filed in 1867 or upon the map filed in 1872.

[2, 3] Appellants' case rests upon the proposition that dedication to the public is complete when the owner of a tract of land files a map thereof for record delineating certain streets thereon and thereafter sells lots in accordance with said map. In support of the proposition reliance is had upon such cases as *Davidow v. Griswold*, 23 Cal. App. 188, 192, 137 Pac. 619; *San Leandro v. Le Breton*, 72 Cal. 170, 175, 13 Pac. 405; *Berton v. All Persons*, 176 Cal. 610, 615, 170 Pac. 151. No quarrel is had with this proposition as an established rule of law in this state, but the record here does not bring appellants' case within the rule. The only evidence of any sales having been made in accordance with the map filed is that of Gilmore to Gibbs some time after May 30, 1872. So far as the record shows, no evidence of any other conveyance was offered to prove dedication or acceptance of these particular streets. Respondent rested upon the showing that the streets had never been used as such during the 54 years of his occupancy. No attempt was made by appellants to show formal dedication or acceptance. Appellants relied solely upon the filing of the maps of 1867 and 1872 as evidence of implied dedication.

[4] But even if this was a sufficient dedication at the times when the maps were filed, failure to use the streets as such for a period of five years worked an abandonment under the provisions of section 2620 of the Political Code, which was in force until its repeal in 1883.

Thus, while this statute was the law of the state, applicable in the city and county of San Francisco as elsewhere, a five-year period of nonuser worked an abandonment of the street, and respondent having been in the adverse possession of the land during that period and continuously thereafter, as the trial court found, the judgment must be affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(52 Cal. App. 331)

O'SHEA v. SICOTTE et al.
(Civ. 3665, 3666.)

(District Court of Appeal, First District, Division 1, California. April 21, 1921. Hearing Denied by Supreme Court June 20, 1921.)

1. Gifts §71—Causa mortis not favored.

The law does not regard gifts causa mortis with favor because of the opportunity they afford for fraud and perjury.

2. Gifts §64(1) — Donor must give donee means of obtaining control, which in case of chose in action must be by assignment.

To complete a verbal gift causa mortis, the donor at the time of making the gift must do something which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given, and, in case of a chose in action not evidenced by a written instrument, the only means of obtaining control recognized is an assignment in writing or some equivalent thereof.

3. Gifts §66(1)—Execution of power of attorney held not to complete verbal gift of bank deposits.

Where a stepmother told a stepson while on her deathbed that in case anything happened to her she wanted him to have everything she had, the execution of powers of attorney constituting the stepson her general agent, under which possession of amounts on deposit in banks was not obtained by the stepson during her lifetime, did not effectuate the gift, especially as, even if the powers of attorney had been executed by delivery of the possession of the money to the stepson, his possession would have been as agent, and the money would not have been beyond the dominion of the donor.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Two actions by Irvine T. O'Shea against Margaret Sicotte and others. From judgments for defendants, plaintiff appeals. Affirmed.

J. L. Taugher, of San Francisco, for appellant.

Andrew F. Burke and Paul A. McCarthy, both of San Francisco, for respondents.

RICHARDS, J. The actions in which these two appeals were taken were by stipulation of the parties tried and submitted upon the same evidence, and the determinative principles of law applicable to each are the same. The facts are also substantially similar and are as follows: Mrs. Helen O'Shea was the stepmother of the plaintiff and appellant, Irvine T. O'Shea. She was an elderly woman and was possessed of the sum approximately of \$20,000, which she had derived from a settlement with her stepchildren as to her interest in the estate of her deceased husband, Jeremiah O'Shea.

This money she had been keeping on deposit in her own name in two San Francisco banks—the Mission Savings Bank, where she had on deposit \$5,000 of said sum, and the San Francisco Savings & Loan Society, where she had on deposit \$15,000 of said sum. On November 16, 1917, Mrs. O'Shea, while at the home of the appellant herein, had an acute attack of illness which rendered her unconscious, and while in said unconscious condition she was removed to St. Luke's Hospital, where she died three days later. On the morning of November 17, 1917, she had so far recovered consciousness as to be able to talk briefly with one of her attendant physicians, and also a little later with the appellant herein. The physician at this first interview advised her that her condition was serious and that she ought to have her affairs fixed up, and that it would be advisable for her to execute a power of attorney "so that some one would attend to things while she was sick." A short while thereafter the interview between herself and appellant occurred which is relied upon by him as forming the basis of the gift causa mortis to himself of the money on deposit in the two above-named banks. The words of said conversation touching said matter, as testified to by appellant, are as follows: Mrs. O'Shea said to him:

"In case anything happens to me, I want you to have everything I have got. Now you had better go and get some one to fix the affairs so that you can get the money out of the bank so that you will have it in case anything happens to me."

Thereupon the appellant went out and telephoned to a notary public to come out to the hospital, where, as he stated to him, his stepmother wanted some papers drawn up. When the notary arrived at the hospital he was taken to the room of Mrs. O'Shea and, after a brief conversation with her, proceeded to another room, where he drew up a general power of attorney constituting appellant Mrs. O'Shea's general agent. This power of attorney, in addition to those general clauses usual in such documents, also contained the following clause:

"In addition it is my express wish that if my present illness should prove fatal I desire that the said Irvine Thomas O'Shea take charge of all of my estate."

When the notary had drawn up this power of attorney, he returned to the room where Mrs. O'Shea was and she signed the same. At the time she did so the notary, according to his testimony, said to her:

"If you turn it (the power of attorney) over to Irvine O'Shea, you are giving him entire charge of everything and you are practically turning your property over to him."

One of her physicians present at this time testified that the notary explained to Mrs. O'Shea that the document was a "power of attorney giving Irvine O'Shea the power to take charge of her business while she was sick." The power of attorney when thus executed was turned over to the appellant, who went that afternoon to the Mission Savings Bank, arriving about closing time, and not having with him the passbook of Mrs. O'Shea, he asked the cashier to transfer the account of Mrs. O'Shea to him, exhibiting at the same time the power of attorney. The bank cashier declined to make the transfer of the account until he had consulted with Judge Matt I. Sullivan, who was the bank's attorney and was also the appellant's attorney, and advised the appellant to see him about the matter. The appellant saw Judge Sullivan that afternoon and exhibited to him the power of attorney, explaining the circumstances under which it had been made, and was advised by him that Mrs. O'Shea should make a will. Thereupon the appellant returned to the hospital, according to his story, and spoke to Mrs. O'Shea about making a will, and she consented to do so, whereupon he returned to Judge Sullivan's office, coming back to the hospital a little later with an assistant in said office for the purpose of having a will prepared for execution by Mrs. O'Shea. She was found to be in a semiconscious condition, apparently unable to make a will, and she remained in that condition until the Monday following, when another vain effort was made to have her make a will. In the meantime and shortly before she died, the appellant went again to the Mission Savings Bank and requested its cashier to pay over to him the money in Mrs. O'Shea's account there, which the cashier refused to do. No demand or request for the money on deposit in the San Francisco Savings & Loan Society was made by the appellant during Mrs. O'Shea's lifetime, nor, in fact, until about two months after her death, which occurred on the Monday following her attack of illness. Upon the death of Mrs. O'Shea a will executed by her about a year prior to her death was admitted to probate. By its terms her entire estate was bequeathed to her sister, Mrs. Margaret Sicotte, and her children. These two actions were commenced by the plaintiff and appellant herein against these beneficiaries under said former will and against the bank having on deposit the sums of money to which these suits respectively refer.

[1] The contention of the plaintiff in each case before the trial court and upon this appeal is that a completed gift causa mortis in his favor was made by Mrs. O'Shea by the transaction above detailed. We are unable to agree with this contention: The law

does not regard gifts causa mortis with favor because of the opportunity they afford for fraud and perjury. *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255. The Supreme Court of this state thus states the well-established rule upon this subject:

"Gifts causa mortis are not regarded in the law with favor, since they are in contravention of the general rules * * * for the testamentary disposition of property, and therefore should in all cases be established by clear and convincing proof of the requisites of such a gift." *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Denigan v. Hibernia Sav. & Loan Society*, 127 Cal. 137, 59 Pac. 389; *Freese v. Odd Fellows Sav. Bank*, 136 Cal. 662, 69 Pac. 493.

[2] It is not intended or intimated that the appellant herein is either charged or suspected of any wrongdoing in his assertions and evidence as to the existence of a valid gift causa mortis in the instant case, but only that the means by which he sought to make such a gift effective were inadequate under the form of our statute to accomplish the desired result. Section 1147 of the Civil Code provides as follows:

"A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

It is not necessary to go far afield in search of authorities construing this section of the Civil Code. The case of *Adams v. Merced Stone Co.*, 176 Cal. 418, 178 Pac. 498, 3 A. L. R. 928, contains a very clear and comprehensive statement of the requisites to the validity of gifts causa mortis. It is there held that in order to the completion of such verbal gifts the donor at the time of making the gift must do something which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given; and in the case of a chose in action not evidenced by a written instrument the only means of obtaining control that is recognized by the authorities is an assignment in writing or some equivalent thereof. The donor must part with the dominion over the thing given, and unless that is done the gift is not complete. In announcing this view the court in that case quoted from the case of *Pullen v. Placer County Bank*, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, which has special application to the instant case by reason of the similarity of its facts. In the case quoted a father had given to his son a check for a thousand dollars upon a bank with the intention of making him a gift of that amount of money. After deliver-

ing the check to his son the father stated that he wished that he would not present it until after his death. To this the son agreed, and upon the death of the father presented the check to the bank, where it was refused payment upon the ground that it had been revoked by his father's death. The court upheld the action of the bank in this respect, saying:

"In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but merely a direction to the defendant to pay one thousand dollars to the son. It indicated the amount to be given and the place at which the money was to be delivered. * * * The request of the father that the son would not present the check until after his death did not affect the sufficiency of the gift. If the gift were complete by the delivery of the check such request would not destroy its validity, and if not then complete this request would not have the effect to dispense with its presentation for the purpose of making it complete. By the failure of the son to present the check, there was no delivery of the money during the lifetime of the father, and the gift was not therefore complete."

[3] It is impossible to discover a distinction between the case last above cited and the case at bar. The appellant herein was given by the donor a power of attorney which would, if executed, have placed the money in the banks in question in each case within the appellant's custody; but this power of attorney was never executed to the extent of placing the funds in either of these banks within the appellant's custody or control. It was like the check in the case cited, in that it was merely an order for the delivery of the money which must have been executed during the would-be donor's lifetime in order to effectuate her gift; but it was unlike the check in one very essential respect, since even if executed it would not have removed the money in question beyond the dominion of the donor, since the possession of the money by the donee would have been simply the possession of his principal and not of himself. The donor would still through her agent have had complete possession and dominion over the thing which was the subject of the attempted gift, and, this being so, the power of attorney in question must be held to have been an ineffectual method of completing the gift *causa mortis* so as to make it valid in law. *Edwards v. Guaranty, etc., Bank*, 190 Pac. 57; *Provident, etc., v. Sisters, etc.*, 87 N. J. Eq. 424, 100 Atl. 894.

The judgments are affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 386)

Ex parte ARATA. (Cr. 790.)

(District Court of Appeal, Second District, Division 1, California. April 29, 1921.)

1. Arrest \S 70—Arresting officer must take accused before magistrate without delay.

Police officers, upon arresting a person on a criminal charge, must take him before a magistrate without delay.

2. Bail \S 43—Detention because of criminal charge unlawful after order to release on bail.

Where accused was arrested without a warrant, and two days later a complaint was filed in police court charging her with prostitution, whereupon she was arraigned and pleaded not guilty, the magistrate acted as his duty required in fixing bail and ordering her release pending trial, and she could not be thereafter detained because of the criminal accusation against her.

3. Health \S 24—Authorities may quarantine only for reasonable ground.

Health authorities may place under quarantine a person afflicted with an infectious or contagious disease, as defined in Pol. Code, \S 2979a, only where reasonable ground exists to support the belief that such person is so afflicted.

4. Habeas corpus \S 85(1)—Burden on authorities to show facts justifying quarantine.

Where a person restrained of his liberty by quarantine questions the power of the health authorities, the burden is on them to show facts in support of the order.

5. Health \S 24—Mere suspicion will not justify quarantine.

A mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will not justify depriving a person of his liberty under an order of quarantine.

6. Health \S 24—Habitual indiscriminate sexual intercourse affords reasonable probability of venereal disease, justifying quarantine.

The fact that women of ill fame indulge in repeated and promiscuous acts of sexual intercourse affords a presumption based on a reasonable probability that such a person is infected with venereal disease, so as to justify quarantine.

7. Habeas corpus \S 85(1)—Authorities claiming one quarantined because of likelihood of venereal disease is prostitute have burden of proof.

If the health authorities claim that a person quarantined is a prostitute, and hence likely to be afflicted with disease, the burden is on them to prove such fact.

8. Constitutional law \S 82—No encroachments on liberty of citizen though result sought beneficial.

Encroachments on the liberty of the citizen cannot be tolerated even though the general result sought is a beneficial one.

9. Habeas corpus \S 79—Narrative of facts in return to writ held not proof of prostitution, justifying quarantine.

Where petitioner, accused of prostitution, gave bail and was ordered released pending

trial, and at the hearing of the writ proof was not offered that at the time of her arrest she was a woman of ill fame, a narrative made in the return as to a police officer having been directed to petitioner's room wherein she offered to commit sexual intercourse with him and fixed a price therefor, which he paid, whereupon other officers, working with him, broke in the door and arrested her, could not be taken as proof that the charge of prostitution was true, so as to justify her detention in quarantine.

Application for writ of habeas corpus by A. Arata, directed to the Chief of Police of the City of Los Angeles. Writ granted.

James W. Groom, Frank Dominguez, and Richard Kittrelle, all of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, by Harry A. Mock, Deputy City Prosecutor, both of Los Angeles, for respondent.

PER CURIAM. Habeas corpus to determine the right of respondent to detain petitioner and deprive her of her liberty. Upon return being made to the writ and hearing had thereon, petitioner's prayer was granted and her discharge ordered by decision heretofore made from the bench. That the reasons for the decision may be made to fully appear, this opinion is now filed.

In the petition filed herein it was alleged that respondent, chief of police, detained and confined in the city prison of Los Angeles the petitioner, and that said detention and imprisonment was without process of law or lawful authority. It was further alleged that petitioner was arrested without a warrant, by persons claiming to be police officers of the city of Los Angeles, on the 9th day of April, 1921, and that two days later a complaint was filed in the police court charging petitioner with a violation of the provisions of an ordinance of said city, which ordinance, stating its terms generally, was one making it an offense for a woman to commit an act of prostitution. The petition further set out that thereupon the petitioner was arraigned in said police court, entered a plea of not guilty, and that her trial was set for a certain date; that the bail was fixed in the sum of \$50, which, it was alleged, petitioner furnished, and that she thereupon secured an order from said police court directing her discharge from custody pending said trial; that the written order of release so secured was presented to the jailer of the Los Angeles city jail; and that the jailer refused to discharge said person for the reason, as stated by him, that the health department of the city of Los Angeles had instructed the jailer and chief of police not to release petitioner until she had submitted to an examination desired to be made by said health department for the purpose of determining whether she was infected with a com-

municable, infectious, or quarantinable disease. In the petition it was further asserted that petitioner was not infected with any such disease; that the health department of the city of Los Angeles had no reason to believe that she was so infected; that she had never been theretofore arrested or charged with any crime; that she was not and never had been a prostitute, and did not commit the act charged against her by the complaint in the police court. Upon the alleged facts so stated no question can be made but that petitioner's detention by the chief of police was wholly unauthorized and without any warrant in law. In the return made to the writ respondent admitted that petitioner was being detained by him in said city jail, and then proceeded to narrate alleged facts in evidentiary form as to a certain police officer having been directed to a room occupied by petitioner wherein petitioner offered to commit an act of sexual intercourse with said officer and fixed a price therefor, which the officer paid, whereupon other officers, acting in conjunction with the first, broke in the door and arrested petitioner. The return next set out the terms of the ordinance which purports to make the commission of the alleged act an offense. The return further set forth that immediately upon being arrested said petitioner was "by order of the health department of said city" placed in a quarantine ward in the city jail, and there held "in quarantine to be examined by officers of the health department of said city, to determine her freedom from contagious or infectious quarantinable venereal disease, as provided by statute and the rules of the State Board of Health of the state of California." It was further stated in said return that a physician duly appointed as a medical examiner of women by the health department of said city and by order of the health commissioner visited petitioner for the purpose of making a medical examination to determine the existence of any such disease as has been described, and that petitioner refused to submit to the examination, and that the health commissioner ordered that she be held in quarantine pending the determination of her freedom from such disease. Further statement is made in the return that "the health department of the city of Los Angeles has determined from experience in a large number of cases that over 90 per cent. of all women apprehended in the commission of acts of prostitution are infected with contagious or infectious quarantinable venereal disease such as is enumerated in section 2979a, Political Code; that the rules of the State Board of Health adopted pursuant to section 2979, Political Code, require that the health commissioner of the city of Los Angeles cause examination to be made of all such persons to determine their freedom from such disease."

[1, 2] Referring briefly first to the duty of the chief of police and officers working under his direction, it is enough to say that the plain and unmistakable terms of the law require such officers, upon making the arrest of a person on a criminal charge, to take such person before a magistrate without delay, where the accused may be arraigned upon a sworn complaint and secure a judicial hearing. The magistrate, in the case of petitioner, acted strictly as his duty required of him in fixing bail and giving the order for release of petitioner pending trial, and, as we shall proceed to show, the right of the chief of police to further detain the petitioner must be justified on grounds having no reference at all to the fact that an accusation had been made in the police court charging petitioner with a crime.

[3] That the health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases coming within the definition set forth in Political Code, § 2979a, as a general right, may not be questioned. It is equally true that in the exercise of this unusual power, which infringes upon the right of liberty of the individual, personal restraint can only be imposed where, under the facts as brought within the knowledge of the health authorities, reasonable ground exists to support the belief that the person is afflicted as claimed; and as to whether such order is justified will depend upon the facts of each individual case.

[4, 5] Where a person so restrained of his or her liberty questions the power of the health authorities to impose such restraint, the burden is immediately upon the latter to justify by showing facts in support of the order. It might be proved, for instance, that the suspected person had been exposed to contagious or infectious influences; that some person had contracted such disease from him or her, as the case might be. Such proof would furnish tangible ground for the belief that the person was afflicted as claimed. And we wish here to emphasize the proposition, which is unanswerable in law, that a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.

[6] Coming then to a case where it is claimed that the person suspected is one whose habits are such as to warrant the belief that they are afflicted with a venereal disease: We may agree that in cases of persons who commit acts of prostitution—that is, acts that are commonly understood to fall within the "commercial vice" definition—such a majority of them may be afflicted with infectious venereal disease as to justify the health department in enforcing the prelimi-

nary quarantine measures as here shown against any such; in other words, that, based upon the experience of the health authorities as it is stated to be in the return, it is reasonably probable that a person found to be of the class mentioned is so infected with such disease. The presumption which this statement allows to be made as against the individual in the first instance has its foundation in the fact that women of ill fame, by the very nature of their occupation, indulge in repeated and promiscuous acts of sexual intercourse. We have held heretofore (*Ex parte Dillon et al.*, 186 Pac. 170) that this inference which the health authorities seek to draw was not a fairly reasonable one to be deduced under proof of sexual acts between individuals charged under an ordinance of the city of Los Angeles forbidding intercourse between unmarried persons, which ordinance had as its intent the prevention of hotels and lodging houses being resorted to for such purpose. The distinction that is suggested between the two classes of cases is apparent and requires no argument to illustrate the reason for it.

[7] If the health authorities rely upon the claim that the person quarantined is a prostitute and hence likely to be afflicted with disease, then the burden is on the quarantine officers to establish the proof of the claim that the accused is of the class and character mentioned. If such person has been legally convicted of being of such class and character, the record of conviction may be relied upon to establish the important fact. In the absence of such conviction, the burden will be with the health authorities to establish the fact by sufficient evidence; for it is the existence of that condition in the person suspected that furnishes the ground for the belief, as an inference only, that the disease exists. It will not do to allow the inference of probable cause to be drawn from a mere suspicion.

[8] We have gone to the pains of making clear our view of the law in the case under discussion. The health authorities, with capable counsel at their elbow, no doubt are well advised of the limitations attached to their powers as they have been herein stated to be. One of the most important rights guaranteed under our Constitution, that of the liberty of the citizen, is involved and cannot be lightly passed over, nor can encroachments upon that right be tolerated even under the argument that, in the main, the general result sought is a beneficent one. The law may not be set at defiance, even to subserve the best-intentioned effort; much less by officers who have taken an oath to uphold it.

[9] At the hearing of this writ proof was not offered to be made that petitioner was at the time of her arrest a woman of ill fame. The narrative contained in the return of alleged acts in which the police officer took

part cannot be taken as proof that the charge made against petitioner in the police court was true.

No sufficient cause has been shown authorizing respondent to detain petitioner in his custody.

(52 Cal. App. 377)

CENTRAL IRON WORKS v. CALIFORNIA BAKING CO. (Civ. 3736.)

(District Court of Appeal, First District, Division 1, California. April 28, 1921. Rehearing Denied May 27, 1921.)

Appeal and error \Rightarrow 1011(1) — Judgment on conflicting evidence affirmed.

Where the only question presented by the record on appeal is the sufficiency of the evidence as to the existence of a contract sued on, and the evidence sharply and substantially conflicts on every point in which the execution and validity of the contract is involved, a judgment for defendant on finding in its favor by the trial court must be affirmed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Central Iron Works against the California Baking Company. From judgment for defendant, plaintiff appeals. Affirmed.

Louis H. Brownstone, of San Francisco, for appellant.

tum Suden & tum Suden, of San Francisco, for respondent.

RICHARDS, J. This action was instituted by the plaintiff to recover damages from the defendant for its alleged breach of a contract by the terms of which the plaintiff was alleged to have had its aid for the steel work upon a certain structure in contemplation of erection by the defendant accepted, but performance thereunder prevented by the fact that the defendant did not construct the building for the steel work upon which the plaintiff's bid had been made. The defendant by its answer denied that such a contract had ever been entered into by it, and the cause went to trial upon that issue, in the course of which a large amount of evidence was presented pro and con by the respective parties; and the cause being submitted the court made general findings to the effect that those paragraphs of the plaintiff's complaint wherein it was alleged that the contract had been entered into between the respective parties to the action in substance as above stated were untrue, and that the paragraph of the defendant's answer wherein the existence of any such contract was denied, was true. Judgment was accordingly rendered in the defendant's favor, and from such judgment this appeal has been taken.

We have carefully examined the somewhat voluminous record herein with a view to ascertaining whether any other question is presented than that of the insufficiency of the evidence to sustain the findings and judgment of the trial court; and we are not only unable to find that any other question is so presented, but we are able to find that upon the single issue of the sufficiency of the evidence to sustain the findings and judgment of the trial court the evidence is so sharply and substantially conflicting upon every point in which the execution and validity of the contract in dispute is involved as to bring the case fully within the rule universally applied to such cases.

The appellant's two contentions are: First, that the defendant's secretary in indorsing upon the plaintiff's bid the words, "Accepted on behalf of the California Baking Company, M. Wiessenhutter, Secretary," had power to bind, and hence had bound, the corporation; and, second, that its board of directors by their subsequent conduct, with knowledge on the part of a majority of their number of the existence of such indorsement, had ratified the action of its secretary. On both of these questions the evidence is hopelessly in conflict. An instance of these irreconcilable conflicts in the testimony may be cited. The architect Righetti testified that a short while before the defendant's secretary came to his office and affixed said indorsement to the plaintiff's bid, he had received a telephone message from Mr. Loesch, the president and general manager of the defendant, that he was sending Mr. Wiessenhutter to sign the bid. Mr. Loesch himself was dead at the time of the trial, and hence his testimony was not available; but the secretary himself testified that he had not been so instructed nor so sent nor authorized, but had acted entirely upon his own initiative in the matter, and had affixed his signature to the bid in question without authority or direction so to do but under certain persuasions on the part of the architect. In the presence of conflicts in the evidence of which the above is but one of many examples, the trial court made its findings against the plaintiff's contention.

The attitude of this court with relation to cases wherein the evidence is substantially conflicting is set forth clearly and at length in the case of *Anglo-American Land Co. v. Heine* (No. 3734), 198 Pac. 1009, just decided, to which reference is made.

With the legal questions and cases presented by the appellant we have no present dispute, but the substantial conflicts in the evidence as to which these are sought to be applied leave no room for their application.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 87)

DANTON v. HAAS et al. (Civ. 3477.)

(District Court of Appeal, Second District, Division 1, California. March 26, 1921.)

Apprentices §14 — Obligation to provide for indentured child ceases with master's death.

Under Domestic Relations Law N. Y. art. 8, § 121, and Laws 1872, c. 635, amending the charter of the New York Foundling Hospital, the obligation of the master to whom an orphan child is indentured to provide maintenance and instruction for the minor terminates with the death of the master, and any covenants as to maintenance, etc., must end with death, as does the correlative obligation to serve; hence there can be no recovery on behalf of a foundling indentured to a woman who agreed to maintain the child as her own during infancy and in event of returning the child to provide a full outfit, but, in case the child continued in her service until reaching majority, to provide a trust fund and make a bequest in her behalf, where the woman died during the infancy of the child.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Beatrice Danton, a minor, by the Title Insurance & Trust Company, her guardian, against Walter F. Haas and another, executors of the estate of Rosa Von Zimmerman, deceased, and others. From a judgment for defendants granted on motion for nonsuit, plaintiff appeals. Affirmed.

G. A. Gibbs, of Pasadena, for appellant.

H. L. Dunnigan and L. A. Lewis, both of Los Angeles, for respondents Walter F. Haas and others, executors.

Walter Loewy, of San Francisco, and Edward F. Wehrle, of Los Angeles, for respondents Klara Kombst and others.

CONREY, P. J. The New York Foundling Hospital is a corporation of the state of New York. Its charter was amended by chapter 635, Laws of New York of the year 1872, which statute was in force at all times herein mentioned. That law authorized the corporation to receive and keep under its care, charge, custody, and management certain classes of children. The corporation was given power, when children in their care attained a proper age, to place them at suitable employments and cause them to be instructed in suitable branches of knowledge, and had discretion to bind out or indenture such children as clerks, apprentices, or servants, to some profession, trade, or employment, for such time or period as they may deem proper, not exceeding, however, in the case of girls, the age of 18 years. Section 6 reads as follows:

"In the case of the death of any master to whom any child shall have been bound to service under the provisions of this act, * * * then such death shall have the effect to cancel

and annul the indenture or contract of service; and thereupon the said corporation shall resume the charge and management of such child, and have the same power and authority with regard to it as before the indenture or contract of service was made."

On the 29th day of June, 1912, the hospital had in its care and custody the plaintiff, Beatrice Danton, then three years of age. On that day, by an agreement in writing entered into between said hospital and Rosa Von Zimmerman, the hospital, as party of the first part, placed and indentured the said Beatrice Danton to Rosa Von Zimmerman, as party of the second part, "as her own child in every respect until the said Beatrice Danton shall arrive at her legal majority, to live with, and be employed by, the said party of the second part in and about her house and household, and the affairs thereof, and to be instructed therein and also as hereinafter specified. * * *" The party of the second part agreed, among other things:

"I. That during all the time aforesaid Baroness Rosa Von Zimmerman will provide said Beatrice Danton with suitable and proper board, lodging, and medical attendance, and all things necessary and fit for any indentured child, and in all respects similar to what would ordinarily be provided and allowed by the said party of the second part, or one in her station of life, for her own child or children. If the said child is returned to the party of the first part when she shall reach her legal majority, then the party of the second part shall give to said child a new Bible, a complete suit of new clothes, together with all those she shall then have in use, and an outfit of at least the same in every respect as their own child."

II. To provide for the education and instruction of the minor, as stated, "and generally that said child shall be maintained, clothed, educated, and treated with like care and tenderness as if she were in fact the child of the party of the second part, and will provide for said child, financially and in every other way, as if the said child were adopted by the said party of the second part under the laws of the state of New York."

VIII. It was further provided that if the child be not returned to the party of the first part when she attains her legal majority, or before that time, and the agreement of indenture canceled and annulled by consent of both parties, the party of the second part agreed to provide for said child as follows: "If said child shall attain the age of 18 years, the party of the second part agrees, in consideration of this indenture and of being permitted by the party of the first part to keep said child, to create a trust fund or \$15,000, said \$15,000 to be deposited with I. & W. Seligman, of New York City, as trustee. The interest of said trust fund of \$15,000 is to be devoted by the said trustee to the care and maintenance and education of said Beatrice Danton until the said Beatrice Danton shall attain the age of 30, at which time the principal and any accumulations of interest are to be paid over to her."

"IX. And the party of the second part further agrees that her last will and testament shall contain a provision giving and bequeathing to the said Beatrice Danton a further sum of \$15,000. In the event of the death of the party of the second part before the said Beatrice Danton shall attain the age of thirty, said sum of \$15,000 is to be deposited with the I. & W. Seligman, and the interest devoted to the care and maintenance of Beatrice Danton until she shall attain the age of 30, when the principal and any accumulations of interest shall be given to her."

After the indenture had been made, Rosa Von Zimmerman took Beatrice Danton into her possession and brought her to the county of Los Angeles, state of California, where they resided until the death of the Baroness Von Zimmerman, which occurred on the 25th day of April, 1917. The baroness left an estate of large value, apparently sufficient to satisfy the claims at issue in this action. After the 25th day of April, 1917, the Title Insurance & Trust Company, a corporation, was duly appointed guardian of the estate of said minor, and as such guardian presented two claims against the estate of Rosa Von Zimmerman, one for \$50,000, to provide maintenance and care for said minor until she should reach her majority, and another for \$30,000, \$15,000 thereof to be placed in trust with I. & W. Seligman of New York, and \$15,000, which it was alleged that under said agreement Rosa Von Zimmerman agreed should be provided in her will to and for the benefit of said Beatrice Danton. The claim for \$50,000 was rejected. The claim for \$30,000 was allowed and paid as to the \$15,000 agreed to be provided by the will of the deceased, and as to the remainder of the \$30,000 claim the claim was rejected. The will of Rosa Von Zimmerman made no provision for said Beatrice Danton. This action to recover upon the rejected claims was brought by the guardian against the executors and the beneficiaries named in the will of the deceased. Answer having been made denying all of the material allegations of the complaint, the case went to trial. At the close of the plaintiff's evidence a motion for nonsuit was granted and judgment entered in favor of defendants. From this judgment the plaintiff appeals.

The facts are not in dispute. The questions upon which the appeal rests are questions of law and of interpretation of the contract, the answers to which will determine the rights of the plaintiff to the relief demanded.

The terms of the indenture which provides for instruction to be given to the minor were placed therein pursuant to the statute mentioned above, together with certain other statutes, all of which were mentioned in the articles of indenture. These statutes were by stipulation introduced into the record as

admitted facts of this case. Aside from the provisions of section 6 of chapter 635, which we have stated, the only other provision relating to the education of indentured children, in the statutes referred to in the contract, is contained in chapter 14 of the Consolidated Laws (Domestic Relations Law, art. 8, § 121) of the state of New York. In subdivision 9 of that section it is provided that if a minor is indentured by the authorities of an orphan asylum, the master or employer shall agree to cause the child "to be instructed in reading, writing and the general rules of arithmetic."

Concerning the first rejected claim, it was stated in the demand as presented to the executors, and is now claimed by the plaintiff, that the sum of \$50,000 is the amount necessary to carry out the terms of the indenture, wherein the deceased agreed to provide said minor child with proper board, lodging, medical attention, and to maintain, clothe, and educate said minor, and to provide for said minor financially and in every other way until said minor shall reach her majority. As the minor was only seven years old at the time of the death of Rosa Von Zimmerman, this period of minority, unexpired at the time of said death, was about eleven years. In the statement of the case made by counsel for appellant, we fail to observe that any evidence or stipulation was introduced to prove that the sum required would amount to \$50,000, or any other definite sum. But since no point is made concerning this, we shall assume that, if there had been no judgment of nonsuit, the court might have been placed in position to determine the reasonable amount necessary for the stated purposes. The inventoried value of the estate exceeded \$2,000,000, and it was stipulated that, "if it becomes a matter for the court to decide," the exact value of the estate might be shown.

Under the laws of New York which apply to the case, the obligation of the master to provide maintenance and instruction for the minor terminates with the death of the master. In a New Jersey case arising under similar laws of New York it was held that the covenants on the part of the master were personal, and that the covenant for support must end with his death, as also did the correlative obligation to serve. *Petrie v. Voorhees' Executor*, 18 N. J. Eq. 285. We think that this is the true rule. It also seems clear that the contract in the case at bar was made upon the assumption that this was the law. Being willing, however, that the minor should be provided for beyond her minority, if until attaining the age of 18 years she remained with Rosa Von Zimmerman, the latter agreed that in that event she would create a trust fund, the interest whereof would be devoted to the maintenance of

Beatrice Danton until she became 30 years old, when the entire fund would be paid to her. And being further willing to provide for the support of said Beatrice Danton even in the event of her own death, Rosa Von Zimmerman further agreed to make a bequest in favor of the child, in the manner stated in the contract of indenture. This last provision would not have been necessary to accomplish the purpose stated, if the other obligations assumed were those claimed by appellant. Fulfillment of the condition upon which Rosa Von Zimmerman could have been required to create a trust fund available in her lifetime has become impossible. The demand for a fund of \$50,000 to provide an income for appellant's support is based upon the same theory which the parties must have had in mind in making the agreement that the will of decedent should provide a fund of \$15,000 for the ward's benefit. For that fund was to provide for her maintenance and support during her minority, although, in addition, she would have further support, and ultimately receive the entire fund. This express agreement having been made, no other may be raised by implication. Admitting it to be true, as contended by counsel for appellant, that the contract was far more generous than the statutes required in the case of such an indenture, and that "the baroness" undertook to treat the child as her own, the limits of the agreement are, nevertheless, fixed and determined. We think that those limits exclude the demands made in this action.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(52 Cal. App. 363)

PEOPLE v. SPRAGUE. (Cr. 760.)

(District Court of Appeal, Second District, Division 2, California. April 27, 1921.)

1. Criminal law §351(1)—Conduct of suspected person showing consciousness of guilt is admissible.

The conduct of a suspected person charged with crime, when such as to show a consciousness of guilt, is always admissible.

2. Criminal law §351(1), 722(2)—Evidence of defendant's appearance and conduct when he met witness held admissible, and argument thereon proper.

Evidence that when defendant met a witness who he must have known was the occupant of the room adjoining that in which the crime was committed his face was disfigured and that he appeared blanched or somewhat excited was admissible, and it was permissible to argue therefrom that he did or did not behave as an innocent person would under similar circumstances.

3. Criminal law §448(11)—Evidence concerning defendant's appearance held admissible over objection that it was a conclusion.

Evidence that when defendant met a witness soon after a crime was claimed to have been committed his face was disfigured and he appeared blanched or somewhat excited was admissible over the objection that it was a conclusion, as the observations of an ordinary witness concerning the various mental and emotional aspects of humanity are admissible.

4. Criminal law §822(4)—Introductory statement in instruction stating prosecution's contention held not erroneous as assuming fact in dispute.

A statement by the court in the charge that the prosecution contended that the crime was rape because at the time it was alleged to have been committed the prosecutrix was under the age of 18 years was not erroneous as assuming as a fact that she was under 18, where it was but introductory to an instruction to convict only in case the jury found beyond a reasonable doubt that she was under 18, as no juror of ordinary intelligence could have understood it otherwise than as a mere statement of the prosecution's contention.

5. Criminal law §822(1)—Charge must be taken as a whole in determining correctness.

To determine whether or not the law was properly declared for the guidance of the jury, the charge as a whole, and not an isolated excerpt therefrom, must be looked to.

6. Criminal law §785(8)—Refusal to charge that witness may not be impeached by particular wrongful acts held not error.

Where witnesses who testified that defendant's general reputation for truth, honesty, and integrity was bad testified on cross-examination that their testimony was based on conversations with creditors who had difficulty in collecting debts, and the court charged that a witness might be impeached by evidence that his reputation for truth or honesty was bad, an instruction that a witness might not be impeached by evidence of particular wrongful acts was properly refused, as it was the duty of the jury to consider the testimony of the character witnesses in its entirety, including the cross-examination as well as the direct examination.

7. Criminal law §1186(4)—Judgment not reversed for refusal of instruction unless there has been a miscarriage of justice.

Under Const. art. 6, § 4½, the refusal of an instruction that a witness could not be impeached by proof of particular acts does not require a reversal where after reading the evidence the court is not of the opinion that a miscarriage of justice has been caused by the error.

8. Criminal law §829(1)—Refusal of instruction covered by those given not error.

The refusal of a requested instruction was not error where the subject-matter was completely and correctly covered in the charge to the jury, and the jury were clearly advised upon all the principles of law pertinent to the charge set forth in the information.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

J. A. Sprague was convicted of rape and he appeals from the judgment and from the order denying a new trial. Affirmed.

E. I. Feemster, of Visalia, for appellant.
U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was convicted of the crime of rape, committed on the body of a young girl 16 years of age, appeals from the judgment and order denying him a new trial.

[1-3] A witness for the prosecution—a man who occupied a room adjoining that in which it was claimed the offense was committed—after testifying that he witnessed the criminal act and that he met defendant shortly thereafter, was asked by the prosecuting attorney on his direct examination what was defendant's appearance when he thus met him. Defendant's counsel objected upon the ground that the question called for the conclusion of the witness. The objection being overruled, the witness testified that defendant's face was rather disfigured, and that he appeared blanched or somewhat excited. The conduct of a suspected person charged with crime, when it is such as to show a consciousness of guilt, is always admissible. It was pertinent to show, therefore, how defendant behaved under the trying circumstances when he met, face to face, the man whom he must have known was the occupant of the room adjoining that in which he is alleged to have satisfied his lustful passions on the body of this young girl. It was permissible to argue that defendant did or did not behave as would an innocent person under similar circumstances. The weight of the testimony was for the jury, but it was not error to admit it. *People v. Rowell*, 133 Cal. 39, 65 Pac. 127; *People v. Cole*, 141 Cal. 90, 74 Pac. 547; *People v. Weber*, 149 Cal. 339, 86 Pac. 671. Nor was the question objectionable upon the ground that it called for the conclusion of the witness—the only ground of objection made in the court below. The observations of ordinary witnesses concerning the various mental and emotional aspects of humanity are admissible in evidence. Thus, when the subject-matter is relevant, it is permissible to ask a witness what was the appearance of another as to anger, fear, intoxication, etc.

"There are," says the court in *Robinson v. Exempt Fire Co.*, 103 Cal. 5, 36 Pac. 956, 24 L. R. A. 715, 42 Am. St. Rep. 93, "many cases where a witness, though not an expert, may be permitted to state the result of his observation, notwithstanding it involves, in a sense, his opinion or judgment, such as the apparent state of health of a person, whether a person is drunk or sober, or other characteristic or state

which manifests itself to the apprehension of the common observer."

See *People v. Lavelle*, 71 Cal. 351, 12 Pac. 226; *People v. Monteith*, 73 Cal. 7, 14 Pac. 373; *People v. McCarthy*, 115 Cal. 260, 46 Pac. 1073; *People v. Sehorn*, 116 Cal. 511, 48 Pac. 495; *Holland v. Zollner*, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; *People v. Arighini*, 122 Cal. 121, 54 Pac. 591.

[4, 5] Complaint is made of an instruction beginning:

"In this case the prosecution contends that the crime is rape, because at the time the offense is alleged to have been committed as set forth in the information, Grace — was under the age of 18 years."

It is claimed that this part of the instruction assumes as a fact that the prosecutrix was under the age of 18 years. We think the language is not fairly open to this construction. The clause we have quoted is but introductory to an instruction whereby the jurors were told, in substance and effect, that it is their duty to convict only in the event that they shall "find from the evidence beyond a reasonable doubt that at the time mentioned Grace — was under the age of 18 years." In the introductory sentence complained of by appellant—that which precedes the instruction as to what facts the jurors must believe beyond a reasonable doubt before they might justly find defendant guilty—the court was dealing solely with the prosecution's contention respecting its theory of the case, and was not declaring as a fact that the prosecutrix was under the age of 18 years at the time when it was claimed that the crime was committed. To determine whether or not the law was properly declared for the guidance of the jury, we are to look, not to an isolated excerpt from an instruction, but to the charge as a whole. *People v. Besold*, 154 Cal. 370, 97 Pac. 871. When the whole instruction is read and considered in its entirety, we are satisfied that no juror of ordinary intelligence could have taken the language complained of as being aught than a mere statement by the court that the prosecution was contending that the girl was under 18 years of age, and that for that reason it was further contending that the crime of rape had been committed.

[6] On rebuttal, and after defendant had testified as a witness in his own behalf, the prosecution put on the stand several witnesses, each of whom, on his direct examination, testified that he knew defendant's general reputation for truth, honesty, and integrity in the community in which he lived, and that it was bad. On the cross-examination of some of these witnesses defendant's counsel drew out the fact that their testimony as to defendant's general reputation, given on their direct examination, was based

upon conversations which they had had with some of defendant's creditors, wherein the latter had stated to the witnesses that they, the creditors, had had difficulty in collecting debts due them from defendant. The lower court instructed the jury that "a witness may be impeached by the party against whom he is called, by contradictory evidence or by evidence that his reputation for truth, honesty, or integrity is bad." The court refused to give, at defendant's request, a similar instruction with the additional admonition that a witness may not be impeached "by evidence of particular wrongful acts." It is argued that the requested instruction should have been given that thereby the jury might have been instructed to eliminate from their consideration the testimony respecting the difficulties defendant's creditors had had with him in the collection of their claims. The refusal to give the instruction was not error. There is no claim that the testimony of the character witnesses was not admissible. Their testimony, and all of it, was in the case for the jury's consideration. It was the jury's duty to consider the testimony of each of the character witnesses in its entirety in order to determine the weight to be given it. It was their duty to consider the facts brought out on the cross-examination as well as those adduced on the direct examination, in order to determine whether the prosecution had established the evil character of defendant's general reputation for truth, honesty, or integrity. And if, after such consideration, the jury believed defendant's reputation to be bad, they were at liberty to take that fact into consideration in determining the weight to be given this testimony. The jury's duty thus to consider the evidence accords precisely with that enjoined upon them by the court's instruction to the effect that a witness of an adverse party may be impeached by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad. See *Steeple v. Newton*, 7 Or. 110, 33 Am. Rep. 705, where the court upheld an instruction to the effect that evidence of misunderstandings that the impeached witness had had with his neighbors, if brought out on the cross-examination of the impeaching witnesses, may be considered by the jury as affecting the credibility of the impeached witness.

[7] Moreover, even if we should concede, though we do not, that it was error to refuse an instruction in the form requested by defendant, nevertheless the evidence in this case is of such a character that it satisfies us that no miscarriage of justice could result; and unless, after reading the evidence, this court shall be of the opinion that a miscarriage of justice has been caused by any error in giving or refusing instructions, the judgment cannot be set aside. Const. art. 6, § 4½.

[8] Complaint is made of the court's refusal to give two other instructions requested by defendant. The subject-matter of each of these was completely and correctly covered in the court's charge to the jury, who were clearly advised upon all the principles of law pertinent to the charge set forth in the information. The trial court, therefore, did not err in refusing to give the requested instructions.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

(52 Cal. App. 239)

JACKSON v. WILDE, Mayor of City of San Diego, et al. (Civ. 3116.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1921.)

1. Master and servant §364—Fireman an "officer" and not "employee" within Compensation Act prior to its amendment.

A regularly appointed member of a city fire department is an officer and not an employee in the sense that he is not in service of contract of hire, so that firemen were not included in the Workmen's Compensation Act prior to its amendment by statute of 1917, p. 835, so as to make the term employee include all elected and appointed paid public officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Employé; Officer.*]

2. Municipal corporations §199—Charter reference held to incorporate ordinance giving fireman sick leave with pay.

The amendment of San Diego Charter, art. 2, c. 1, § 2, in 1915 (St. 1915, p. 1828), expressly continuing in force an ordinance reorganizing the fire department and providing for a firemen's relief and pension fund, makes the ordinance, including the provision for leave of absence with pay in case of sickness contracted while on duty, a part of the city's organic law.

3. Municipal corporations §176(3) — Fixing compensation of fireman is municipal affair as to which freeholder's charter prevails over general law.

The fixing of the compensation to be received by city firemen under the authority given by Const. art. 11, § 8½, subd. 4, to provide for compensation for municipal officers and employees, is a municipal affair within the meaning of article 11, § 6, so that such provision is paramount to any general law respecting the matters dealt with in ordinance fixing compensation.

4. Municipal corporations §199—Officer is entitled to pay while disabled by sickness.

The salary of a public officer is an incident to the title of the office and not to its occupation or exercise, so that a fireman who is a public officer is entitled to compensation although he may be disabled by sickness from perform-

ing its duties if there is no law or regulation authorizing a discontinuance of compensation during disability.

5. Master and servant ⇨364—Municipal corporations ⇨199—Pay of fireman during sick leave is not "compensation for injury."

Payment of salary of fireman under the terms of the city ordinance for the period while he was on leave of absence for sickness contracted while on duty is not "compensation for injury" within the meaning of the Workmen's Compensation Act.

6. Mandamus ⇨71—Lies to enforce particular act clearly required by law.

Although mandamus will not lie to control the discretion of an inferior tribunal or officer, that is, will not lie to enforce a particular decision, it will lie to enforce action by the inferior tribunal or officer when the law clearly establishes a petitioner's right to such action with no room for the exercise of discretion.

7. Mandamus ⇨101—Issued to compel auditing board to allow claim which it had no discretion to reject.

Though mandamus will not issue against auditing body to allow a claim the determination of which involves the exercise of some quasi judicial or discretionary power, it will issue to compel the allowance of a claim with respect to which the auditing board has not discretion.

8. Municipal corporations ⇨1012—Auditing board held to have no discretion to disallow pay to fireman granted sick leave with pay.

Under a city ordinance authorizing the fire superintendent to grant a fireman leave of absence with pay during a sickness contracted while on duty, the determination by the superintendent that a fireman's sickness was so contracted is conclusive, and the auditing board has no discretion to disallow the fireman's salary during such leave, though the pay roll as made out and verified by fire chief must pass through the hands of the auditing committee in the ordinary course of business.

9. Municipal corporations ⇨199—Evidence held to sustain fire chief's finding fireman contracted sickness in the line of duty.

Evidence that a fireman was on duty 24 hours a day except for one day in every five or six, and that the nature of his duties made him peculiarly subject to colds, held sufficient to sustain the fire chief's finding that the cold contracted by a fireman which subsequently turned into influenza was contracted while on duty, though the particular time when it was contracted was not established.

10. Mandamus ⇨101—Fire chief's determination fireman's sickness was contracted in line of duty is conclusive.

In mandamus to compel allowance of a fireman's compensation during time he was absent on leave with pay, the fire chief's determination, in granting leave of absence, that the fireman's sickness was contracted while on duty is conclusive, if rendered in the exercise of his honest judgment.

11. Mandamus ⇨187(9)—Errors in rules of evidence as to question on which fire chief's determination was conclusive are not prejudicial.

In mandamus to compel allowance of fireman's salary for the time he was on sick leave with pay, where the fire chief's determination that the fireman's sickness was contracted while on duty was conclusive, error in rulings on questions asked the fire chief as witness relating to the fireman's sickness were not prejudicial to defendants.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Petition of A. L. Jackson for a writ of mandate to Louis J. Wilde, as mayor of the City of San Diego, and others. From a judgment granting the writ, defendants appeal. Affirmed.

T. B. Cosgrove, City Atty., of Los Angeles, S. J. Higgins, of San Diego, and Arthur F. H. Wright, of Bisbee, Ariz., for appellants.

Wright & McKee, of San Diego, for respondent.

FINLAYSON, P. J. This is an appeal from a judgment in favor of plaintiff, a member of the fire department of the city of San Diego, awarding a peremptory writ of mandate commanding defendants, as members of the city's auditing committee, to allow, approve, and order paid the city's pay rolls for the months of January and February, 1919, in so far as the same pertain to plaintiff's salary.

Since 1889, San Diego has been operating under a freeholders' charter. This charter provides for an auditing committee whose duty it shall be "to examine, allow, and order paid, or reject and disallow all claims, demands and bills of whatever nature (except monthly salaries of city officers as fixed by this charter) which may be presented against the city." It is further provided that "the auditor shall not draw a warrant for any bill unless the same has been approved by a majority of the whole auditing committee," and that "all demands, bills and claims which may arise against the city, including the pay roll of all employees of the city, whether under regular monthly salary or not (except salaries of city officers fixed by this charter), shall be duly verified as hereinafter provided, and shall be filed with the secretary of the auditing committee, who shall file and number the same in the order of presentation, and refer the same to the auditing committee for action, whose duty it shall be to allow or reject the same, in whole or in part, and if allowed, designate the particular funds from which they are to be paid. * * * Stata. 1889, p. 704.

Plaintiff, for seven or eight years past, has been a fireman regularly employed in the city's fire department at a monthly salary of

\$125, less the sum of \$1 per month which the city treasurer is required to retain from the monthly pay of every member of the department to be paid into the firemen's relief and pension fund. In January, 1913, an ordinance numbered 4979, and entitled "An ordinance reorganizing the San Diego fire department and providing for a firemen's relief and pension fund," was regularly adopted. This ordinance provides that the city's fire department shall be under the management of the superintendent of fire, who, subject to the approval of the common council, shall organize the department, create such fire companies as he may deem necessary, prescribe the number and duties of the officers and employees, and exercise full power and authority over all appropriations made for the use of the department, subject to the approval of the common council. Section 8 of the ordinance provides:

"The superintendent of the department may grant such leave of absence with full pay, not to exceed one year, to any fireman who has contracted sickness or disability in the line of duty. * * * The chief of the fire department may grant such leave of absence, not to exceed thirty days, with full pay, or for other reasons, a leave of absence without pay."

In the months of January and February, 1919, one Louis Almgren was both superintendent and chief of the fire department. Plaintiff, some time shortly prior to January 26, 1919, contracted a cold. Upon the ground that plaintiff's cold was a sickness or disability contracted by him in the line of his duty as a fireman, Almgren, as superintendent and chief of the fire department, granted plaintiff a leave of absence, with full pay, from and including January 26, 1919, to and including February 8, 1919. Almgren made out the department's pay roll for each of the months of January and February. Each pay roll contained a provision to the effect that plaintiff was entitled to the full amount of his monthly salary of \$125, less the \$1 required to be deducted for the firemen's relief and pension fund. The pay rolls were duly approved and verified by Almgren, as provided by said Ordinance No. 4979, and on March 20, 1919, they were delivered to the secretary of the auditing committee for the committee's allowance and approval. On March 26th each of the pay rolls, so far as it related to plaintiff's salary, was disallowed and rejected by the auditing committee upon the ground that plaintiff's sickness and disability was not contracted in the line of his duty as a member of the fire department, and that therefore he was not entitled to any salary during the time he was absent from duty. The trial court found that plaintiff's sickness was contracted in the line of his duty, and adjudged that the writ issue commanding defendants, as members of the auditing committee, to allow, approve, and or-

der paid each of the pay rolls in so far as they pertain to plaintiff's salary.

[1] Appellants' first contention may thus be stated: If plaintiff were allowed pay during the days he was absent from duty on sick leave, he, in effect, would be receiving from the city of San Diego compensation for "injury," within the meaning of the Workmen's Compensation, Insurance and Safety Act; that act, in section 6, declares that liability for the compensation provided therein for any injury sustained by an employee, arising out of and in the course of his employment, shall exist against his employer in lieu of any other liability for such injury (Stats. 1917, p. 834); the city's charter is silent respecting compensation to city employees for injuries sustained by them in the course of and arising out of their employment; therefore, so the argument runs, the case is within the rule that a city having a freeholders' charter is subject to general laws, even in municipal affairs, when the subject-matter is not covered by the charter; and plaintiff therefore is entitled only to such compensation for the sickness which he claims was contracted by him in the line of his duty as is provided by the Workmen's Compensation Act. In short, the claim is that the provision of the ordinance authorizing the superintendent or chief of the fire department to grant a fireman sick leave on full pay has been superseded by the Workmen's Compensation Act, and no longer is in force. Were it not for the amendment of 1917 to the Workmen's Compensation Act, there would be no possible basis for any such contention, for, prior to that amendment, the act was not applicable to "public officers" (*Mono County v. Industrial Acc. Comm.*, 175 Cal. 752, 167 Pac. 377); and a regularly appointed member of a city's fire department is an "officer," and is not an "employee," in the sense that he is in service under a contract of hire (*McDonald v. New Haven*, 94 Conn. 403, 109 Atl. 176, 10 A. L. R. 193; see, also, *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681). In 1917, the statute was amended so as to cause the term "employee," as used in the act, to embrace "all selected and appointed paid public officers." (Stats. 1917, p. 835.)

[2] Appellants' argument assumes that the charter of San Diego is wholly silent upon the right of a fireman to sick leave on full pay. Such, however, is not the case. In 1915, section 2 of chapter I of article 2 of the city's charter was amended, so that subdivision "j" of that section now reads:

"Such manager of operation and superintendents shall be the executive heads of their respective departments and shall appoint and remove their assistants and employees, subject to such civil service regulations as this charter may provide, except that provisions now contained in the People's Ordinance No. 4979 and entitled 'An ordinance reorganizing the San

Diego fire department and providing for a firemen's relief and pension fund' shall continue in full force and effect." Stats. 1915, p. 1828.

Here is an express declaration in the city's charter that the provisions of the ordinance under which plaintiff claims the right to full pay for the two months during parts of which he was absent on sick leave "shall continue in full force and effect." To all intents and purposes the ordinance, including the provision that a fireman on sick leave shall be entitled to full pay notwithstanding his enforced absence, has become a part of the city's organic law.

[3] That provision of Ordinance No. 4979 under which plaintiff claims the right to a full month's salary for each of the months of January and February, 1919, relates to the "compensation" of the members of the city's fire department. By subdivision 4 of section 8½, art. 11 of the State Constitution, plenary authority is given to provide in any freeholders' charter, or in any amendment thereto, for the "compensation" that shall be received by every municipal officer or employee. The fixing of the compensation to be received by a city fireman is a "municipal affair," within the meaning of section 6, art. 11. It follows, therefore, that the amendment of 1915 to the charter, whereby it was declared that the provisions of Ordinance No. 4979 "shall continue in full force and effect"—an amendment adopted after section 6 of article 11 had been amended in 1914—is paramount to any general law respecting such matters as are dealt with in the ordinance.

For the foregoing reasons we fail to see how there can possibly be any room for the application of the rule that, with respect to a municipal affair upon which a freeholders' charter is silent, the provisions of any general law pertaining thereto shall control.

[4] Moreover, appellants' contention is based upon the erroneous assumption that if plaintiff receive pay for the time he was away on sick leave he will thereby be receiving compensation for "injury," within the meaning of the Workmen's Compensation Law. Plaintiff was not employed by the day, nor did he contract for or receive a per diem compensation. He was appointed for an indefinite period, at a fixed monthly salary. His compensation, provided, we assume, by ordinance duly adopted by the common council, was annexed to or was an incident of his office or employment. So long as he continues to fill the office of fireman he is entitled to the full amount of his monthly salary, regardless of any temporary absence from duty, save, of course, in so far as the ordinance in question contemplates that he shall not receive full pay if he be absent from duty without a leave of absence on account of sickness or disability contracted in the line of duty. It is well settled that a person holding a public office has a prima facie right to the

salary thereof, although he be physically disabled from performing his duties; and if there be no law or regulation authorizing the discontinuance of the compensation during the disability, the only remedy is his removal. His right to compensation is not by virtue of contract, express or implied, but exists, when it exists at all, as a creature of law and as an incident to the office. *Bates v. St. Louis*, 153 Mo. 18, 54 S. W. 439, 77 Am. St. Rep. 701; *Stratton v. Oulton*, 28 Cal. 44; *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488; *Cavanev v. City of Milan*, 99 Mo. App. 672, 74 S. W. 408; *O'Leary v. Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156; *Bryan v. Cattell*, 15 Iowa, 538; *People v. Bradford*, 267 Ill. 486, 108 N. E. 732. As said in *Stratton v. Oulton*, supra, the salary "is incident to the title to the office and not to its occupation or exercise." 28 Cal. 51. This rule has been held to apply to such public servants as policemen. *People v. French*, 91 N. Y. 265; *State v. Walbridge*, 153 Mo. 194, 54 S. W. 447; *Frederick v. Peoria*, 203 Ill. App. 486. If applicable to policemen, the rule must be equally applicable to firemen.

Plaintiff's title to the office of fireman is not disputed. To that office the law attaches a monthly salary, and to that salary he is entitled so long as the law creating it remains in force and he continues to hold the office. The legal right to the office carries with it the legal right to the salary, and his right thereto is not dependent upon the fact or value of services actually rendered.

[5] Ordinance No. 4979 contemplates the performance of services by a fireman only during such times as he is not incapacitated for duty by reason of sickness or disability. The monthly salary that goes with the office is the fireman's compensation for the services that are contemplated by the ordinance. The salary is not compensation for anything other than the services that are within the purview of the ordinance. In no sense, therefore, can a fireman's fixed monthly salary be regarded as compensation for "injury," within the meaning of the Workmen's Compensation Act, even though it be pay for a period of time during a part of which he may have been absent on sick leave.

For the foregoing reasons we conclude that there is no merit in appellants' first contention.

It next is claimed that mandamus is not the proper remedy. Appellants' argument is, in substance, this: The auditing committee, in passing upon the city's pay rolls, is vested with discretionary and judicial powers; in the instant case the committee was vested with power to determine whether plaintiff's alleged illness was contracted in the line of his duty; in deciding that question the committee exercised a discretionary or quasi judicial power; therefore, say counsel for appellants, mandamus will not lie.

[6] While it undoubtedly is true that mandamus will not lie to control the discretion of an inferior tribunal or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, it will lie to force a particular action by the inferior tribunal or officer when the law clearly establishes the petitioner's right to such action. Where, by the express declaration of the Legislature or other lawmaking body, a given result must follow a given state of facts, with no room for the play of discretion upon the part of the inferior tribunal or officer, the writ may issue to compel the granting of specific relief. *Inglin v. Hoppin*, 156 Cal. 483, 105 Pac. 582. In *Hensley v. Superior Court*, 111 Cal. 541, 44 Pac. 232, the superior court had refused to make or enter an order or decree of due notice to creditors, upon the ground that the order for the notice was not in conformity with the law. The Supreme Court, in issuing its mandate, declared:

"Where, as here, the law affixes a right to specific relief upon certain facts, and there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal or other plain, speedy, and adequate remedy, mandamus will lie to compel it."

[7] Though the writ will not issue against an auditing body to allow a claim where the determination of whether the claim should be allowed or rejected involves the exercise of some quasi judicial or discretionary power, the nature of the claim may be such as not to require the exercise of any judgment or discretion whatever. In that case the writ may issue to compel the committee or auditing body to audit and approve the claim. *Lawrence v. Booth*, 48 Cal. 187; *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; *Hammel v. Neylan*, 31 Cal. App. 21, 159 Pac. 618; *Bryan v. Cattrell*, supra.

[8] In the instant case, defendants, members of the auditing committee provided for by the San Diego city charter, were not called upon to exercise any legal discretion whatever. By the express terms of the ordinance under which plaintiff claims the right to a full month's salary for each of the months of January and February, Almgren, as superintendent and chief of the fire department, was vested with the whole power to grant leave of absence, with full pay, to any fireman who, in the chief's opinion, had contracted sickness or disability in the line of duty. Almgren, who at this time was both superintendent and chief of the fire department, alone had the right to pass upon the sufficiency of the cause of absence, and whether it had been produced by sickness or disability contracted in the public service; and

the right of any fireman to sick leave rested solely and entirely in his discretion. See *Santa Minto v. City of New York*, 3 E. D. Smith (N. Y.) 386.

The superintendent and chief of the fire department having, in the exercise of the discretionary power with which he alone is vested, granted to plaintiff a leave of absence with full pay, on the ground that he had contracted sickness while acting in the line of his duty, the ordinance, upon that state of facts, steps in and declares, in effect, that plaintiff is entitled to his full month's pay without any deduction whatever, save, of course, the one dollar that goes to the firemen's relief and pension fund. No room, therefore, was left for the exercise of any discretion on the part of the auditing committee, and it clearly was the duty of the superior court to issue its mandate to defendants, that thereby plaintiff might be accorded the right to which the city's ordinances indubitably entitle him. *Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537, a case upon which appellants place much reliance, is nowise inimical to our conclusion that mandamus is a proper remedy. The claim that was presented to the state board of examiners in that case was one essentially calling for the exercise of the board's discretion and judgment. Discretion and judgment were exercised by the board, with the result that the claim was rejected. Here the only question involving the exercise of discretion or judgment was: Did plaintiff contract his illness while acting for the city in the line of his duty as a fireman? The power and authority to answer that question was lodged in the superintendent and chief of the fire department, where we naturally would expect it to be placed. The authority and power to determine whether plaintiff was ill, and, if he was, whether his illness was contracted in the line of duty, was an authority and power that had to be lodged somewhere. The ordinance, the provisions of which were incorporated into the city's charter by the amendment of 1915, lodges that power in the person who, by reason of his daily association and contact with the men under his supervisory care, is the one best fitted to exercise such discretionary powers—the superintendent and chief of the fire department. True, the pay rolls, when made out, approved, and verified by the fire chief, must pass through the hands of the auditing committee in the ordinary course of business; but the amounts of the salaries allowed by the committee can be no other than such as are fixed by the charter or by ordinance passed pursuant thereto. In the *Sullivan* Case our Supreme Court quotes from the opinion of the New York Court of Appeals in *Osterhoudt v. Rigney*, 98 N. Y. 223, as follows:

"The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion,

(193 P.)

are final and conclusive, and cannot be questioned on a collateral proceeding. Whether the claim is a proper town or county charge, *in a case where it is doubtful, and rests upon disputed evidence*, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction, and acts in good faith, its audit cannot be overhauled, but is final, as well as to the taxpayers as to the claimant." (Italics ours.)

If plaintiff's rights be measured by this clear and correct statement of the law, it will be apparent that he has not mistaken his remedy. The fire chief, in whom the whole power is lodged, determined that plaintiff contracted illness in the line of his duty, and for that reason gave him leave of absence with full pay. The amount, therefore, to which plaintiff was entitled, was not doubtful, it did not rest upon disputed evidence, and it was definitely fixed by ordinance.

[9] Appellants contend that the evidence is insufficient to justify the finding that plaintiff contracted sickness and disability in the line of his duty as a member of the fire department. Fire Chief Almgren, the only witness in the case, testified that plaintiff had contracted a cold which later turned into influenza; that plaintiff was on duty 24 hours a day, except one day in every five or six, when he was given a day off duty under a regulation which allows every fireman one day off in every five or six; that firemen are peculiarly subject to colds by reason of their exceptional exposure when on duty; and that at the time in question a great number of the men had colds. Absolute certainty as to the time when plaintiff contracted the cold is not required. It is sufficient that it is more probable that he contracted it while on duty, when he was peculiarly exposed to the ordinary causes of such an illness, than that he "caught the cold," as the saying is, when off duty. See *San Francisco v. Industrial Acc. Comn.*, 191 Pac. 26; *Engels, etc., Co. v. Industrial Acc. Comn.* (Cal.) 192 Pac. 845; *Santa Minto v. City of New York*, supra.

[10] Moreover, as we view the case, the question whether plaintiff contracted the cold while on duty was not a proper issue in the case. For reasons already stated, we think that was primarily a question for the fire chief, to be determined by him when he was called upon to decide whether plaintiff should be given a leave of absence with full pay. His decision upon that question, in the exercise of his honest judgment, was final and conclusive; for in him, and in him only, was that discretionary or quasi judicial power lodged. Of course, if he did not exercise an honest judgment, which is nothing other than to say no judgment whatever, then his

mere arbitrary or fraudulent *ipse dixit* would not vest plaintiff with the rights appertaining to a valid sick leave. But no claim has been made that the fire chief acted fraudulently, collusively, or arbitrarily. No issue of that kind was presented by appellants in their return to the alternative writ. The chief's determination, therefore, that plaintiff was entitled to sick leave on full pay, was final and conclusive.

[11] Finally, the claim is made that the lower court erred in sustaining certain of respondent's objections to questions propounded to the witness by appellants' counsel and in overruling certain objections interposed by appellants to questions put to the witness by respondent's counsel. These contentions are based upon the assumption that the discretionary power to grant leaves of absence, and to determine whether they should be granted with full pay on account of sickness contracted in the line of duty, is not wholly lodged in the superintendent or chief of the fire department, and that the chief's decision thereon is subject to review by the auditing committee. Since we think that the whole power is lodged exclusively in the superintendent and chief, and that an honest exercise of his discretionary power is final and conclusive, we do not think it necessary to consider these objections in detail. The rulings objected to certainly were not prejudicial.

There are no other points that merit consideration.

Judgment affirmed.

We concur: WORKS, J.; CRAIG, J.

(52 Cal. App. 348)

FANCHER CREEK NURSERIES v. LOESCHER. (Civ. 3685.)

(District Court of Appeal, First District, Division 1, California. April 22, 1921. Hearing Denied by Supreme Court June 20, 1921.)

Principal and agent §63(3)—Contract making agent "personally responsible" for goods sold makes him directly and primarily responsible.

Contract between principal and selling agent providing that he would sell for cash only, and shall be "personally responsible" for all goods sold, makes him, where selling on credit, directly and primarily responsible to his principal, without any necessity of the principal's first resorting to the buyer.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Personally Responsible.]

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the Fancher Creek Nurseries against E. F. Loescher. Judgment for plaintiff, and defendant appeals. Affirmed.

N. Lindsay South, of Fresno, for appellant.
Harris, Johnson, Willey & Griffith, of Fresno, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action upon a contract by the terms of which the defendant was created the agent of the plaintiff to make sales of nursery stock.

The contract, which was entered into on December 10, 1918, after providing for the appointment of the defendant as the plaintiff's agent for the purpose of selling and canvassing for the sale of nursery stock, contained a clause providing that the defendant as such agent agreed that he would sell nursery stock for cash only, would keep full and correct accounts of all sales made, and would make remittances promptly as sales and collections were made; the prices at which such sales were to be made were to be fixed from time to time by the principal; the defendant was to receive a commission of 20 per cent. on all sales of nursery stock except citrus and grafted grape vine stock, upon which his commissions were to be 10 per cent., which commissions were to be paid only on orders which had been actually closed and paid for in cash. The clause in said contract out of which this action arose was in the following words:

"The party of the second part shall be personally responsible for all goods sold and bills contracted under this agreement."

The complaint herein was in three counts, the first being a general count in assumpsit for a balance claimed to be due upon the entire amount of business transacted by the defendant as the plaintiff's agent, including an amount claimed to be due upon a direct purchase of nursery stock made by him on his own account. The second count was one to recover the sum of \$287.50, the amount of the defendant's said personal purchase; while in the third count the contract was pleaded in full, and only the sum claimed to be due from the defendant for sales made by him to others as the plaintiff's agent was demanded.

The defendant upon the trial and upon this appeal admits his indebtedness in the sum set forth in the second count of the complaint springing from his personal purchase of nursery stock, and only complains

of the findings of the trial court as to his liability under the personal responsibility clause in the contract above quoted for sales made by him to others as the plaintiff's agent. The sole question which he thus raises upon this appeal is as to the construction to be placed upon said clause; his contention being that under said clause in his contract he was only to be held liable for such sums as might remain uncollectible after the plaintiff had first had recourse to those whose orders had been taken and filled for nursery stock, and hence that, the plaintiff, not having alleged or proven any demand or attempted recourse upon the parties originally liable upon such orders, it had not shown the existence of a cause of action against the defendant and appellant herein.

We are unable to sustain this contention. The contract in question, when construed as a whole, clearly provides that the defendant, as the plaintiff's agent, should sell for cash only to such customers as he might succeed in obtaining orders from for the plaintiff's nursery stock; the plaintiff being required to fill these orders when so taken. It is quite evident that the principal inserted the clause in said contract providing for the personal responsibility of the defendant upon all orders taken by him for its own protection, and to our minds there is but one reasonable construction to be placed upon said clause, and that is that the agent, being authorized by the terms of his contract to sell for cash only, was bound, in the event of his accepting any orders for nursery stock other than cash orders, to make good such orders in cash directly to his principal.

The case of *Fuerst v. Musical Mut. Protective Union* (City Ct.) 95 N. Y. Supp. 155, upon which the appellant relies, must be read as to its interpretation of the phrase "personal responsibility" with its context; and when so read it is clear that its definition of that phrase as applicable to that particular case cannot be given application to the facts of the case at bar. The clause in the contract under review in this case would be meaningless if it was not intended to make the agent directly and primarily responsible to his principal upon all orders taken by him. The trial court correctly took this view in its findings and judgment, and, since this is the only question involved in this case, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(52 Cal. App. 142)

A. R. G. BUS CO. v. WHITE AUTO CO.
(Civ. 3482.)

(District Court of Appeal, Second District, Division 1, California. April 1, 1921. Hearing Denied by Supreme Court May 31, 1921.)

1. Evidence \S 442(6)—Parol evidence held inadmissible to show that 10 order contracts were but parts of a single transaction.

In an action for damages for failure to deliver auto trucks, parol evidence of the circumstances under which 10 order contracts were made, each one stating that it was a complete contract, held inadmissible for the purpose of showing that the order contracts were all but parts of a single transaction, under Civ. Code, §§ 1636, 1642.

2. Customs and usages \S 17—Parol evidence of custom held inadmissible.

In an action for damages for failure to deliver auto trucks evidence that there was in the automobile business a general and well recognized custom and usage that where trucks were sold and the purchase price not paid in full at the time of the sale, automobile lease contracts in a certain form should be executed, was properly refused; it contradicting the written order contracts, providing that there was not between the parties any understanding or agreement with respect to the sale, "except such as are embraced in the terms therein."

3. Sales \S 62—Held that there was no supplemental executed oral agreement concerning undelivered motor trucks.

In an action for damages for failure to deliver motor trucks, where defense was that plaintiffs refused to insure the trucks and execute lease contracts and notes, the fact that plaintiffs had executed lease contracts and notes and furnished insurance policies in connection with the delivery of three trucks, which were delivered by defendant, did not constitute an executed supplemental agreement, affecting the terms or performance of the separate and independent contracts involved.

4. Sales \S 418(2)—Damage difference between contract price and market price on failure to deliver.

Where seller fails and refuses to deliver motor trucks, the measure of damages is the difference between the contract price and the market price of the trucks at the time when seller repudiates the contract, under Civ. Code, §§ 3308, 3354.

On Hearing in Supreme Court.

5. Evidence \S 442(6)—Parol evidence inadmissible to show that purchaser of auto trucks was to execute lease agreement and take out insurance.

In an action for damages for failure to deliver motor trucks under written order contracts, which provided that there was not between the parties any understanding or agreement with respect to the sale "except such as are embraced in the terms therein," parol evidence was inadmissible to show an oral agreement that purchaser should execute a lease

agreement and carry insurance on each truck for the benefit of the seller; there being no provision in the order contracts for the execution of such lease agreement, or any lease agreement at all, whether the order contracts for each truck were or were not parts of a single transaction.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by A. R. G. Bus Company against the White Auto Company. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeals, and hearing denied in Supreme Court.

Herbert W. Kidd and Eugene D. Williams, both of Los Angeles (A. J. Verheyen and Rex Hardy, both of Los Angeles, of counsel), for appellant.

Alfred H. McAdoo and George E. Mills, both of Los Angeles, for respondent.

CONREY, P. J. On the 18th day of June, 1917 (defendant's corporate name at that time being Pioneer Commercial Auto Company), a contract in writing was entered into between plaintiff and defendant whereby the plaintiff agreed to purchase from defendant an automobile truck therein described, and to pay therefor the stipulated price of \$3,883.90. The terms of the contract, so far as it is necessary to set them forth here, are as follows:

"To be paid on delivery \$783.90, balance in 18 monthly notes, interest at 8 per cent. per annum. Or said deposit of \$—— to be forfeited to the Pioneer Commercial Auto Company as their compensation for withholding sale. Title to above-described property to remain in Pioneer Commercial Auto Company until same is paid for in full. Approximate delivery date as soon as possible."

"It is understood that the car above ordered is subject to the warranty published in the catalogue of the manufacturer, and that no other warranty or guaranty is or will be given, and that there is no understanding or agreement whatsoever between the undersigned and the Pioneer Commercial Auto Company, or its agents, with respect to the above order, except such as are embraced in the terms therein."

The complaint alleged that on said day plaintiff and defendant entered into seven separate contracts, all of which are identical in their provisions and all containing the terms above stated; that under and by virtue of these contracts the plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to plaintiff, seven Model GBBE White automobiles at a total price and consideration of \$3,883.90 each; that defendant had wholly refused and failed to make delivery of said automobiles, notwithstanding demand therefor was made by plaintiff; that defendant had announced and declared to plaintiff that it does not intend to

and will not make delivery of said automobiles as aforesaid. The first count of the complaint, after stating the foregoing facts, alleges that by reason of the breach and failure of the defendant to deliver said automobiles under and pursuant to the terms of the said contracts, plaintiff has suffered damages in the sum of \$9,472.40. There are seven other counts in the complaint, all of which are like the first count, except that each of them states a separate cause of action on one of the seven contracts, and claims damages on account of the defendant's failure and refusal to deliver the automobile described in the contract. Judgment was entered in favor of the plaintiff for damages in the sum of \$2,500, from which judgment the defendant appeals.

The answer of the defendant, so far as denials of facts alleged are concerned, raises no issue except upon the fact of damage to the plaintiff and the amount thereof. But as a further and affirmative defense, it was alleged in the answer that on said 18th day of June, 1917, plaintiff and defendant entered into one certain contract, whereby the plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to the plaintiff, 10 White automobile trucks at a price of \$3,383.90 per truck, "plus the additional necessary cost of installing upon each of said trucks special bodies therefor." The terms of this alleged contract included a cash payment of \$783.90 on delivery of each truck and the giving of 18 notes for the unpaid portions of the purchase price of each of said trucks, with the further provision that a written lease contract as to each of said trucks was to be entered into by plaintiff and defendant on delivery of each of said trucks, and that certain insurance was to be placed on each of said trucks in favor of the defendant at the time of delivery of said trucks to the plaintiff. It was alleged that three of the trucks were delivered, but that the plaintiff failed and refused to place insurance on any of them as required by the alleged contract, or to deliver to the defendant any insurance policies. Further allegations of the answer show that on or about October 1, 1917, the fourth automobile truck included in said contract was ready for delivery, and defendant offered to deliver it to the plaintiff "upon the payment by it to defendant of said sum of \$783.90, and upon the furnishing of insurance upon said truck in the sum of \$2,600, and thereupon notified plaintiff that unless said payment was made upon said fourth truck, and said insurance furnished thereon not later than October 9, 1917, defendant would refuse to deliver said truck, or any of the remaining six trucks contemplated to be sold and delivered under the terms of said contract"; that plaintiff failed and refused to comply with these demands, and that by reason thereof defend-

ant notified plaintiff that it would refuse to proceed further with the filling of said orders or with the delivery of the remaining seven trucks contemplated to be delivered under the terms of said contract.

Appellant contends that the evidence is insufficient to sustain the court's finding that at the time stated the plaintiff and defendant entered into the seven separate written contracts mentioned in the complaint, and that each one thereof was an independent contract; and that the court erred in refusing to admit parol testimony and other evidence going to prove that the 10 order sheets constituted but one contract. This presents the most important question in the case. It should be noted, however, that the defendant sought, not only to prove that the 10 order sheets constituted but one contract, but also to prove by evidence extraneous to those writings that the plaintiff agreed to sign "lease contracts" and to furnish insurance on the trucks in favor of the defendant. All of this offered evidence was objected to by respondent and excluded by the court. In support of appellant's contention that the court erred in these rulings, we are referred to two sections of the Civil Code and to certain decisions, and especially to *Torrey v. Shea*, 29 Cal. App. 813, 155 Pac. 820.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636.

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Civ. Code, § 1642.

In *Torrey v. Shea*, supra, the rule is approved that where an inspection of the instruments themselves is not sufficient to ascertain whether or not several writings between the same parties were intended to cover a single contract, the intention of the parties being either not expressed or doubtfully expressed, resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made, for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments. The rule was so applied in that case that the defendants were permitted to show in evidence a contemporaneous collateral oral agreement of the parties to the several instruments to the effect that the subject-matter of each instrument should be but a unit in a series of sales which as a whole were to constitute the subject-matter of a single transaction. It was pointed out that in that case the defendants did not seek nor were they permitted to contradict by parol proof the covenants of the particular instrument in suit, and that therefore the rule that parol evidence is not admissible to alter,

vary, or contradict a written instrument was not applicable. But the court further stated:

"Of course, this exception to the general rule can be invoked and applied to a written instrument which prima facie purports to embody the complete legal obligations of the parties, only where the established circumstances surrounding and attending its execution warrant the inference that the parties did not intend that it should be a complete and final statement of the whole transaction before them."

[1] In the case at bar, each one of the written contracts contains the following stipulation:

"That there is no understanding or agreement whatsoever between the undersigned and the Pioneer Commercial Auto Company, or its agents, with respect to the above order, except such as are embraced in the terms therein."

This is a direct declaration of intention that the writing is itself a complete contract. To have permitted appellant to prove by parol evidence that this was only part of a transaction wherein at the same time other trucks were sold by the defendant to the plaintiff, and that all of the sales constitute one transaction, would be a direct contradiction of the terms of each contract. To go further, and permit defendant to prove an addition to the agreed price by charging the purchaser with the duty of paying for insurance on the trucks for the benefit of the vendor, would constitute a further addition to and contradiction of the terms of the contract.

It is next contended that the court erred in refusing to receive testimony to explain ambiguity in the contracts. The illustrations offered by counsel related to items not relevant to the actual controversy between the parties. Appellant's refusal to perform its contracts did not in any instance grow out of any disagreement with respondent concerning the color of the automobile, or the extent of lengthening of wheel bases, or the meaning of the phrase "18 monthly notes." Appellant proceeded upon the theory that notwithstanding the terms of each contract to the contrary, it could treat them all as one transaction, and impose upon respondent conditions not specified in any one of the contracts as written. Its breach of the contract grew out of that assumption, and did not result from ambiguities in the specifications of the orders. As to the elements of contract which have any bearing upon appellant's claimed right to refuse performance, we think the court did not err in treating each contract as complete upon its face.

[2] We think that the court did not err in refusing to admit evidence of witnesses to the effect that there was in the automobile business, at the time when these contracts were entered into, a general and well-recognized custom and usage that where trucks were sold and the purchase price not paid

in full at the time of the sale, automobile lease contracts in a certain form should be executed. This could not have been done without contradicting the agreement of the parties that there was not between them any understanding or agreement with respect to the sale "except such as are embraced in the terms therein."

[3] The conclusions already announced compel the further decision that the court did not err in refusing to receive testimony going to prove that defendant's refusal to deliver the fourth truck, or to make further deliveries, was warranted or justifiable. Neither did the court err in refusing to admit evidence proving that, subsequent to the date of the execution of the contract, the same was supplemented by an executed oral agreement. The fact that respondent executed lease contracts and notes and furnished insurance policies in connection with the delivery of the three cars which were delivered to it by appellant in no wise constituted an executed supplemental agreement affecting the terms or performance of the other separate and independent contracts.

[4] The remaining point suggested is that the evidence does not sustain the finding establishing the amount of damages suffered by the plaintiff. The claim is that the evidence proved nothing more than a speculation or guess concerning the loss sustained. It is claimed that the only witness on this subject testified to nothing definite. In answer to the question:

"What in your opinion would have been the reasonable market value in Los Angeles on October 9, 1917, of a new truck exactly as any one of the three trucks that were delivered by defendant to plaintiff?"

—the answer was:

"Why, I would assume possibly \$3,930 each."

But on cross-examination the witness stated that these figures were the result of a computation which he had made, and gave details which were sufficient to establish the difference between the contract price and the market price of such trucks at the time when appellant repudiated the contracts. There was other testimony tending to show that this computation was not excessive. The measure of damages was appropriately determined in accordance with sections 3308 and 3354 of the Civil Code. *Connell v. Harron, Rickard & McCone*, 7 Cal. App. 745, 95 Pac. 916.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the

district court of appeal of the second appellate district, division one, is denied.

[5] In denying the petition we would say that we withhold approval from the portion of the opinion of the district court of appeal holding that parol evidence of the circumstances under which the ten order contracts were made was inadmissible for the purpose of showing that the order contracts were all but parts of a single transaction. A decision of the question so presented was not necessary. The evidence was offered only for the purpose of laying the foundation for a further showing that it was agreed that upon the delivery of each machine the plaintiff should execute a lease agreement and that this lease agreement should contain a provision whereby the plaintiff would in effect carry insurance on the machine for the benefit of the defendant. There was no provision in the order contracts for the execution of any such lease agreement or any lease agreement at all. This being so, the attempt to show an understanding for the execution of the lease agreements was but an attempt to vary by parol or extrinsic evidence the terms of written contracts. This could not be done, whether the ten contracts were or were not parts of a single transaction.

OLNEY, J., SHAW, J., WILBUR, J., and SLOANE, J., concur. ANGELLOTTI, C. J., and LENNON, J., concur in the denial of the petition for hearing in this court.

(52 Cal. App. 322)

DILLINGHAM et al. v. DAHLGREN.
(Civ. 3688.)

(District Court of Appeal, First District, Division 2, California. April 21, 1921.)

1. Frauds, statute of §158(4)—Evidence held insufficient to show complete written contract of sale.

In an action for the breach of an agreement to sell real estate, wherein the statute was urged as a defense, testimony taken in connection with a reference in the preliminary agreement to a contract to be completed held to indicate that the parties intended the execution of a new agreement with a preliminary agreement as a basis, and that the defendant never delivered to plaintiff for her approval a proper written contract, but that he delivered a proposed contract containing important features in addition to those contained in the preliminary agreement.

2. Frauds, statute of §106(2)—Contract for transfer of realty must be complete.

Where the transfer of a piece of real estate is involved, the parties cannot leave to future oral agreement any of the essential parts of their contract.

3. Evidence §158(27)—Frauds, statute of §71—Agreement for transfer of realty cannot be proved orally.

In an action for the breach of an agreement to sell her real estate, wherein the statute of frauds was involved, and the case did not involve a lost instrument, the case did not come within the rule concerning secondary evidence as provided for by Code Civ. Proc. § 1855, but was covered by section 1973, providing that, where such an agreement is involved, evidence cannot be received without the writing.

4. Frauds, statute of §158(3)—Defective recital may be cured but not created by parol evidence.

A description of land sought to be sold under a broker's contract can be cured, but not created, by parol evidence, and such rule applies with equal force to every other recital which the law requires to be in writing.

5. Contracts §15—Consent of parties necessary.

It is essential to the validity of contracts that the parties should have consented to the same subject-matter in the same sense, and they must have contracted ad idem.

6. Contracts §32—Agreements to be reduced to writing not binding until so reduced.

Preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself, and to be final the agreement must extend to all the terms which the parties intend to introduce, and there is no binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing; the same rule applying whether the preliminary negotiations were oral or written.

7. Contracts §25—Agreement to make contract invalid.

An agreement that parties will in the future make such contract as they may then agree upon amounts to nothing, and cannot be made the basis of a cause of action; for, where a final contract fails to express some matter as time of payment, the law may imply the intention of the parties, but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Evelyn L. Dillingham and husband against A. L. Dahlgren. Judgment for plaintiffs, and defendant appeals. Reversed.

G. L. Aynesworth, L. N. Barber, and A. W. Carlson, all of Fresno, for appellant.

H. L. Meyers, Ray C. Wakefield, and H. F. Briggs, all of Fresno, for respondents.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for \$1,350 for the breach of an agreement to sell to the plaintiffs a certain piece of real property situated at Fresno, Cal.

Appellant contends that the complaint, evidence, and findings are insufficient to sustain the judgment because they do not show a binding agreement between the parties for the sale of this property. The contract sued upon is brief, and is as follows:

"A. L. Dahlgren agrees to sell to Evelyn L. Dillingham the following described property. 'Lots 7 and E. 1/4 8 Blk. 33 Belmont Add. for the sum of \$3,750.00, to be paid as follows: \$100.00 deposit, \$400.00 on completion of contract, and \$35.00 per month or more including interest at 7%.

"Seller agrees that he will paint woodwork in kitchen, varnish woodwork in dining and living rooms, also paint porch and steps. Seller agrees to pay for cement walk from house to street, buyer to pay for street work.

"A. L. Dahlgren.

"Evelyn L. Dillingham."

The case as made by the plaintiff contains two frailties: (1) Concerning the applicability of the statute of frauds; (2) concerning the making of contracts in general. These two frailties happen to run arm in arm under the facts of this particular case, but are not necessarily dependent one on the other.

First, we shall take up the consideration of the case as to how it measures up when we consider the clause of the statute of frauds.

The trial court found:

"That by the phrase 'on completion of contract' in said preliminary agreement (the document herein set out) the parties intended the execution of a more formal agreement in writing in accordance with the terms of said preliminary agreement."

It is the contention of appellant that this finding is not sustained by the evidence, and that it appears from the testimony of the plaintiff that it was not intended that the parties had completed their agreement, but that it was the intention of all parties to agree to enter into an agreement in the future embodying conditions which would be satisfactory to both parties. The testimony of the plaintiff certainly sustains this position. She testified as follows:

"Q. At the time this little memorandum which has been introduced in evidence was signed, was there any conversation between you and Mr. Dahlgren that some formal agreement would be drawn up for the sale and purchase of the lands? A. Mr. Dahlgren was to go ahead and complete a form of contract. Q. Now was anything said about what would be in the terms of that contract? As a matter of fact nothing was said as to what the terms of that contract would be, was there? A. No; only just there would be a mutual agreement. Q. And this little paper that has been introduced in evidence here, marked Plaintiff's Exhibit 2, was not intended to be an agreement at all, but simply something to be signed until the formal agreement was drawn? A. Well, it was an agreement. Q. But it wasn't to be an agreement that you people should buy and sell property? A. It was an agreement from which

a contract was to be made. Q. But you were not going to sign just any agreement Mr. Dahlgren drew up, were you? A. Any reasonable form of contract; yes. Q. But you don't answer my question. Please answer the question. You wouldn't have signed just any agreement Mr. Dahlgren would have drawn up, no matter what its terms were, would you? A. I don't believe I quite understand. Q. In other words, if Mr. Dahlgren had drawn up an agreement for the sale and purchase of that land with terms and provisions in it that you didn't like, you wouldn't have signed it, would you? A. No. Q. In other words, whatever agreement he was to draw up would have to be one which you would agree to? A. I was perfectly willing to sign a regular form of contract. Q. Your idea was that any contract he drew up would have to be such as you would approve? Is that right? A. Yes; I think so. Q. In other words, if he had drawn a contract with terms which you thought were wrong or unfair to you, you would not have signed it. A. No. Q. And as to the matter of an agreement, neither you nor he had said anything about just what terms or provisions were to go into it, had you—hadn't been a word said about it? A. Not exactly, but Mr. Dahlgren handed me a contract which was perfectly all right with me and which I was willing to sign. Q. Was that before this little memorandum was signed? A. No; after. Q. That is the paper that was introduced in evidence? A. Yes sir. Q. But, now, Mrs. Dillingham, answer my question. Prior to the time that paper was drawn up and handed to you, you and he had had no discussion whatever as to the terms and conditions of the contract to be drawn. A. No. Q. And you didn't know what terms and provisions the contract he was to draw would have in it? A. No; certainly not, but I was certainly under the impression it would be a regular form of contract that is always used in real estate sales. Q. Now tell me what the regular form of contract in real estate sales contains. I want to say I have never seen one and I have been in the business for 12 years. A. I don't say I can explain exactly, but I think you have one in your hand. Q. No; I have not. I am sorry to say I have not. Now, Mrs. Dillingham, as a matter of fact there is no such thing as a regular form of contract, is there? A. Yes; in a way. Q. Well, you have never seen two contracts that were the same? A. Not exactly. Q. Now, as a matter of fact, you and Mr. Dahlgren didn't say a word about the drawing of a regular form of contract, did you? A. Well, no; but it was understood. Q. It was your intention whenever he submitted whatever form of contract he did submit to you that you should take it to your attorney for examination, wasn't it? A. Yes, sir. Q. And you did take it to your attorney for examination? A. Yes, sir. Q. And asked him if it was all right? A. Yes, sir. Q. And if he had not said it was all right, you would not have signed it? A. No. Q. Now, then, as a matter of fact, did he furnish you a certificate of title? A. No; he did not. Q. There was nothing in the agreement about his furnishing you a certificate of title, in that little memorandum of agreement? A. No, sir. Q. Wasn't anything said in it about furnishing you that, and you would not have gone ahead with the agreement if he had not furnished you one? A. No, sir.

Q. And he would have had to agree to put that in the contract before you would have gone ahead with the contract? A. Yes, sir. * * * Q. As a matter of fact, as far as you and Mr. Dahlgren are concerned, nothing was ever said between you at all prior to the submission to you of this particular memorandum in evidence about the terms that would go into the contract, other than what happens to be in this little memorandum about the price and description of the property, terms of payment, and things he would fix around the place and things you would fix and pay for; that was all that was discussed? A. Yes, sir. Q. And you left for future determination all the terms that should go into a completed contract. didn't you? A. Yes."

[1] The foregoing testimony, taken in connection with the reference in the preliminary agreement to a contract to be completed, indicates clearly that the parties intended the execution of a new agreement, with the preliminary agreement as a basis, but containing many additional provisions to be determined by future negotiations. The evidence does not show that the defendant delivered to the plaintiff for her approval, a contract in writing which embodied substantially the terms of the preliminary agreement, together with the conditions that would have been implied by law, but that he delivered to her a draft of a proposed contract to which was added many important features in addition to those contained in the preliminary agreement.

[2, 3] In the transactions between the plaintiff and defendant, involving as they did a transfer of a piece of real estate, the parties could not leave to future oral agreement any of the essential parts of their contract. The case does not involve a lost instrument, and therefore does not come within the rule concerning secondary evidence. Code Civ. Proc. § 1855. But the case is covered by Code of Civil Procedure, § 1973, which provides that in a case involving such an agreement as is here claimed evidence cannot be received without the writing. In *Swisher v. Conrad*, 76 Fla. 644, 646, 80 South. 564, 565, the Supreme Court of Florida said:

"The written memorandum for the sale of land required by the statute of frauds cannot rest partly in writing and partly in parol, but the written memorandum must disclose all the terms of the sale. *Rhode v. Gallat*, 70 Fla. 536, 70 South. 471."

In *Klein v. Markarian*, 175 Cal. 37 at page 40, 165 Pac. 3, at page 4, Mr. Justice Sloss, speaking of such a contract as this memorandum, says:

"Furthermore, the contract fails to provide how the obligation to make the deferred payments is to be evidenced or secured. The option was signed by the defendant alone. He was to convey his land upon payment of less than one-fourth of the purchase price. Thereupon he would have no writing signed by any one evidencing an obligation to pay the bal-

ance, nor any security for such balance beyond the inadequate security of a vendor's lien. If this was the intent of the parties, specific performance might have been properly refused upon the ground that the contract was not 'just and reasonable' as to the defendant. Civ. Code, § 3391; *Godwin v. Collins*, 3 Del. Ch. 196; *Diamond, etc., Co. v. Todd*, 6 Del. Ch. 163 [14 Atl. 27]. If, on the other hand, the parties contemplated that the purchaser should give some form of secured evidence of indebtedness to cover the deferred payments—and this the plaintiff's own conduct shows to have been his view—the agreement was entirely uncertain with respect to the manner in which the balance should be evidenced and secured. *Marsh v. Lott*, 8 Cal. App. 385 [97 Pac. 163]."

In the case of *Co-op. Ass'n v. Phillips*, 56 Cal. 539, the court refused to enforce an agreement because it appeared that it was not really the final contract between the parties, but the basis on which to conclude a contract for the sale of land. In the case of *Wineburgh v. Gay*, 27 Cal. App. 603, 150 Pac. 1003, the memorandum which was the basis of the action read as follows:

"I will lease to you the stores now occupied by the Union Title & Trust Co. for 5 years, beginning Jan. 1, 1911, \$250 for the first two years and \$275.00 for the following three years. Usual clauses in lease to rebuilding."

It was held that the last sentence in this memorandum was uncertain and that it was not a completed agreement. In this case the memorandum set forth was also a preliminary agreement, and the controversy arose over a failure to agree upon the provisions to be included in the formal contract between the parties. The court said, at page 605 of 27 Cal. App., at page 1005 of 150 Pac.:

"It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties." *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 371 [35 Pac. 1000]. "To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.'" 5 *Browne on Statute of Frauds*, § 371. In *Breckinridge v. Crocker*, 78 Cal. 529 [21 Pac. 179], the court said: "The memorandum must contain all the material elements of the contract." *Seymour v. Oelrichs*, 156 Cal. 782, 787, 134 Am. St. Rep. 154, 106 Pac. 88."

In the case of *Poel v. Brunswick*, 216 N. Y. at page 314, 110 N. E. at page 620, the court says:

"In order to satisfy the requirements of the statute of frauds, the written note or memorandum must include all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is es-

essential that it shall completely evidence the contract which the parties made. If, instead of proving the existence of that contract, it establishes that there was in fact no contract or evidenced a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute."

Rutenberg v. Main, 47 Cal. 213, involved a cash sale; *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206, involved an exchange in present; *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123, involved a contract to sell on time, but the terms were stated in the memorandum except such terms as the law implies; *Preble v. Abraham*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, involved a defective description which it was held could be cured not by the introduction of the oral conversations, but by evidence showing ownership in the defendant to certain lands at the time of the contract, the location thereof, etc.; and as stated by Mr. Justice Lénnon in *Proulx v. Sacramento Valley Land Co.*, 19 Cal. App. 529, at page 534, 126 Pac. 509, at page 511:

"In short, a description of land sought to be sold under a broker's contract can be cured, but not created, by parol evidence."

[4] What was said by the learned justice in reference to a defective recital as to description applies with equal force to every other recital which the law requires to be in writing.

We will now take up a consideration of the case under the rules governing the creation of contracts in general, and in this behalf we will for the moment turn our backs on the statute of frauds.

[5, 6] "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*." *Breckinridge v. Crocker*, 78 Cal. 529, 536, 21 Pac. 179, 181. In this connection one of the rules governing the creation of contracts in general is stated in 13 Corp. Jur. 289, § 100, as follows:

"The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement; nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing."

The same rule applies whether the preliminary negotiations were oral or in writ-

ing, if it manifestly appears that certain parts of the contract are later to be agreed upon and inserted in the formal draft. The writer has carefully selected all of the following cases as substantiating the foregoing proposition: *Fuller v. Reed*, 38 Cal. 99, 109; *Co-operative Ass'n v. Phillips*, 56 Cal. 539, 545; *Pac. R. M. Co. v. Railway Co.*, 90 Cal. 627, 633, 634, 27 Pac. 525; *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 371, 35 Pac. 1000; *Spinney v. Downing*, 108 Cal. 666, 668, 41 Pac. 797; *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 670, 117 Pac. 936; *Las Palmas, etc., Distillery v. Garrett & Co.*, 167 Cal. 397, 400, 139 Pac. 1077; *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 461, 469, 168 Pac. 1037; *Durst v. Jolly*, 35 Cal. App. 184, 190, 169 Pac. 449. The rule is general in California whether the question arises in a case of specific performance (*Co-operative Ass'n v. Phillips*, supra); or an action to foreclose a mortgage (*Mercantile Trust Co. v. Sunset, etc., Co.*, supra); an action to quiet title (*Durst v. Jolly*, supra); or an action for damages (*Talmadge v. Arrowhead R. Co.*, supra; *Jules Levy Bros. v. A. Mautz & Co.*, supra; *Las Palmas, etc., Distillery v. Garrett & Co.*, supra).

[7] An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906. See, also, *Ridgway v. Wharton*, 6 H. L. Cases, 263, 10 Reprint, 1297.

In the present case it not only appears that the agreement relied upon was silent as to many matters essential to a contract between the parties, but it further appears that it was not intended and did not purport to be a final contract between the parties, but only a preliminary agreement; that the parties intended further negotiations and mutual agreements as to numerous other matters involved in the transaction between them; that these matters when agreed upon were to be embodied in a final contract between the parties, but no agreement with reference to them was ever reached.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

(52 Cal. App. 336)

CHADBOURNE et al. v. WHITE.
(Civ. 2266.)

(District Court of Appeal, Third District, California. April 22, 1921.)

Principal and agent §166(4)—Knowledge of agent's act necessary for ratification by principal.

For an alleged agent's warranties and representations to be ratified by the principal, the principal must have knowledge thereof.

Appeal from Superior Court, Butte County;
H. D. Gregory, Judge.

Action by F. A. Chadbourne, Jr., and another, partners as Chadbourne Bros., against J. M. White. Judgment for defendant, and plaintiffs appeal. Reversed.

Harry Davids, of Chico, for appellants.
Bond & Deirup, of Chico, for respondent.

HART, J. This action is by the plaintiffs as copartners against the defendant upon a promissory note for the sum of \$1,000, dated April 3, 1914, and due and payable on September 1, 1914. The complaint is in the usual form of such an action. In due time the defendant filed an answer, admitting the execution of the note by him, and that it was given as in part payment of a certain tractor, but defending himself against the validity of the note on the ground that the tractor failed to measure up to an alleged express warranty made by the seller as to the capacity of the machine to perform the work for which it was designed. The answer alleges that, immediately upon discovering that the tractor was not as warranted, the defendant rescinded the contract for its purchase and offered to restore the tractor to the plaintiffs, at the same time demanding the return to him of the note in suit; that plaintiffs refused, and ever since have refused, to accept the return of said tractor and to deliver to defendant the said note. In the same answer the defendant set up a second defense based upon false and fraudulent representations by the plaintiffs relative to the tractor and its capacity or power for doing the work it was intended for. That cause of action also contained, in the same language as it appeared in the first cause of action, the allegation that, in the month of July, 1914, the defendant first discovered the worthlessness of the tractor and then offered to return the same to plaintiffs and to place the latter in the same position as they were before the defendant entered into the contract for the purchase of the engine and demanded of plaintiffs the return of the note upon which the complaint declares, and that plaintiffs have at all times since said offer refused to accept the same and to redeliver said note to defendant. The answer prayed for the cancellation of the note and for the

sum of \$3,000 for loss of crop by reason of the failure of the tractor to perform the work essential to the growing and the harvesting of the crop for the year 1914.

The special defense or the counterclaim was answered by the plaintiffs, and on the day the cause came on for trial (December 4, 1918) the defendant made an application for leave to amend his answer, and the same was allowed. The effect of the said amendment was to exclude from the answer all the allegations as to false and fraudulent representations, and consequently to leave in the case as the sole ground for the rescission of the contract of purchase and thereupon the cancellation of the note in suit the fact, as alleged, that the tractor was not as warranted by the plaintiffs, alleging also that immediately upon discovery of that fact defendant offered to return the tractor, etc.

Upon the issues thus framed the case was tried, and on the 16th day of December, 1918, the case was taken under advisement.

On March 11, 1919, no decision then having been arrived at or declared, the defendant moved for leave to file another amended answer or counterclaim so that the same would "conform to the pleadings and the proof taken at the trial." The amended answer changed the allegation with regard to offering to return the tractor, etc., "immediately upon discovering that said tractor was worthless," by stating in lieu thereof that from the time of the delivery of the tractor to the defendant the same "proved unworkable," but that defendant believed and had faith that by making proper repairs on the same said tractor could be put in condition to perform the labor which the plaintiffs and their agent "warranted and represented that it would perform as aforesaid." The allegation goes on with the statement that defendant continued to have faith, etc., until the date he rescinded the contract of purchase; that the tractor could be put in workable condition, and that he employed many expert tractor engineers on such faith, at great expense, to work on and operate and repair the machine, to no purpose, however, since the parts of the tractor continued to get out of order or be broken; that thus the defendant tested and experimented with the tractor upon the belief that its defects could be so corrected as to render it capable of performing its work properly until the month of August, 1914, when he discovered that said tractor was inherently defective in its construction and not capable of being repaired so as to make it work as warranted, etc. The relief asked for by this amended answer, in addition to rescission and cancellation, was for damages, not for the crop, as was the prayer in the original pleading of defendant, but for money alleged to have been expended by defendant in repairing and attempting to operate the tractor.

The plaintiffs moved to strike out the second amended answer, and also filed a demurrer thereto, but the motion was denied and the demurrer overruled. These orders were made on the 8th day of September, 1919. Plaintiffs thereupon filed an answer to the answer and counterclaim of defendant. On the 15th day of September, 1919, the court filed a written decision against the plaintiffs, and on the 23d day of September, 1919, counsel for plaintiffs moved to reopen the cause before judgment. The principal ground upon which said motion was founded and pressed was that the second amended answer, filed, as seen, after the trial of the case—that is, after the proofs had been received and the case submitted for decision—contained "new and other matter than that contained in the amended answer and cross-complaint upon which said defendant relied when the said cause was tried and heard, and when the said cause was submitted to the above-entitled court for decision." This motion was denied.

Findings were made and judgment rendered and entered rescinding the contract of sale of the tractor and ordering the note in suit to be delivered to defendant for cancellation. The defendant was not awarded damages.

This appeal is by the plaintiff from the judgment so entered, and is supported by a transcript of the proceedings had at the trial, as prescribed by section 953a of the Code of Civil Procedure.

The assignment of error first discussed in the briefs involves the action of the court in allowing the defendant to file the amended answer after trial had been completed and in denying the motion of the plaintiff for a reopening of the case after the filing of said amended pleading, but we may waive consideration of this point, since we have concluded that the judgment must for other reasons be reversed.

In taking up the merits of the controversy it is deemed the more orderly first to state the facts of the transaction upon which this action is founded. One Joseph Peltier was in the year 1913, and down to the date of the sale thereof by him, the owner of a ranch not far from Suisun City, in Solano county, consisting principally, if not altogether, of tule lands. Either in the month of November or December, 1913, he purchased at Los Angeles two Buffalo-Pitts gas tractors, paying therefor the sum of \$1,500 each; the price of said tractors later and at the time of the trial of this action having advanced to the sum of \$3,000 each. Before completing the contract for the purchase of said tractors, Peltier had the machines examined by an expert "gas engine man" employed by him for that purpose. Peltier worked the tractors on his ranch satisfactorily from the time that they were delivered to him (either in the month of November or the month of

December, 1913) for very close to two months and until the winter rains set in, causing the ground to become so soft that the engines could no longer be used for plowing purposes. When, for the reason just stated, the working of the tractors ceased, Peltier caused the magneto and electric parts of the machine in question here to be removed and the tractor to be covered at the place on the ranch where the work of operating it had ceased, and there allowed it to remain until it was sold and delivered to the defendant in the month of April, 1914, as will be later more fully explained.

Within four months, approximately, after the operation of the tractor had been stopped, as above explained, Peltier sold his ranch and all its equipments, including the tractors referred to, to Chadbourne Bros., the plaintiffs herein. The ranch and all the machinery—the agricultural implements, including, as stated, the tractors mentioned—on said ranch were sold by Peltier for a lump sum.

After Peltier had made arrangements to sell his ranch to the Chadbournes (this statement is based on the testimony of Peltier testifying as a witness for the defendant and is not contradicted), a man named Cline, residing in San Francisco, called on him (Peltier) and said to Peltier that he (Cline) had a client for one of those engines, and asked Peltier if he desired "to sell them." Peltier replied that the tractors were not then his property and referred Cline to the plaintiffs. Peltier, at the time of that conversation with Cline, had never met or seen White, the defendant. Peltier never at any time resided on the ranch, his residence having been in the city of San Francisco. His son, however, had lived on the ranch, having been in charge of the reclamation work thereon while his father was the owner of the ranch.

Fred A. Chadbourne, one of the plaintiffs, called as a witness by the defendant, testified that he had never met the defendant, White, prior to the transaction eventuating in the sale of the tractor to the latter; that shortly after they (the Chadbournes) had bought the Peltier ranch he was told by Peltier that he had a prospect for a buyer of one of the tractors, and Chadbourne was referred by Peltier to Cline, who, Peltier told Chadbourne, would give him "the details of what could be done with it"; that he (witness) thereafter called on Cline in San Francisco, and that the latter explained the proposition for the purchase of the tractor, the terms of payment and where and how the same was to be shipped to the defendant, the proposed purchaser; that the proposition made to him by Cline was satisfactory to him and he agreed to pay Cline, for his services in effecting the sale of the tractor for the sum of \$1,500, 20 per cent. of the sale or purchase price.

The defendant White was, at the time of

the transactions involved herein, engaged in the business of farming in Butte County, then having under lease 2,000 acres of what was then known as the "Phelan ranch," in said county, and farming the same on shares. About a year prior to the time of the transactions involved herein the said Cline called on White at his ranch and undertook to sell to him (White) a Hart-Parr engine, but failed in the undertaking. Subsequently White received a letter from Cline in which the latter stated that "he had found an engine that would do my work, and all the trouble was that it was too heavy for the ground that it was in." Cline in said letter asked White to "come down and look it over." White shortly thereafter went to San Francisco, and on the day following that of his arrival in that city, he, accompanied by Cline, and a man named Spears, a friend of the defendant, and who, although a carpenter by trade, had had considerable experience in handling gas engines, went to the Chadbourne ranch and there inspected the tractor. This was in the month of February, 1914. White, when testifying, stated, in reply to a question by his attorney as to whether "there were any representations" made with regard to the tractor, replied that there were and that such representations were made "by Mr. Cline and by Mr. Peltier's son." Asked what those representations were, White answered:

"Mr. Cline told me the machine was in perfect condition and had never been run only to demonstrate it, and that the only objection to it was that it was too heavy, and that it would do my work here; that he knew that it would do my work on the Phelan ranch, and I asked him how it compared with the Rumley, and he said that it was three times as good an engine as the Rumley, and that is the kind that I hired to help me with the crop, and that is all I remember."

The witness Spears, who, as seen, went to the Chadbourne ranch with defendant to inspect the engine, testified as to the representations or warranty of the tractor made by Cline on that occasion as follows:

"After we went up to the engine he (Cline) explained to us what the machine was supposed to do and what it would do. He represented that the engine was in first-class shape and that it would develop 75 horse power on good ground such as we had up through our valley here, especially in Chico, and so forth, and he said the engine was new and in first-class shape, and up to the representations."

It appears that, before F. A. Chadbourne had seen Cline after having been told by Peltier that the former had a prospect for the sale of the tractor, Cline had arranged to get the tractor for White on the following terms: \$100 cash down; \$400 to be paid plaintiffs upon the delivery of the tractor to White at his ranch; and a promissory note to be executed and delivered by White to the Chadbournes for the balance, \$1,000, said note to

become due and payable on the 1st day of September, 1914. As seen, this arrangement was explained by Cline to F. A. Chadbourne, who accepted it. It further appears that White, before said Chadbourne had seen Cline, had paid Cline the cash payment of \$100. This sum Chadbourne permitted Cline to retain as a part of his commission.

The tractor was shipped to and received by White some time in the month of April, 1914. From the time that the machine reached the ranch of White until the date on which the latter received a notice from a local bank that his note in favor of the Chadbournes for \$1,000 was due and payable and at said bank for collection, the defendant, according to his testimony, as well as that of a number of other witnesses testifying for him (some of the witnesses were experienced in handling gas engines), experienced much difficulty in making the tractor work. Parts would break on every occasion on which he attempted to use it, and the breaks would, of course, have to be repaired and new parts installed in the machine, and all this at great expense and also resulting in delay in the preparation of his crop for that year. The defendant testified that the engine failed to develop the power which Cline represented that it was capable of developing; that, although it ought to have pulled at least twelve plows, it could not at any time pull a greater number than four or five; that he did succeed in plowing 160 acres of land with it, but this was accomplished with great difficulty, expense, and delay. A number of persons of more or less experience in operating and repairing gas engines, having been called by White to his assistance in efforts to make the engine work satisfactorily, corroborated White's testimony that the tractor would not do the work required of it on his ranch.

Some ten days or two weeks after the tractor had been delivered to White, F. A. Chadbourne went to the White ranch. This was the first time that said Chadbourne had ever met White. Chadbourne testified that White had either telegraphed or written to him, stating that he (White) was having trouble with the machine; that the ignition would not work. The witness said that he had no trouble in starting and operating the tractor. Chadbourne found that certain parts originally of the tractor had been removed and other parts substituted. On the occasion we are now referring to White did not say to Chadbourne that he desired to return the machine or rescind the contract of purchase, although he testified that the tractor did not work satisfactorily on that occasion.

As before suggested, the note from White to plaintiffs as in part payment for the tractor (dated April 3, 1914) was due and payable on September 1, 1914. A few days prior to the last-named date the plaintiffs placed the note in the hands of a bank for collection. The bank notified defendant that it

had the note and requested him to call and take it up. The defendant called at the bank and declared to a proper officer thereof that he would not pay the note; that the tractor was a mechanical failure and wholly worthless. On the 29th of August, 1914, a few days prior to the maturity of the note, and after defendant had been notified that the note was in the hands of the bank for collection, the defendant addressed the following letter to plaintiffs:

"I notified Mr. Cline two months ago I couldn't do anything with the engine and I intended to give it up. It has been a bill of expense to me and I could accomplish nothing. I have fooled with the damned thing until it has practically broke me up. It broke down at the beginning of harvest and I had to hire an oil pull to pull my machine, and by the time I got the extras from Buffalo, New York, I was through harvesting. I paid seven hundred dollars for the use of the engine 21 days, and getting extras and fixing the Buffalo tractor cost two hundred and fifty dollars to fix it up and it hasn't done anything since. I found it is first one thing breaks and then another. Now I don't intend to pay any more on the engine. The engine is here. If you want it—all right."

To the above statement is to be added the testimony of defendant to the effect that, when he inspected the tractor on the Chadbourne ranch prior to entering into the contract for its purchase, he came to the conclusion that the engine was worth the price he asked for it. It should also be stated, as the court in effect found, that the defendant, when testifying, offered as excuse for delay in rescinding the contract the statement that, notwithstanding the repeated "breakdowns" of the engine, he still had faith that it could finally be made to operate satisfactorily, and that he was encouraged to cherish such faith and belief until the month of August, 1914, when he discovered that the failure of the machine to operate properly was due entirely to its inherent defects, or defects which could not be remedied.

The foregoing statement, which embraces the salient facts of the transaction from the time of the purchase of the tractor by defendant to the time of his alleged rescission of the contract of purchase, is based entirely upon the testimony of witnesses called by and in behalf of the defendant. It should also be stated that neither Cline nor the younger Peltier testified in the case.

As the attorney for appellant correctly declares in his brief, to uphold his special plea in bar or defense, it was incumbent upon the defendant to prove these facts: (1) That Cline was the agent of the plaintiffs, with authority to sell the tractor; (2) that Cline, as such agent, warranted the tractor to be capable of performing satisfactorily the work for which such a machine is intended; (3) that the tractor failed to measure up to the warranty; and (4) that there was prompt

rescission of the contract of purchase upon discovery of the alleged defects of the tractor rendering it incapable of doing the work as warranted. The plaintiffs contend that none of these essential elements to warrant a recovery by defendant was shown by the evidence to exist.

The theory upon which the defendant tried this case in the court below was that the alleged warranty or representations were made by Cline when he was prosecuting the alleged negotiations with Peltier for the tractor, and that the plaintiffs, having concluded the transaction already started by Peltier and Cline when the former was still the owner of the engine, and accepted the benefits thereof, must be held to have ratified the transaction as so begun, including whatever representations or warranty might have been made by Cline to defendant as to the quality, condition, and horse power of the tractor. The case is presented by respondent upon this appeal upon the same theory, and the proposition is thus stated in his brief:

"Respondent's theory is that Cline became Chadbourne's agent by ratification; that the tractor was bought on warranties, and that there was a sufficient and proper rescission."

There is, as we read the record before us, absolutely no warrant in the evidence for the position of defendant upon the question of the alleged ratification of the transaction so far as Peltier had anything to do with it; if as a matter of fact he may be said to have been a party to it at all. As seen, the testimony of Peltier is that, when Cline approached him with the proposition to buy or sell the tractor, he (Peltier) had sold the tractor with his ranch to plaintiffs, and that he referred Cline to the plaintiffs to make with them as owners of the machine such arrangements about selling or purchasing it as he might be able to. Peltier's testimony was not contradicted. It is true that defendant testified that Cline told him, when the latter first brought to his (defendant's) attention the tractor in question, that Peltier was then the owner of the engine, but that testimony was purely hearsay or at any rate is valueless in the face of the positive testimony of Peltier himself that he had sold the machine to the Chadbournes prior to the time at which Cline first spoke to him about selling it. Furthermore, if it be assumed that Peltier did own the machine at the time Cline first approached him with a proposition to purchase or sell the same, then there is no evidence of any kind or character showing or even tending to show that the plaintiffs, when accepting Cline's proposition for the sale of the tractor to defendant, had any knowledge of the facts characterizing the transaction between Cline and defendant, or, in other words, had any knowledge that the inducing cause of the sale of the tractor to defendant was the warranty made by Cline as to the character and

capacity of the engine while he was negotiating with Peltier. "Ratification necessarily presupposes a knowledge of the thing ratified." *Huffman v. Knapp*, 30 Cal. App. 759, 761, 159 Pac. 456.

The above considerations are, upon the theory upon which it was tried and is presented by the defendant, decisive of the case against the legal validity of the judgment appealed from. We may, however, with no impropriety, notice some other features of the case as it is presented here.

It is only a rational interpretation of the evidence to hold that Cline's position in the transaction was merely that of a broker. The defendant testified, as seen, that about a year prior to the date of the receipt by him of a letter from Cline that he (Cline) had found a tractor that would be suitable for his (defendant's) purposes, Cline made a futile attempt to sell him a Hart-Parr tractor; that subsequently the letter referred to was addressed to defendant by Cline. From this testimony the inference is reasonable, and indeed natural, that Cline had been looking about for a tractor for the defendant; that is, looking for an engine that he could sell to the defendant. F. A. Chadbourne testified as a witness for defendant (and there is no contradiction to this testimony) that, when he called on Cline in San Francisco for the first time after having been told by Peltier that the former had a proposition to make with respect to the sale of the engine, Cline said to Chadbourne that defendant would buy the tractor for \$1,500; that he had already paid him (Cline) \$100 down on the proposition; that he would make a further payment of \$400 on the delivery of the engine to him (defendant) and give to Chadbourne his promissory note for the balance, \$1,000, payable September 1, 1914. Chadbourne then agreed to pay Cline 20 per cent. of the purchase price as his compensation for negotiating the sale of the tractor, and also told Cline that he could retain the \$100 cash payment as part of his commission. Thus it is clear that Cline had already arranged for the sale of the tractor before he had ever seen or communicated in any manner with Chadbourne about the proposed sale, and it would seem to be equally clear from this testimony that Cline was acting no less for the defendant than he was for the plaintiffs. In other words, the testimony just adverted to well affords the inference that Cline was a mere broker in the transaction, acting for himself and upon his own initiative. An agent of the Chadbournes he became, it is true, but only when, after laying the proposition of the defendant before them for the sale of the tractor, they accepted the proposition made by Cline for defendant, and he was then still no less the agent of the defendant than that of the plaintiffs. But he then became their agent only to the extent

of being authorized to execute the terms upon which the sale was to be made. The proposition for the purchase of the tractor and the terms thereof having first come from defendant to the Chadbournes through Cline, and whatever representations Cline made to defendant as to the character of the tractor having been so made before Cline became the agent of the plaintiffs, it is manifest that the latter cannot be bound by the representations or warranty so made. However, we think the judgment should be reversed for the reasons first hereinabove given, and it is so ordered.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

(52 Cal. App. 388)

DAVIS v. MENE et al. (Civ. 3153.)

(District Court of Appeal, Second District, Division 2, California. April 27, 1921.)

1. Animals — 74(5)—Finding of knowledge of vicious propensities of dog justified.

In an action for damages from the bite of a dog, evidence that the animal was a bulldog, which was muzzled when at large and chained when at home, and that he was kept as a watchdog because of the presence of petty thieves in the neighborhood, held to justify a finding that defendants knew of the dog's vicious propensities.

2. Animals — 74(4)—Dog's reputation admissible.

In an action for damages from the bite of a dog, evidence of the general reputation of dog as to viciousness is proper to support the inference of the owner's knowledge of the dog's habits.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Arthur W. Davis against Louis Mene and another, copartners doing business as the Los Angeles Baking Company, for damages for personal injury. Judgment for plaintiff, and the defendants appeal. Affirmed.

C. P. Johnson, of Los Angeles, for appellants.

Frank W. Walden, of Los Angeles, for respondent.

WORKS, J. This is an action for damages caused by the bite of a dog. Plaintiff had judgment, and the defendants appeal. It is impossible to make a statement of the facts of the case, except from assertions made in the briefs of each of the parties and not denied by the other. Both counsel recite facts without reference to the record, and this fault is so frequent that we are unable to make a statement from that source.

From the meager material presented to us the facts appear to be these: Respondent went on a business errand to the house of one of the appellants. The dog was on the front porch of the dwelling, tied to a post by a chain nearly six feet in length, which allowed him to get to or near the entrance door. When respondent was at this point he was bitten by the animal.

[1] Appellants object to the sufficiency of the evidence to support several of the findings of the trial court. Most of these points depend upon the objection that there was no evidence to justify the finding that appellants knew of the vicious propensities of the dog. Counsel have afforded us enough of an insight into the facts to enable us to say that the animal was a bulldog, that he was muzzled when at large, that he was chained when at home, and that he was kept as a watchdog, because of the presence of petty thieves in the neighborhood. All of these matters were properly to be considered in determining the knowledge of appellants as to the proclivities of the animal (3 C. J. 118, 119; 1 R. C. L. 1117, 1118), and, as appellants indicate no contrary evidence in the record, the court could have made no other finding on the subject.

In discussing the sufficiency of the evidence to support a certain finding, appellants charge respondent with contributory negligence "in walking within the length of the 57-inch chain on which a vicious-looking bulldog was attached to one end thereof." Respondent, in his turn, claims that appellants were negligent "in chaining him so close to the door that he could bite an unsuspecting caller, as was done in this case." As the burden is on appellants to show error (Kellogg v. Kellogg, 170 Cal. 84, 148 Pac. 518), and as we are pointed to no evidence on this interesting subject by either counsel, we shall assume that respondent was not aware of the presence of the dog, and that the charge of contributory negligence is an unjust imputation upon him.

[2] Over the objection of appellants respondent was allowed to show the general reputation of the dog as to viciousness, and it is contended that the trial court committed error in receiving the evidence; but such evidence is proper to support the inference of knowledge on the part of the owner as to the habits of a dog kept by him. 3 C. J. 116. However, even if that were not true, in this case, as we have already shown on the other evidence alone the court could have made no finding but that appellants knew of the dangerous proclivities of the animal.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; ORAIG, J.

(52 Cal. App. 320)

PEOPLE v. WILDER. (Cr. 552.)

(District Court of Appeal, Third District, California. April 21, 1921.)

1. Indictment and information \S 189(9)—Offense of petit larceny included in that of grand larceny.

The offense of petit larceny of which defendant was convicted was comprehended within that of grand larceny, with which he was specifically charged in the information.

2. Criminal law \S 1172—Where no appearance or brief for defendant, submission being on the record, all matters other than violation of fundamental rights are presumed waived.

On calling a criminal case for argument in regular order on the calendar, where there was no appearance for defendant and no oral argument made or being filed, and upon motion of Attorney General the case was submitted on the record, the Court of Appeals is required to examine the record only as far as is necessary to determine whether if in any of the trial proceedings any fundamental right of the accused was violated, and all other points involving other questions will be presumed waived.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Joseph H. Wilder was convicted of grand larceny, and he appeals. Affirmed.

N. A. Gernon, of Red Bluff, and C. H. Braynard, of Redding, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People

HART, J. [1] The defendant was, by an information filed in the superior court in and for the county of Tehama, charged with the crime of grand larceny, in that he unlawfully and feloniously stole and took away from the premises of one J. A. Noble, in said county, 30 chickens, of the "Rhode Island Red" variety or breed, of the alleged value of \$2 each, or the aggregate value of \$60. The jury found the accused guilty of petit larceny, said crime being comprehended within that specifically charged in the information, and he has appealed from the judgment of conviction and the order denying his motion for a new trial.

[2] The case was regularly placed on the calendar of the April, 1921, term of this court for hearing and argument, and counsel for the defendant and the Attorney General were duly and regularly notified thereof. On calling the case for argument in the regular order in which it appeared on the calendar, there was no appearance for the defendant, and therefore no oral argument in support of his appeal made to or before the court; nor has there been any brief filed in behalf of the accused. This being the state of the case

when called for hearing, the same, upon motion of the Attorney General, was ordered submitted upon the record.

When an appeal in a criminal case is thus submitted, we are required to examine the record only so far as it may be necessary to enable us to determine whether, in any of the proceedings of the trial, any fundamental right of the accused has been violated. All points involving other questions are, by reason of the failure to file a brief or present an argument in some other form in support of the appeal, presumed to be waived, or, at least, regarded by defendant of not sufficient force to sustain the appeal.

The information accurately, according to legal form, states the crime of grand larceny. We have carefully read the evidence, and upon its face it is amply sufficient to support the verdict. We have also examined the charge of the court to the jury, and therein the principles of law applicable to the offense and the evidence received as in proof of the crime charged are fully, clearly, and correctly declared.

The judgment and the order appealed from are affirmed.

We concur: FINCH, Presiding Justice pro tem.; BURNETT, J.

(52 Cal. App. 350)

HAGEMAN v. COLOMBET. (Civ. 3630.)

(District Court of Appeal, First District, Division 1, California. April 25, 1921.)

1. Evidence §434(9)—Where fraud is asserted, parol evidence is admissible, notwithstanding brokerage contract was in writing.

In an action to recover commissions for effecting an exchange of lands, where defendant asserted the transaction was tainted with fraud, and that writings did not show the true contract, parol evidence is admissible to show the real agreement between the parties.

2. Fraud §58(1)—Provable by circumstances.

Fraud may be proved by circumstances.

3. Brokers §67(1)—Broker who undertook to make secret commission from opposite party cannot recover.

Where plaintiff, engaged as a broker by defendant to effect an exchange of lands, undertook to collect compensation from the opposite party by insisting that defendant should pay a larger cash sum, it being agreed that as a commission from the opposite party he should receive the excess, plaintiff was guilty of such fraud as would deprive him of the right to collect commissions from defendant.

4. Brokers §66—Broker who entered into secret agreement with agents of opposite party to divide commission not entitled to recover.

Where plaintiff, acting as defendant's broker in an exchange of lands, agreed with brok-

ers of opposite party to divide with them his commissions, he was guilty of conduct which deprived him of the right to collect commissions from defendant, for he was acting in a supposed confidential and advisory capacity towards defendant.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Joe Hageman against C. W. Colombet. From a judgment for defendant, plaintiff appeals. Affirmed.

R. C. McComish, of San Jose, for appellant.

Owen D. Richardson and J. B. Peckham, both of San Jose, for respondent.

WASTE, P. J. The plaintiff brought this action to recover the sum of \$1,250, alleged to be due as a commission for effecting an exchange of real estate. The trial court held that the transaction was so tainted with fraud on the part of the plaintiff as to preclude a recovery, and gave judgment for the defendant. The plaintiff appeals.

[1] The appellant rested his right to recover upon certain writings signed and approved by the respondent. The respondent asserted that the agreements produced by appellant did not show the true contract, but had been fraudulently altered in material respects by the appellant after execution. During the course of the trial the court admitted, over the objection of appellant, evidence of verbal negotiations between the parties, for the purpose of ascertaining just what the parties had agreed to, and what was the real nature of the transaction between them. The evidence was properly admitted. In case of fraud no mere form of words of which the parties have made use can shut out inquiry as to the real facts. *Brison v. Brison*, 75 Cal. 525, 533, 17 Pac. 639, 7 Am. St. Rep. 189. While the testimony is conflicting in material matters, certain facts appear which, with the inferences to be drawn therefrom, are amply sufficient to support the judgment. The respondent engaged the appellant, a real estate broker, acting as his agent only, to effect an exchange of respondent's apartment house and property in San Jose for the ranch property of E. J. Lee near Watsonville, upon conditions set out in a written offer signed by respondent.

One of the terms of the exchange contained in the offer when it was signed by respondent was the payment by respondent to Lee of the sum of \$5,000 cash, in addition to the other expressed consideration. The respondent testified that there was no provision in the offer at that time as to the payment of a commission to appellant by either Lee or the respondent. The appellant took this offer to Lee, who was willing to make the exchange upon the terms offered by respondent, and in-

duced Lee to pretend that he would not close the deal unless respondent paid him \$7,500 cash, instead of \$5,000 cash, as the offer stood, and to further agree to pay the additional \$2,500 thus obtained from respondent to appellant as a commission for making the exchange. Lee agreed to the plan, and appellant, in the absence of respondent, and without his knowledge or consent, altered the written offer already signed by respondent, to read "\$7,500 gold coin," instead of "\$5,000 gold coin," as the amount respondent should pay in cash to Lee. He also inserted a stipulation that Lee should pay appellant a brokerage fee of \$2,500, and that respondent should pay him a like fee of \$1,250 for making the exchange. Lee then signed the altered agreement. Appellant then represented to respondent that Lee would not make the exchange unless he was paid \$7,500 cash. Being anxious to consummate the deal, and believing the representations, respondent turned over to appellant \$7,500, of which sum he paid Lee \$5,000 only, retaining the balance of \$2,500 for his purported commission. He later divided this amount with agents who represented Lee in the transaction. In this action he is seeking to recover \$1,250 additional from respondent.

[2, 3] There is other evidence of the dealings between appellant and respondent and of the details of the entire transaction. But we think we have recited enough to show the nature of the fraud and bad faith, and the element of concealment on the part of appellant which characterized his dealings with the respondent. In all cases it is permissible to prove fraud by circumstances. In aid of the direct facts proved, legitimate inferences are permitted to be indulged in to establish other facts not directly in evidence. *Maxson v. Llewelyn*, 122 Cal. 195, 198, 54 Pac. 732.

Little need be supplied in this case, however, in addition to the facts proved. If the appellant was acting solely as agent for respondent, as the court found, he was bound in the exercise of the utmost good faith to use every endeavor to make the best bargain fairly obtainable for his principal. He admitted on the stand that he "was to make the best deal possible" for respondent. When he deliberately set about forcing respondent to pay \$2,500 more to Lee than Lee was willing to accept in the exchange, in order that he might enrich himself to that extent under the guise of collecting a commission from Lee, he was guilty of such bad faith that his right to compensation from respondent was lost. 9 Corp. Jur. 566, and cases cited.

[4] Appellant was undoubtedly endeavoring to act in the matter of the exchange of properties for both Lee and the respondent, without respondent's knowledge or consent. The lower court also found that, during the course of his employment by respondent, and

without his knowledge, the appellant entered into a secret agreement with the agents of Lee to pay them one-third of any commission he might receive making the exchange. He was not a mere middleman whose duty was ended when he brought appellant and respondent together. He was acting in a supposed confidential, advisory capacity for the respondent, who relied upon his advice and assistance. For these reasons, also, he was not entitled to recover in this action. *Clark v. Allen*, 125 Cal. 276, 278, 57 Pac. 985; 9 Corp. Jur. 568, 571.

The judgment is affirmed.

We. concur: KERRIGAN, J.; RICHARDS, J.

(82 Okl. 116)

WHITE et al. v. STATE. (No. 10108.)
(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

Ball §79(1)—Refusal to vacate forfeiture of appearance bond held error.

Where the record discloses, upon a hearing on a motion to vacate an order forfeiting an appearance bond, that the principal in said bond was on the day the order of forfeiture was entered confined to his bed sick, and had been for two or three days prior to the date of the forfeiture, and that on the day said cause was called for trial a motion was presented for a continuance supported by the certificate of the attending physician that the principal in said bond was unable to attend court, and the evidence of two other physicians was introduced in support of the motion to vacate the order of forfeiture, and no evidence was introduced by the state contradicting the testimony introduced in support of the motion, held, it was error and an abuse of discretion of the trial court to overrule the motion to vacate the forfeiture.

Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Proceedings by the state to forfeit the appearance bond of Charley White. From an order refusing to set aside the forfeiture, defendant Charley White and Henry Massey and others, sureties on the bond, bring error. Reversed and remanded, with directions.

J. W. Clark, of Atoka, and George Trice, of Coalgate, for plaintiffs in error.

Baxter Taylor, of Oklahoma City, for the State.

KENNAMER, J. This appeal is prosecuted by Charley White and others, as plaintiffs in error, against the state of Oklahoma, as defendant in error, to reverse an order of the district court of Atoka county made on the 9th day of January, 1918, forfeiting the

appearance bond of Charley White, one of the plaintiffs in error herein.

The record discloses that on the date that the bond was forfeited a motion was presented to the trial court on behalf of the defendant in the cause in which the order of forfeiture was made for a continuance upon the ground that the defendant was sick and unable to attend court, with certificate of attending physician attached showing that the defendant was sick in bed with pneumonia fever, which motion was by the court overruled, and an order entered forfeiting the bond. On the same date that the forfeiture was entered the sheriff of Atoka county requested two other physicians to go to the home of the defendant, about 11 miles from Atoka, and their testimony was introduced in support of the motion to vacate filed on the next day after the order was entered forfeiting the bond which corroborates the statement of the attending physician that the defendant in said criminal cause was physically unable to attend court and go through with a trial. The affidavits of several of the neighbors show that the said Charley White, principal in said bond herein, had had serious sickness in his family for several days, and by reason of the fact that the said Charley White had had to be up at night giving medicine and waiting upon his sick folks that he had become sick himself. The record shows that the said Charley White consulted his attending physician with regard to attending the trial, but that his physician insisted that he was physically unable to attend court, and that he would file a certificate with the court on the date that said cause was called for trial, and that the same was on file when the order was entered forfeiting the bond. The evidence of the plaintiffs in error in this cause presented in support of their motion to set aside the order of forfeiture was not contradicted on the hearing of the motion. No pleading was filed denying the allegations in the motion to vacate the order of forfeiture, and no brief has been filed on behalf of the defendant in error, and upon a careful examination of the record as a whole we believe the court erred in not setting the forfeiture aside on the evidence offered, and that the following authorities sustain this conclusion: *Dunn et al. v. State*, 166 Pac. 193, 65 Okl. —; *Reed et al. v. State*, 76 Okl. 298, 185 Pac. 326; *State v. Hines et al.*, 87 Okl. 198, 131 Pac. 688.

It is the judgment of this court that the judgment and order of the trial court refusing to set aside the forfeiture be reversed, and the court is directed to enter judgment setting aside the forfeiture of said bond.

HARRISON, C. J., and JOHNSON, McNEILL, ELTING, and MILLER, JJ., concur.

(82 Okl. 144)

BRANT v. BRANKLE. (No. 10105.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

1. Statute bars relief on ground of fraud after two years after discovery.

Under the third subdivision of section 4657, Rev. Laws 1910, an action for relief on the ground of fraud can only be brought within two years after the discovery of the fraud.

2. Limitation of actions §180(2)—Whether petition shows that cause of action was barred may be raised by objection to the introduction of evidence.

The question as to whether the petition shows upon its face that the cause of action set forth therein is barred by the statute of limitations may be raised by an objection to the introduction of evidence on that ground.

Error from District Court, Woodward County; J. C. Robberts, Judge.

Action by William T. Brant against Frank J. Brankle. Judgment for defendant, and plaintiff brings error. Affirmed.

R. H. Nichols and S. M. Smith, both of Woodward, for plaintiff in error.

Chas. Swindall, of Woodward, for defendant in error.

NICHOLSON, J. On the 17th day of August, 1917, the plaintiff in error, as plaintiff below, brought this action against the defendant in error in the district court of Woodward county, seeking to recover the sum of \$150, with interest thereon from the 14th day of August, 1911, and the further sum of \$50 attorney's fee, which sum of \$150 plaintiff alleges was obtained from him by the defendant by fraud in the sale of an interest in certain real estate. On the trial, the defendant objected to the introduction of any evidence in support of the allegations of the petition for the reason that the petition showed that said action was barred by the statute of limitations. This objection was sustained, and judgment rendered for the defendant.

The petition alleged, in substance, that the false and fraudulent representations were made on August 14, 1911, and the sum of \$150 obtained by said false and fraudulent representations on that day; that said plaintiff did not discover said fraud for more than three years after he paid defendant said sum; and that upon discovering the fraud, the date of which, however, he could not give, he notified the defendant thereof and demanded that the defendant refund said money. To this petition the defendant filed demurrer, on the ground that it appeared upon the face of said petition that plaintiff's cause of action was barred by the statute of limitations. This

demurrer was by the court, Judge James B. Cullison presiding, overruled. Thereupon the defendant filed answer, consisting of a general denial and pleading the two, three, and five year statute of limitations.

The plaintiff has served and filed his brief in accordance with the rules of this court, and the defendant has neither filed a brief nor offered any excuse for such failure, and under the well-established rule in this jurisdiction this court is not required to search the record to find some theory upon which the judgment of the trial court may be sustained, but may, when the authorities cited in the brief filed appear reasonably to sustain the assignments of error, reverse the cause in accordance with the prayer of the petition. But in this case the authorities cited in the brief of the plaintiff in error do not sustain the assignments of error.

[1] This is clearly an action for relief on the ground of fraud, and must have been brought within two years after the discovery of the fraud under subdivision third, of section 4657, Rev. Laws 1910, which provides:

"Within two years: * * * An action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

The petition on its face shows that the plaintiff did not discover the infirmities in the deed for more than three years after he accepted it and paid the defendant the sum of \$150. While it is not shown how much more than three years had elapsed before he discovered the fraud, it must be held, under the language of said petition, that it was more than three and less than four years, and if it had been four years, plaintiff's cause of action was barred, as this action was commenced six years and three days after the transaction complained of.

[2] The question as to whether the petition shows upon its face that the cause of action set forth therein is barred by the statute of limitations may be raised by general demurrer. *Webb et al. v. Logan et al.*, 48 Okl. 354, 150 Pac. 116; *Delzell v. Couch*, 173 Pac. 361. And an objection to the introduction of evidence on the ground that the petition fails to state facts sufficient to constitute a cause of action presents the same question that would have been raised by a general demurrer. *Pappe v. Post*, 23 Okl. 581, 101 Pac. 1055.

The petition showing upon its face that the plaintiff's cause of action was barred by the statute of limitations, the judgment of the trial court is correct, and is affirmed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

BOARD OF COM'RS OF OKLAHOMA
COUNTY v. CLOSE BROS.
(No. 10120.)

(Supreme Court of Oklahoma. May 24, 1921.
Rehearing Denied June 21, 1921.)

(Syllabus by the Court.)

1. Taxation \S 906 $\frac{3}{4}$ —Interest, penalties, and forfeitures on delinquent taxes must be paid into county sinking fund.

By section 2, art. 3, c. 43, Laws 1896, amending section 1, art. 10, c. 70, St. 1893, and by section 3, art. 9, c. 32, Laws 1897, it was provided that all interest, penalties, and forfeitures upon delinquent taxes should be paid into the county sinking fund.

2. Municipal corporations \S 521—Holder of paving warrants not entitled to penalty on assessments collected by county treasurer.

Close Bros., a corporation, holder of certain paving warrants regularly issued by officers of Oklahoma City against lots benefited by paving, and regularly certified by the city treasurer to the county treasurer with the city taxes, brought an action against the county for interest purported to have been collected by the county treasurer and not paid to the bondholder, and the evidence conclusively discloses that the amount of the warrants and all interest collected thereon was paid to the bondholders, but the taxes were not paid when due and became delinquent, and the county treasurer, when collecting the taxes, added the penalty of 18 per cent. as provided by law. *Held*, the owner of said warrants is not entitled to any portion of the penalty collected by said county, to supply a deficiency for interest not collected, and it was error for the trial court to render judgment against the county for said amounts.

Appeal from District Court, Oklahoma County; John A. Hayson, Judge.

Action by Close Bros., a corporation, against the Board of County Commissioners of Oklahoma County, State of Oklahoma. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded, with directions.

Forest L. Hughes, Co. Atty., and M. S. Singleton, Asst. Co. Atty., both of Oklahoma City, for plaintiff in error.

G. A. Paul, of Oklahoma City, for defendant in error.

McNEILL, J. This is an action commenced by Close Bros., a corporation, in the district court of Oklahoma county, against the board of county commissioners of Oklahoma county. The petition alleged that Oklahoma City, as authorized by certain ordinances, issued tax certificates against various lots in Oklahoma City for paving as required by law, and said tax certificates were certified by the city treasurer to the treasurer of Oklahoma county for the pur-

pose of collecting the same with interest and penalty. It was alleged the plaintiff was the owner of said tax certificates, and the county had collected from the owners of the real estate the amount of the certificates with more than 7 per cent. interest from the date of maturity and had failed to pay to the plaintiff the full amount of the interest due and collected. To the petition is attached the number of the warrants and the amount collected by the county treasurer and the amount claimed to be due plaintiff. The collections were made by the county treasurer during the years 1906, 1907, and 1914.

To this petition the defendant filed an answer which was a general denial and pleaded the statutes of limitation. A jury was waived, and the case was tried to the court. The court found in favor of plaintiff for interest due on the warrants collected in the year 1906 in the total amount of \$423.02, for the year 1907 \$472.72, and for the year 1914 \$642.76, or a total of \$1,538.50.

From said judgment the county has appealed. For reversal it is first contended that the claims for the years 1906 and 1907 are barred by the statutes of limitation; second, that the defendant in error received the full amount collected by the county treasurer, and the only amount retained by the county was the penalty collected, and plaintiff is not entitled to recover any portion of the penalty collected by the county treasurer.

We will consider the second proposition first. The evidence disclosed that the certificates were certified to the county treasurer of Oklahoma county by the city treasurer and placed upon the tax rolls showing the amount due as certified by the city treasurer. When the taxes became delinquent and the owner of the property paid the taxes, the county treasurer collected the amount certified to him by the city treasurer, and added the penalty of 18 per cent on the total amount of taxes due as provided by section 382 of the Laws of 1903 (Wilson's Rev. & Ann. St.), which was in force and effect at the time the taxes for 1906 and 1907 were collected. In this manner the county treasurer collected no interest on the warrants from the date they were certified to the county treasurer until the taxpayer paid his taxes. The difference upon each tax warrant is very small, ranging from 10 cents on certain warrants and in a few instances to a couple dollars.

[1] It is the contention of plaintiff in error that the special assessments certified to the county treasurer by the city authorities and the taxes for municipal purposes, when delinquent, draw the same penalty as other taxes, and the county treasurer collected the penalty on the total amount of taxes due, and all of the penalty collected goes to the sinking fund, and not to the city or

to the owner of the paying warrants, as held by this court in the case of *Hunter v. State ex rel. City of Shawnee*, 49 Okl. 672, 154 Pac. 545, where this court stated as follows:

"By section 2, art. 3, c. 43, Sess. Laws 1895, p. 220, amending section 1, art. 10, c. 70, Stat. 1893, and by section 3, art. 9, c. 32, Sess. Laws 1897, p. 257, it was provided that all interest, penalties, and forfeitures upon delinquent taxes should be paid into the county sinking fund."

In regard to penalties this court in the case of *Board of County Commissioners of Custer County v. City of Clinton*, 49 Okl. 795, 154 Pac. 513, stated:

"In this connection it is well to observe that the penalty is not properly a part of the tax, and that neither the city nor the county levy a penalty, but, on the contrary, the Legislature has exercised its sovereign power and imposed these penalties as an additional charge for punishment for delinquencies upon the part of the taxpayer in order to hasten the payment of the taxes due. The penalty is not created by the levy of the tax, nor has the Legislature authorized the city or the county to impose the same, and the fund being created by the Legislature, it follows that the Legislature has the right to dispose of said fund to the same extent as other fines and penalties arising from the violation of other laws of the state or the failure to perform other duties. *City of New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767; *Shultz v. Ritterbusch*, County Treas., 38 Okl. 478, 134 Pac. 961."

It was likewise held by this court in the case of *Seymour v. Oklahoma City*, 38 Okl. 547, 134 Pac. 45, 47 L. R. A. (N. S.) 702, as follows:

"S. is the holder and owner of certain sewer warrants issued pursuant to section 990, Compiled Laws of Oklahoma 1909. The mayor and councilmen for each year made 'a levy on each lot or piece of ground, for a sufficient sum in addition to other taxes, to discharge the maturing installments' on each lot or piece of ground, with interest on the unpaid installments for such year; such taxes being collected by the county treasurer. The holder of such warrants, on presentation of the same, claimed the penalty collected on such warrants, on account of the failure to pay the same as they matured. Held, that S., the holder of said warrants, was not entitled to said penalty."

[2] These decisions definitely settle the question that the bondholder is not entitled to any part of the penalty. The defendant in error takes the position that under section 6013, Laws 1903 (Wilson's Rev. & Ann. St.) only the 18 per cent. penalty can be collected for nonpayment of any taxes, so that included in the charge against the delinquent property owner is the 18 per cent. penalty, both ad valorem tax which goes to the county sinking fund, and also an 18 per

cent. penalty for delinquency on any special charge, or special charge or assessment, that may be levied or assessed against said property owner, of which 18 per cent. the county retains 11 per cent. and the bondholder obtains but 7 per cent. It is contended that, as to the charge or penalty, in so far as it is a charge for nonpayment of the special assessment when collected by the county, whether you call it penalty or interest, the provisions of law with reference to placing delinquent payments in the sinking fund have no application.

In the case of Ritterbusch, County Treas., v. Havinghorst, 29 Okl. 478, 118 Pac. 138, Justice Hayes stated as follows:

"Nor can any provision be found in the statute for the contention that all over 7 per cent. shall be retained by the county treasurer. The statute does not make any division of this interest. It contains no expression that part shall go to the city and the remainder to the county. The whole of it goes either to the city or to the county."

And after the decision in that case Justice Williams, in the case of Seymour v. Oklahoma City, 38 Okl. 547, 134 Pac. 45, 47 L. R. A. (N. S.) 702, held that the holder of the warrant was not entitled to the penalty collected by the county treasurer; and the later decisions of the court cited above which hold that the penalty is no portion of the tax, we think, definitely settle this question. There is no provision for dividing this penalty, but all must go either to the county or to the city or the warrant holder. If the city and the warrant holder are not entitled to any of the same, then it all must go to the county as provided by statute.

The defendant in error, however, relies upon the case of Board of County Commissioners v. Seymour, 45 Okl. 533, 146 Pac. 219. That case was submitted to this court upon an agreed statement of facts, and it was agreed in that case, that the county treasurer was collecting more than 8 per cent. interest and had collected more than 8 per cent., and the bondholder was suing for the 8 per cent. interest provided for in his warrant, and it was admitted that the county had collected the same. That decision is easily distinguished, for the court held, if the county was collecting the interest, the bondholder was entitled to the same. There is no such agreed statement of facts in this case, nor does the evidence disclose that the county treasurer collected any interest that was not paid over to the bondholder, but, as attorney for defendant in error in this case states, the plaintiff is entitled to a portion of the penalty to cover a deficiency for interest not collected, but in this we cannot agree. Whether the county treasurer collected all the interest due the bondholder it is unnecessary for us to de-

termine; in any event the bondholder is entitled to no part of the penalty collected by the county.

It is contended by defendant in error the appeal should be dismissed for the reason the case-made does not contain all the evidence, and no motion for a new trial was filed within three days as provided by law.

The case purports to contain all the evidence, and the trial court found that a motion for a new trial was filed in three days, and permitted a copy to be filed in lieu of the one that had been actually filed; therefore the contention that the case should be dismissed is not well taken.

For the reasons stated, the judgment of the court is reversed, and the cause remanded, with instructions to set aside the judgment and take such further proceedings not inconsistent with the views herein expressed.

HARRISON, C. J., and PITCHFORD, MILLER, and NICHOLSON, JJ., concur.

(82 Okl. 152)

NICODEMUS, Mayor, et al. v. STATE ex rel. PARKER. (No. 11393.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \S 592(1)—One obtaining license to conduct pool hall from county judge, etc., cannot be refused license by city.

Where a person desiring to conduct a pool and billiard hall in an incorporated city or town in this state has obtained a license therefor from the county judge, as required by chapter 21, Session Laws of 1915, and has deposited the license fee required by the ordinance of said city or town, and otherwise complied with the ordinance, the city authorities have no power to refuse a city license.

2. Municipal corporations \S 592(1)—Municipality cannot impose additional qualifications on one desiring to conduct pool hall.

The qualifications of one who has obtained a license to conduct a pool and billiard hall from the county judge, has been determined, and the mayor and council of a city or town have no power to by ordinance prescribe additional qualifications.

3. Licenses \S 22—Mandamus \S 87—City cannot discriminate between those desiring to conduct pool hall; where license to conduct pool hall is refused through caprice, issuance may be compelled by mandamus.

Under a general ordinance of a city or town licensing pool and billiard halls, the city authorities have no right to make an arbitrary discrimination in granting license; they cannot grant the same to favored ones and refuse another, who has in all respects complied with the statutes of the state and ordinances of the city, and one who has brought himself strict-

ly within the requirements regulating the licensing power may compel by mandamus the corporate authorities to grant him a license, when it is refused through mere caprice.

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

Application in mandamus by the State, on the relation of G. M. Parker, against W. E. Nicodemus, Mayor, and Katherine Williams Burke, City Clerk, of the City of Drumright. Peremptory writ of mandamus granted, from which the defendants appeal. Affirmed.

Hughes & Foster, of Sapulpa, for plaintiffs in error.

John N. Hill, of Drumright, for defendant in error.

NICHOLSON, J. This is an action in mandamus instituted in the superior court of Creek county by the defendant in error against the plaintiffs in error, wherein it was sought to require the plaintiffs in error to issue a pool hall license to the relator, G. M. Parker, under ordinance No. 197 of the city of Drumright, providing for the licensing of public pool and billiard halls. The court granted a peremptory writ, and from the order so granting the same, and from the order overruling motion for a new trial, plaintiffs in error appeal. We will hereafter refer to the parties as they appeared in the trial court.

The petition for the writ, which it was stipulated was to be regarded as the alternative writ, alleged in substance that the defendant W. E. Nicodemus, was mayor, and the defendant Katherine Williams Burke was city clerk of the city of Drumright; that on the 11th day of March, 1920, Hon. J. V. Frazier, judge of the county court, issued to said plaintiff a pool hall and billiard hall license to operate and maintain a pool hall at No. 104 East Broadway, in the city of Drumright, Okla.; that said license had never been revoked, but was still in full force and effect; that on the 13th day of March, 1920, said plaintiff made application to the city of Drumright for a pool hall license in pursuance to the ordinance of said city, and deposited the sum of \$140 with the city clerk, Katherine Williams Burke, as in said ordinance required.

That it is made the legal duty of the mayor and city clerk to issue said license upon the compliance of said applicant with said ordinance and the laws of the state of Oklahoma; that said plaintiff had complied with the laws of the state of Oklahoma and the United States laws, and that he had complied with all legal requirements of the ordinance of the city of Drumright, but that, notwithstanding, the said W. E. Nicodemus, defendant, did, on or about the 3d day of April, 1920, arbitrarily, and without assigning any legal reason or excuse, refuse to issue said plaintiff his pool hall license, and still refuses to issue the same.

The plaintiff had gone to a great deal of expense; that he was the owner of the building where said contemplated business was to be operated; that he had installed fine fixtures and equipment with which to conduct said business, which was then lying idle owing to the wrongful acts of said defendant in refusing to issue to him a license as required by law, and that he was being damaged in the sum of \$10 each day, he was being kept from operating said business, and was being deprived of his property and property rights without due process of law.

That the said sum of \$140 paid the city clerk by him was the exact amount required for a license fee under said ordinance; that the other requirements of said ordinance had been judicially determined by the county judge, as appears by plaintiff's county license, and that said defendants were without further discretion in the matter, and prayed that, being otherwise remediless, a writ of mandamus issue requiring and compelling said defendants to comply with their legal duty and issue to said plaintiff a pool hall and billiard license as applied for.

The return to the writ, omitting the caption, reads as follows:

"Comes now the defendant, W. E. Nicodemus, as mayor of the city of Drumright, and Katherine Williams Burke, as city clerk, and for answer and return to the alternative writ of mandamus issued herein, states:

"First. That the alternative writ does not state sufficient facts to entitle the relator to the relief prayed for, or to any relief.

"Second. That the said alternative writ states facts which preclude the relator from the relief demanded, and for any relief.

"Third. And for further answer the said defendants deny each and every allegation in said petition contained, except such as are hereinafter specifically admitted:

"That defendants admit that the relator, on the 13th day of March, 1920, made application to the city of Drumright for a pool hall license in pursuance to an ordinance of said city, a copy of which is attached to relator's petition herein, and admit that said relator deposited with the city clerk \$140 as in said ordinance required, and the defendants admit that on the 3d day of April, 1920, the said defendant, W. E. Nicodemus, as Mayor of the said city of Drumright, refused to issue the said relator a pool and billiard license, and admit that he still refuses to issue the same.

"Wherefore, defendants, having fully answered, pray that the alternative writ heretofore issued be quashed, set aside, and held for naught, and that the relief prayed for be refused and denied and that the defendants have judgment for their costs herein expended, and that the petition of the plaintiff be dismissed."

The allegations of the petition were fully sustained by the evidence of the plaintiffs and no evidence was introduced on behalf of the defendants.

[1] By the provisions of section 2, c. 21, Sess. Laws 1915, it is made unlawful for any person or corporation to operate a public pool

(193 P.)

or billiard hall or public pool or billiard table in any incorporated city or town without first securing a license issued by the county judge, and the person applying for such license must make a showing once each year, and satisfy the county judge that he is a person of good moral character, that he has never been convicted of violating any of the laws commonly called prohibitory laws, or convicted of violating any of the gambling laws of the state, or has paid the special liquor dealers tax to the United States, and must make further proof that no special liquor dealer's tax stamp or receipt issued by the United States is held by any person occupying that part of such building in which the pool or billiard hall is to be located. A fee of \$5 per year shall be charged by the county judge for issuing such license.

It is further provided that, upon application being filed, the county judge shall give five days' notice by posting notices, one of which shall be at the county courthouse, and three in the city or town where said pool hall shall be located, which notices shall contain the name of the applicant and the location of said pool or billiard hall, and any citizen of said city or town may appear before the county judge and protest the issuance of said license, and impose a fine of not less than \$25 or more than \$100 for the violation of said provision. And by section 4 of said act it is provided that said act shall in no way impair the right of any incorporated city or town to impose an additional license fee for maintaining any such pool or billiard hall or table, or prevent any city or town from abolishing same under existing laws.

The then existing law pertaining to pool and billiard halls in chapter 225, Sess. Laws 1913, section 1 of which reads as follows:

"The city council of each city of the state and the board of trustees of each incorporated town or village shall have the power to enact ordinances to restrain, prohibit and suppress games and gambling houses, bowling alleys, pool and billiard tables, and other gambling tables."

In February, 1920, the mayor and councilmen of the city of Drumright adopted Ordinance No. 197, entitled:

"An ordinance providing for the licensing of public pool and billiard halls and public pool and billiard tables within the city of Drumright; providing fees therefor; providing for the revocation of such license and providing for the punishment of a violation of this ordinance and declaring an emergency."

Sections 2, 3, and 4 of said ordinance are as follows:

"Sec. 2. Any person, persons or corporation maintaining or operating or desiring to maintain and operate a public pool or billiard hall, or any public pool or billiard table within the corporate limits of the city of Drumright, shall, before being permitted to open any such public pool or billiard hall, or any such public pool or billiard table within the corporate lim-

its of the city of Drumright, first, make application in writing and file the same with the city clerk, wherein it shall be shown the name of the person, persons or corporation so making application for such license and the residence of each and the place within the corporate limits of the city of Drumright wherein such pool or billiard hall, or public pool or billiard table is to be maintained and operated, describing the premises so that the same may be located within reasonable certainty; the number of pool or billiard tables to be operated; and at the same time the person, persons, or corporation so making such application shall deposit with the city clerk the annual fee hereinafter provided for.

"Sec. 3. The person, persons or corporation so applying for such license, as aforesaid, must thereupon bring his application before the mayor of the city of Drumright, and must make a showing to satisfy the mayor that the applicant is a person of good moral character; that he has never been convicted of the violation of any of the laws of the state of Oklahoma, nor the ordinances of the city of Drumright, relating to pool and billiard halls, or of any of the laws of the state of Oklahoma, or ordinances of the city of Drumright, prohibiting traffic in any spirituous, vinous or fermented liquors, or of any of the laws commonly called 'Prohibition Laws'; that the building wherein said pool or billiard hall is to be operated and maintained is not used in whole, or in part, for the purpose of violating any of the laws aforesaid.

"If upon such hearing the mayor shall be satisfied that the person, persons or corporation so applying are persons of good moral character, and that he, or they, have not been convicted of a violation of any of the laws aforesaid, it shall thereupon be the duty of the mayor to direct the city clerk to issue to such person, persons or corporation a license, permitting such person, persons or corporation to maintain and operate a public pool or billiard hall, or public pool or billiard table as aforesaid, within the corporate limits of the city of Drumright for a period of one year from the date thereof, which license shall be signed by the mayor and attested by the city clerk with the corporate seal of the city there-to affixed.

"Sec. 4. The person, persons or corporation so granted a license as aforesaid, shall pay an annual license fee of \$20 per table, which sum shall be deposited with the application with the city clerk, as aforesaid, and if upon a hearing of said application, the same should be denied, then, it shall be the duty of the city clerk immediately to refund to the person, persons or corporation so making such application, the deposit aforesaid."

Section 6 provides a penalty by fine and abatement of said pool or billiard hall as a public nuisance.

The plaintiff obtained his license from the county judge, and applied to the mayor for a city license, deposited the sum of \$140 with the city clerk, and made proof of his good character; but the mayor refused to issue him license, without assigning any reason for such refusal. The wording of section 1, c. 225, Sess. Laws 1913, is almost identical with section 388, Wilson's Statutes of 1903, in so

far as the subject under consideration is concerned, and chapter 21, Sess. Laws 1915, supra, is, in its provisions, similar to section 3395, Willson's Statutes of 1903; and in construing sections 388 and 3395, Willson's Statutes, supra, the Supreme Court of the territory, in Territory of Oklahoma ex rel. City of Oklahoma v. J. M. Robertson and Howard Hays, 19 Okl. 149, 92 Pac. 144, held:

"Where a dealer in intoxicating liquors has obtained a county license authorizing him to sell such liquors within a city of the first class, such city has no power to refuse a city license to such person upon presentation of his county license, filing his bond with the county clerk, and paying to the city treasurer the amount required by the city ordinance for such license.

"The qualifications of one who has obtained a county license has been determined, and the mayor and city council of a city of the first class have no power to by ordinance prescribe additional qualifications."

[2] The plaintiff having satisfied the county judge that he was a person of good moral character, and having otherwise complied with chapter 21, Sess. Laws 1915, and the county judge having issued the license provided for therein, and the plaintiff having deposited the license fee required by ordinance of the city, the mayor and councilman had no power to by ordinance prescribe additional qualifications.

[3] Where the city, by general ordinance, provided for licensing pool and billiard halls and pool and billiard tables, the city authorities have no right to make an arbitrary discrimination in granting license; they cannot grant the same to favored ones and refuse another, who has in all respects complied with the statutes of the state and ordinance of the city, and one who has brought himself strictly within the requirements regulating the licensing power may compel by mandamus the corporate authorities to grant him a license when it is refused through mere caprice. *Zanone v. Mound City*, 103 Ill. 552.

The plaintiff having brought himself within the requirements of the licensing power, it follows that the judgment of the trial court granting the writ of mandamus is correct, and it is therefore affirmed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

(82 Okl. 141)

LAREAU, Director of School Dist., v. RATHER. (No. 9860.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 773(2)—Appeal will be dismissed for failure to file briefs within time.

Where the plaintiff in error has failed to file brief within the time required by the rules

of this court, or within the time allowed by order of this court, his appeal will be dismissed.

Error from District Court, Harper County; W. C. Crow, Judge.

Action by Bertha Rather, as plaintiff, against J. J. Lareau, Director of School District No. 31, Harper County, Okl., as defendant. Judgment for plaintiff, and defendant brings error. Dismissed.

Charles Swindall, of Woodward, for plaintiff in error.

Dick & Lewis, of Buffalo, for defendant in error.

NICHOLSON, J. The appeal in this case was filed on April 5, 1918. On October 12, 1920, the appeal was dismissed for want of prosecution. On October 19, 1920, the order of dismissal was vacated upon the stipulation of the parties, and plaintiff in error was given until December 14, 1920, to file brief. On December 6, 1920, a stipulation was filed giving the plaintiff in error until December 30 to file brief, but no brief was filed, and on February 8, 1921, the appeal was again dismissed for want of prosecution. On February 15, 1921, the order of dismissal was set aside and the cause reinstated. On March 29, 1921, plaintiff in error was given until April 10, 1921, to file brief, but no brief has been filed, and no excuse given for the failure to file the same.

Therefore the appeal herein is dismissed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

(82 Okl. 173)

BLUE v. BOARD OF COM'RS OF GARVIN COUNTY. (No. 11257.)

(Supreme Court of Oklahoma. May 10, 1921. Rehearing Denied June 21, 1921.)

(Syllabus by the Court.)

Appeal and error \Leftrightarrow 761—Plausible argument in brief, unsupported by citation of authority, insufficient to overcome presumption of correctness of judgment.

A plausible, but not convincing, argument in the brief, unsupported by citation of authority, is not sufficient to overcome the presumption indulged by the Supreme Court in favor of the correctness of the judgment of the trial court.

Appeal from District Court, Garvin County; F. B. Swank, Judge.

Action by John Blue against the Board of County Commissioners of Garvin County. From judgment for defendant, plaintiff appeals. Affirmed.

John A. McClure and Albert Rennie, both of Pauls Valley, for plaintiff in error.

Monroe Osborn, Co. Atty., and McQ. Williamson, Asst. Co. Atty., both of Pauls Valley, for defendant in error.

McNEILL, J. This is an appeal from a judgment of the district court of Garvin county holding that the lands allotted to freedman of the Chickasaws by virtue of the provisions of the Act of Congress of July 1, 1902, c. 1362, 32 Stat. 641, are subject to taxation. The district court held said lands were taxable, and from said judgment the plaintiff has appealed.

Plaintiff in error in his brief concedes that this identical question was decided adversely to him by this court in the case of *Allen v. Trimmer*, 45 Okl. 83, 144 Pac. 795, but that said appeal is taken in accordance with the suggestion of this court in the case of *Farris v. Union Central Life Insurance Co.*, 179 Pac. 819.

Counsel for plaintiff in error suggest that his position is expressed in the dissenting opinion rendered in the former case of *Allen v. Trimmer*, *supra*. No authorities are cited to support the contention of plaintiff in error that the former opinion of this court is erroneous. Counsel for plaintiff in error concede there is a difference between the status of the Choctaw freedmen which was the question involved in the case of *Farris v. Union Central Life Insurance Co.*, *supra*, and the status of the Chickasaw freedmen, in this to wit, that when the grant was made to the Choctaws, the negroes had been admitted to tribal membership but the Chickasaw freedman were not. This is a very important question in the case, and was discussed in the opinion in the case of *Allen v. Trimmer*, *supra*. No authorities are cited by plaintiff in error to support the contention that the former opinion of this court is erroneous, and this court in a long line of decisions stated:

"A plausible, but not convincing, argument in the brief, unsupported by citation of authority, is not sufficient to overcome the presumption indulged by the Supreme Court in favor of the correctness of the judgment of the trial court." *Arbuckle Min. & Mill. Co. v. Beard*, 56 Okl. 144, 155 Pac. 1138.

This court does not feel bound to brief the case for plaintiff in error and defendant in error both, and then to write an opinion. Defendant in error has filed no brief, and the plaintiff in error's brief simply calls the court's attention to the dissenting opinion and the statement of this court in the opinion dealing with the Choctaw freedmen that the court had some doubt as to the correctness of the judgment in the case of *Allen v. Trimmer*, *supra*. This is not sufficient to overcome the

presumption that the judgment of the trial court is correct,

For the reasons stated, the judgment of the district court is affirmed.

HARRISON, C. J. and **PITCHFORD, NICHOLSON,** and **ELTING, JJ.**, concur.

(82 Okl. 147.)

GYPSY OIL CO. v. GREEN et al.
(No. 11361.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

1. Master and servant §101, 102(5), 265(5)
—Kind of appliances required; accident does not show negligence.

A master has some discretion concerning the kind of tools and appliances which he will use or furnish his servants. He is not required to furnish tools of any particular pattern or appliances constructed in any particular manner, provided the tools and appliances furnished are sound, reasonably safe, and perform the work which they are designed to do; and mere proof that he is using tools and appliances of a certain kind, if an accident happens in the use of them, does not tend to show negligence unless it is coupled with some evidence—not mere speculation—that they were not properly constructed or properly performing their function.

2. Master and servant §265(5)—No presumption of negligence.

The fact that an employee is injured in the course of his employment carries with it no presumption of negligence on the part of the employer, but such negligence is an affirmative fact for the injured employee to establish by the evidence.

3. Negligence §136(9)—Question for jury.

Where, from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence, such question is properly for the jury.

4. Master and servant §103(1)—Duty to provide reasonably safe appliances nondelegable.

It is the undeleagable duty of the master to exercise ordinary care to provide his servants a reasonably safe place to work, and reasonably safe tools, materials, and appliances with which to work, and a failure in either of these duties will subject the master to liability for all damages proximately resulting therefrom through injuries to the servant.

5. Death §86(1)—Children may recover for probable pecuniary loss after they reach majority.

Under section 5281, Rev. Laws 1910, the right of recovery is not limited to children of a deceased father to losses suffered during their minority, and they may recover for probable pecuniary loss after they reach their majority; but the recovery had, whether by minor or adult

children, must be based upon the reasonable expectancy of pecuniary benefit, of which they were deprived by the death of their father.

6. Death §99(4)—Damages held excessive.

Evidence examined, and held, that the verdict is excessive, and is not warranted by the facts proven.

Appeal from Superior Court, Creek County; Gaylord R. Wilcox, Judge.

Action by Bulah Green and Thelma Green, by P. J. Green, their guardian, as plaintiffs, against the Gypsy Oil Company, a corporation, as defendant. Judgment for plaintiffs, and defendant appeals. Affirmed on condition of a remittitur; otherwise, reversed and remanded for a new trial.

James B. Diggs, Rush Greenslade, and William O. Liedtke, all of Tulsa, for plaintiff in error.

Jarrett & Speakman, of Chandler, for defendants in error.

NICHOLSON, J. The parties hereto occupy reverse positions in the court below, and we will refer to them as they appeared there. The plaintiffs instituted this action against the defendant in the superior court of Creek county, to recover damages on account of the death of their father, Henry Green. On the 28th day of November, 1919, a verdict was returned in favor of the plaintiffs for the sum of \$20,000, upon which judgment was rendered.

On December 30, 1918, the deceased was an employee of the defendant, and on said day he and other employees of the defendant were instructed to pull the tubing from one of the defendant's oil wells. In pulling said tubing, it was necessary for one of the parties engaged in said work to stand on a tubing board constructed in the derrick, a distance of about 40 feet from the ground, and to reach said tubing board it was necessary to climb a ladder attached to the derrick. The deceased attempted to climb this ladder to reach the tubing board, and, when, he had climbed said ladder a distance of about 20 feet from the ground, the same pulled loose from the derrick and fell with him, and by reason of such fall he sustained injuries which resulted in his death on the 22d day of February, 1919. That part of the petition charging negligence on the part of the defendant is as follows:

"That said ladder was a part of the appliances, tools and machinery furnished by the defendant to said Henry Green to use in the course of his employment. That it thereby became the duty of the defendant to furnish the said Henry Green with a reasonably safe place in which to work and with reasonably safe tools, machinery and appliances with which to work. That the said defendant failed and made breach in its said duty toward the said Henry Green, in this, to wit, that the said ladder was

improperly, inadequately, carelessly and negligently constructed, and nailed and fastened to the said derrick, and by reason thereof the same was not reasonably safe for those who used it, and the said company had negligently and carelessly failed and refused to repair and to keep the said ladder so nailed and fastened to the said derrick as to make the same reasonably safe to protect and preserve the lives of those who used it.

"That on the last-named date the said Henry Green while acting in the course of his employment, aforesaid, for the defendant company, without any fault or negligence on his part, and without knowledge on his part of the defective condition of the said ladder as above mentioned and set forth, the said Henry Green attempted to climb said ladder in the ordinary manner to perform his duties in assisting in pulling the tubing from the said well. That when the said Henry Green had climbed the ladder to the distance of about 20 feet, the said ladder, without fault or negligence on the part of the said Henry Green, and by reason of the fault, wrong, carelessness and negligence of the defendant as above stated, pulled loose from the top of the second section thereof, upon which the said Henry Green was then climbing, thus causing the ladder to swing backwards and downwards from the top, and at the same time to pry and pull loose from the bottom of said section, and to fall to the ground with the said Henry Green, and he falling a distance of about 20 feet, was thereby thrown upon the ground on his head and face, thus crushing, bruising and injuring his head, face and back and spinal column. That by reason thereof, three or four sections of the lower vertebrae were twisted, wrenched and fractured, and the said Henry Green did linger and languish and therefrom did thereafter die on the 22d day of February, 1919.

"That the said death of the said Henry Green was caused by the said wrongful, careless and negligent acts and omissions of the said defendant, and the wrongful and negligent acts and omissions of the said defendant in failing to provide and furnish the said Henry Green with a reasonably safe place and with reasonably safe tools, equipment and machinery with which to perform the duties of his employment, while engaged in the employment of the defendant corporation, as above set forth, all without fault, carelessness or negligence on the part of the said Henry Green.

"That the said defendant company knew and had notice of the defective, unsafe and dangerous condition of the said ladder at the time of the happening of the said accident, and knew and had notice that said ladder was not constructed in a reasonably safe manner, and said defendants did not exercise reasonable care and diligence to repair or maintain said ladder in a reasonable safe condition, or by the exercise of reasonable and ordinary care and diligence it could have obtained such knowledge, and that had the defendant exercised that degree of care and diligence as was commensurate with its duty in constructing and properly repairing and maintaining and nailing and fastening the said ladder to the said derrick, the accident herein complained of could and would not have happened, and would have been avoided."

To this petition the defendant filed a general demurrer, which was overruled and exceptions saved, and thereupon it filed answer denying generally the allegations of the petition, and as further defenses pleaded contributory negligence on the part of said Henry Green, and the assumption of the risk of such employment by him. To which answer the plaintiff filed a reply consisting of a general denial.

The plaintiff in error makes 29 assignments of error and has argued them in two groups, the first of which is based upon the refusal of the court to sustain defendant's demurrer to the evidence of the plaintiffs, and to give the peremptory instruction requested by the defendant, and go to the sufficiency of the evidence to sustain the verdict and judgment.

The plaintiff in error argues that the ladder which fell with Henry Green had for approximately three years successfully withstood every test and strain to which it had been put and had properly performed the functions it was intended to perform without visible indication that the nails therein had become loosened by reason of the fact that the ladder had become covered and saturated with oil and paraffin; that the defendant was not required to construct this ladder in any particular way; that it was only obliged to exercise ordinary care to furnish its servants with a ladder so constructed and nailed as to be reasonably safe for the uses to which it was intended to be put, and the fact that the ladder fell as a result of the nails therein becoming loosened from the effect of the oil and paraffin on the wood of the ladder is no evidence of negligence on the part of the defendant to in the first instance furnish its servants with a reasonably safe ladder.

The evidence shows that the ladder which fell with the deceased was fastened to the second gird of the derrick with three 20-penny nails driven through the gird at one side and two at the other into the upright pieces at the top of the ladder, that the ladder was not nailed or in any manner fastened to the braces between the girds, and was in no way fastened at the lower end, and that the lower end lacked 10 or 12 inches of reaching the lower gird of the derrick; and from this evidence it appears that this ladder was simply permitted to hang from the second gird, fastened only by the nails driven through the top of the ladder. The evidence further shows that ladders of this kind are usually fastened to the derrick by nails driven through the gird into the ladder at the top and bottom thereof, and also by nails driven through the braces into the ladder, and, in fact, the ladder is usually nailed each place it touches the rig.

[1, 2] We agree with counsel for defendant that it was not required to construct this ladder in any particular way, if it was so constructed and nailed as to be reasonably safe for the uses required of it. A master

has some discretion concerning the kind of machinery, tools, and appliances which he will use. He is not required to use machinery or tools of any particular pattern, nor appliances constructed in any particular manner, provided the machinery, tools, and appliances furnished his servants are sound and reasonably safe and perform the work which they are designed to do, and the fact of accident carries with it no presumption of negligence on the part of the employer, but such negligence is an affirmative fact for the injured employee to establish by the evidence. *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 706, 38 L. R. A. (N. S.) 1191; *Palmer v. Wichita Falls & N. W. Ry. Co.*, 60 Okl. 205, 159 Pac. 1115. But the question of whether or not this ladder was so constructed, nailed, or fastened in the first instance as to be reasonably safe was a question of fact to be determined by the jury.

In *Littlejohn v. Midland Valley R. Co.*, 47 Okl. 204, 148 Pac. 120, the court says:

"Questions of negligence do not become questions of law, to be decided by the court, except where the facts are such that all reasonable men must draw the same conclusions from them, and the case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish. *Anthony v. Bliss et al.*, 39 Okl. 237, 134 Pac. 1122; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 87 L. Ed. 1107; *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 987; *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485."

And in *New York Plate Glass Ins. Co. v. Natz*, 51 Okl. 713, 152 Pac. 353, the syllabus is as follows:

"In a suit based on negligence, the court should submit the case to the jury, unless the evidence produced, together with all reasonable deductions and inferences to be fairly drawn therefrom, entirely fails to show negligence upon the part of defendant. If the evidence fails entirely to show negligence, then the court should instruct a verdict in favor of defendant."

[3] And in *Chicago, R. I. & P. Ry. Co. v. Felder*, 56 Okl. 220, 155 Pac. 529, the court says:

"In cases involving the question of negligence, the rule is now settled that—'When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.'"

[4] The defendant contends that the ladder furnished deceased was at the time he entered defendant's employ reasonably safe, and if

thereafter it became unsafe, the defendant had no notice or knowledge, either actual or constructive, of its defective condition, and the evidence fails to show a duty on the part of the defendant to inspect the ladder, and a failure on its part to perform that duty, or that a reasonable careful inspection would have revealed such defect. The evidence discloses that Henry Green entered the employ of the defendant on July 15, 1918, and that he was injured on December 30, 1918; that the ladder and the derrick to which it was fastened were covered with oil and paraffin to such an extent that the heads of the nails were not visible; and that men standing on the floor of the derrick could not see how many nails there were in the ladder or where the same were nailed, and this was the condition when Henry Green entered the employ of the defendant.

It was the undeleagable duty of the defendant to exercise ordinary care to provide Henry Green a reasonably safe place to work, and reasonably safe tools, materials, and appliances with which to work, and if it failed in either of these duties, it was guilty of negligence, and was subject to liability for any damages proximately resulting therefrom. *Prickett v. Sulzberger & Sons Co.*, 57 Okl. 567, 157 Pac. 356; *Choctaw Electric Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145.

If the facts were such that all reasonable men must have drawn the conclusion that this ladder was properly constructed and securely fastened to the derrick in the first instance, but became unsafe by reason of it and the derrick becoming saturated with oil and paraffin, thereby causing the nails to loosen and pull out, then it would have been incumbent upon the plaintiffs to show by the evidence that the defendant had failed to make reasonably careful inspections at reasonable intervals, and that if such inspections had been made they would have disclosed the defects which led to the injury in time to permit of its reparation, in the exercise of reasonable care, and a failure to make this showing would preclude a recovery. *Thompson on Negligence*, vol. 4, § 3803. And if a reasonably careful and skillful inspection would not have disclosed the defects which caused the injury, there would be no liability even though such inspections had not been made. *Thompson on Negligence*, supra; *Labatt's Master and Servant*, vol. 3, § 1058. The facts being such that all reasonable men might draw different conclusions, therefore the trial court did not err in overruling the defendant's demurrer to the evidence and in refusing to give the peremptory instruction requested by the defendant.

[6] We will next consider assignment of error No. 14, which attacks the correctness of instruction No. 6, which reads as follows:

"You are further instructed that under the law of this state, the right of the children of the deceased father is not limited to the time of their minority, but extends to and after they obtain the age of majority; but the recovery had, whether by a minor or by an adult child, must be based upon the reasonable expectancy of pecuniary benefit of which they were deprived by the death of their father."

And assignments of error Nos. 24 and 25, which are:

"The court below erred in rendering judgment on the verdict in the sum of \$20,000; such judgment is excessive and unwarranted by the facts established at the trial of said action.

"That the amount of the verdict, \$20,000, is so excessive that thereupon it appears that said verdict was given and returned under the influence of passion and prejudice upon the part of the jury."

The right of the plaintiffs to recover is governed by section 5281 and section 5282, Rev. Laws 1910, and a reading of section 5281 discloses that said section does not limit the recovery of the plaintiffs to the period of their minority, but provides:

" * * * The damages must inure to the exclusive benefit of the widow and children. * * * "

In *City of Sapulpa v. Deason et al.*, 196 Pac. 544, the following language is found:

"What would fairly and reasonably compensate the plaintiffs for the loss sustained is the test, and not that if the deceased had lived out his life expectancy, as counsel for defendant in error seems to think should be the test. The minor children of the deceased, on attaining their respective majority, would have no further claim for compensation by reason of the death of their father."

The defendant insists that this case is controlling, and that plaintiffs are precluded from a recovery for loss extending beyond their minority, but the statement, "The minor children of the deceased on attaining their respective majority would have no further claim for compensation by reason of the death of their father," is obiter dictum, and an examination of this case shows that the verdict and judgment were held excessive for other reasons.

In *Pressley et al. v. Incorporated Town of Sallisaw et al.*, 54 Okl. 747, 154 Pac. 660, the fifth paragraph of the syllabus reads as follows:

"Under section 5281, Rev. Laws 1910, the right of recovery is not limited to children of a deceased father up to their majority, but extends to all children of deceased, regardless of their ages; but the recovery had, whether by minor or adult children, must be based upon the reasonable expectancy of pecuniary benefit, of which they were deprived by the death of their father."

And in the body of the opinion the court quotes from the decisions of a number of

states holding that the children are not precluded from a recovery for loss extending beyond their minority. The correct rule seems to be that the recovery is not confined to losses sustained during minority, and that a child may recover for probable pecuniary loss after he reaches his majority.

While instruction No. 6, standing alone, might be objectionable, yet when considered with instruction No. 7, giving the measure of damages, we cannot say that it was prejudicial to the defendant; these two instructions considered together fairly state the law, as announced in *Pressley v. Incorporated Town of Sallisaw*, supra; *Big Jack Mining Co. v. Parkinson*, 41 Okl. 125, 137 Pac. 678; and *Sedgwick on Damages*, § 577.

[6] We think the other instructions complained of and contained in the second group of assignments, when considered with the instructions as a whole, fairly state the law, and that the defendant was not prejudiced thereby. However, we are of the opinion that the jury erred in the amount of the recovery, and that the verdict is clearly in excess of the sum that could be based upon the idea of compensation alone.

It is therefore ordered that if the plaintiffs, within 30 days from the date of the receipt of the mandate herein by the trial court, file a remittitur for all of said judgment in excess of \$12,500, and interest thereon from the date of the judgment at the rate of 6 per cent. per annum, the judgment as thus modified will be affirmed; otherwise, the judgment is reversed, and the cause remanded, with directions to grant a new trial.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

(32 Okl. 145)

PLANTERS' COTTON & GINNING CO. v. WEST BROS. et al. (No. 11396.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

1. Ballment §15—Corporation Commission has power to regulate cotton gins in performance of public duties.

Section 4, c. 176, Laws 1915, provides, in substance, that the Corporation Commission has power and authority to regulate and control cotton gins in all matters relating to the performance of their public duties and to correct abuses, prevent extortions, to fix rates, and to require gins to afford all reasonable facilities and conveniences necessary to serve the public.

2. Ballment §15—Order of Corporation Commission based on discrimination by cotton ginner, supported by evidence, will not be reversed on appeal.

The Corporation Commission made an order requiring the gin company at Lamar, Okl.,

to render similar service to persons engaged in the purchase of seed cotton and cotton seed alike, and without discrimination, and ordered the gin company to cancel all agreements in restraint of trade, and, there being sufficient evidence to support a finding that the gin company had discriminated against purchasers of cotton seed and seed cotton, for the purpose of creating a monopoly, said order will not be reversed on appeal.

3. Public service commissions §6—Corporation Commission has only such jurisdiction as is expressly or by necessary implication conferred upon it.

The Corporation Commission of this state has such jurisdiction only as is expressly or by necessary implication conferred upon it by the Constitution and statutes.

4. Ballment §15—Corporation Commission cannot impose fine for violation of penal laws.

Section 8235, Rev. Laws 1910, defines what is public business and confers upon the Corporation Commission power to control such business, and to make such orders as necessary to regulate and control the same, and section 19 of article 9 of the Constitution authorizes the Commission to assess fines or punishments against persons for violating its orders, but neither the Constitution nor the statutes has conferred upon the Commission power or authority to fine or punish parties engaged in public business for violating the penal laws of this state.

Appeal from Order of Corporation Commission.

Proceeding by West Bros. before the Corporation Commission of the State of Oklahoma against the Planters' Cotton & Ginning Company for unjust discrimination. From an order of the Commission and imposition of a fine, the Planters' Cotton & Ginning Company appeals. Affirmed in part, and in part reversed.

Gibson & Hull, of Muskogee, and Abernathy & Howell, of Shawnee, for plaintiff in error.

E. S. Ratliff, of Oklahoma City, for Corporation Commission.

McNEILL, J. On the 10th day of October, 1919, West Bros. and others, of Lamar, Okl., filed a complaint with the Corporation Commission against the Planters' Cotton & Ginning Company, a corporation, protesting against certain conditions and irregularities of the Gin Company at Lamar. It was alleged that the gin company owned both gins at Lamar, Okl., and was discriminating against cotton buyers regarding the use of its warehouse for storage of cotton seed and seed cotton; that the price paid by the gin company for cotton was inadequate, and when the merchants and independent buyers began paying an adequate price for the cotton they were forced to get out of the

seed cotton market on account of the monopoly of the gin company and by its manipulating the scales and the gins of the company in a manner that gave gains in weight to the farmer on the seed, and a low percentage in the lint of the cotton baled, when purchased by an independent buyer, and on the other hand farmers who sold cotton to buyers who sold the gin company their seed complained of a loss on the weight of their seed.

A hearing was had before the Corporation Commission, and the Commission made certain findings of fact which may be stated, in substance, that the Planters' Cotton & Ginning Company is a corporation owning a number of gins throughout Oklahoma, and is engaged in ginning cotton and buying cotton seed, and operating cotton oil mills in the state of Oklahoma, and were the owners of two gins at Lamar and the only gins operated at that point; that the ginning company virtually controlled a monopoly of ginning cotton and buying cotton seed at Lamar and has taken advantage of its position by reason of its monopoly, and is discriminating between persons buying seed cotton in the town of Lamar, in that it has allowed only such buyers of seed cotton as would agree to sell them the cotton seed to use the warehouse; that the gin company had an agreement with one Mackey and was giving him the exclusive right to use all the facilities and to use the storage and pay him a premium of \$2.50 on each ton of cotton seed turned to the defendant company, and in return for the exclusive privilege Mackey is required to turn all of the cotton seed bought by him to the gin company. The Commission found this agreement was for the purpose of stifling and eliminating competition, and its object has been obtained. The price of cotton at Lamar had not fluctuated, but the price had only been advanced when the farmers and independent buyers attempted to break the restraint of trade made by the said defendant company. Upon said finding the Commission ordered that the gin company instructed its managers and agents at Lamar and all other points in the state where it maintains gins and buys cotton seed to render service to all persons, firms, and corporations engaged in the purchase of seed cotton and cotton seed alike without discrimination, and all agreements now in existence and in restraint of trade be canceled immediately, and the gin company be restrained from entering into such agreements. It is further ordered that the defendant gin company be fined \$500 in accordance with the provisions of chapter 79, art. 1, Revised Laws of Oklahoma 1910.

From said order and judgment the gin company has appealed. For reversal it is contended that the findings of fact made by the Commission are not sustained by the evidence and are contrary to the evidence, and the Corporation Commission is without au-

thority to enter said order. It is unnecessary to discuss the different findings separately, but an examination of the entire record discloses there is sufficient evidence to support the finding that the gin company was operating both gins at Lamar and were stifling and eliminating competition and discriminating against the buyers of cotton seed and seed cotton, and there is evidence to support the finding that, when an independent buyer would purchase cotton seed and have the same ginned, the company in some manner manipulated the scales or the gin so the amount of lint from the cotton ginned for the independent buyer was greatly reduced from what was generally received from the same amount of seed, and there was a great variation in weight of the scales of the company and that of independent scales, and the loss was always sustained by the independent buyer.

[1] It is sufficient to say that there is sufficient evidence in the record to support the finding of the Corporation Commission that the gin company at this place was stifling competition and creating a monopoly and were manipulating its scales and weights in a manner that would prevent independent persons from purchasing cotton seed and then were paying an inadequate price for the cotton by reason of this monopoly.

[2] It is next contended that the Commission is not authorized under the law to make a finding that the warehouse is a part and parcel of the public utility. The Corporation Commission made no such finding, but simply made an order that the manager and agents at Lamar were required to render service to all persons engaged in the purchasing of seed and cotton seed alike and without discrimination, and all agreements now in existence in restraint of trade to which defendant is a party be canceled. Section 4, c. 176, Session Laws 1915, gives to the Corporation Commission power and authority to regulate and control cotton gins in all matters relating to the performance of public duties and charges the Commission with the duties to correct abuses and prevent extortion and give them authority to fix rates, charges, and regulations to be obeyed by persons operating gins and requiring the gin company to afford all reasonable facilities and conveniences and services to the public, and shall have power and authority to require facilities to be afforded the public and has the same power to control cotton gins, and the regulations thereof, as it has over transportation and transmission companies.

There is no direct finding that the warehouse was a part of the public utility, and under the authority above given to the Corporation Commission by the statute it has authority to regulate business of the gin company, and the gin company would have no right to discriminate against the buyers of

cotton in the use of its warehouse, as a means to stifling competition, and for the purpose of creating a monopoly and controlling prices. It is unnecessary for us to decide whether a warehouse used by a ginning company is one of the conveniences or facilities that it may be required to furnish for the public, but the court will not permit the use of such a facility for the purpose of creating a monopoly and stifle competition in order to pay an inadequate price for the cotton purchased.

[3, 4] The third proposition argued is that the Corporation Commission was without jurisdiction or authority to assess a fine of any kind or character against the defendant. This court in the cases of *Oklahoma City v. Corporation Commission*, 195 Pac. 498, and *A. T. & S. F. v. Corporation Commission*, 170 Pac. 1156, held that the Corporation Commission had only such jurisdiction or authority as is expressly or by necessary implication conferred upon it by the Constitution or statutes of this state. The power and authority of the Corporation Commission to assess fines is granted to the Corporation Commission by section 19, art. 9, of the Constitution, which provides in substance that the Corporation Commission may assess fines for violation of any of its orders. In the instant case the corporation had violated no order of the Corporation Commission. Whether they were guilty of violating any of the provisions of article 1, c. 79, Revised Laws 1910, it is unnecessary to decide, as no authority is granted the Corporation Commission to hear and try persons charged with offenses defined in said article.

The Corporation Commission contends that section 8235, R. L. 1910, is applicable because the evidence disclosed that the gin company had created a monopoly and is subject to be controlled by the Corporation Commission. The Commission had jurisdiction and authority to make proper orders regulating the business, but neither this section of the statute nor any other section of the statute that has been called to our attention gives the Corporation Commission power and authority to punish and assess fines against the corporation for violating any of the penal laws of the state. The only power and authority granted to the Corporation Commission is to assess fines for violating its orders.

We therefore conclude that the judgment of the Commission in so far as the fine is concerned was beyond the authority of the Corporation Commission to enter the same. The order of the Corporation Commission is affirmed in all respects, except in so far as the order imposing the fine is concerned, and that portion of the judgment is set aside and held for naught.

HARRISON, C. J., and PITCHFORD, ELTING, and NICHOLSON, JJ., concur.

YOUNG et al. v. EATON. (No. 10149.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

1. Statutory provisions.

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. Section 2852, Rev. Laws 1910.

2. Damages \S 120(2)—Measure of damages for failure to furnish ensilage cutter stated.

When, in the spring of the year, a person purchases a silo to be erected on his farm for use that summer or fall, and the agents for the company manufacturing the silo contract to furnish the purchaser an ensilage cutter at a stipulated price per ton for cutting the silage, but fail upon demand to furnish such cutter, the measure of damages is the difference between the value of the material or silage, the cost of putting it in the silo, and what the ensilage would have been worth at the usual feeding time for such ensilage during the winter following.

3. Evidence \S 443(2)—Proof of oral contract to furnish ensilage cutter held not to vary written contract between silo company and purchaser of silo.

When a person in purchasing a silo enters into a written contract with the company specifying the kind of silo purchased, conditions of warranty, and terms of payment, and at the same time the agents of the silo company, for the purpose of inducing the purchaser to buy, orally contract to furnish an ensilage cutter at a stipulated price per ton to be used by the purchaser during the season for putting up the ensilage, proof of such oral contract does not tend to vary the terms of the written instrument between the silo company and the purchaser.

4. Appeal and error \S 1001(1)—Verdict not disturbed when supported by competent evidence.

When there is any competent evidence reasonably tending to support the verdict of the jury, it will not be disturbed on appeal.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

Action by J. O. Eaton against E. F. Young and another to recover damages for breach of contract. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Bassmann and H. Tom Kight, both of Claremore, for plaintiffs in error.

John M. Goldesberry and George W. Boone, both of Collinsville, and H. Jennings, of Claremore, for defendant in error.

MILLER, J. This action was commenced in the district court of Rogers county by J. C. Eaton, as plaintiff, against E. F. Young and M. O. Swan, as defendants, to recover damages arising from the breach of a contract to furnish an ensilage cutter. The case was tried to a jury, which returned a verdict in favor of the plaintiff for \$375. The court rendered judgment on the verdict, to reverse which the defendants prosecuted this appeal. The parties will be referred to as they appeared in the court below.

The plaintiff in his petition alleges the defendants were in business at Oolagah and were agents for the Indiana Silo Company; that during the month of March, 1913, the plaintiff purchased a silo of the Indiana Silo Company through the defendants as such agents. Said silo was of a capacity of 200 tons. The defendants agreed with the plaintiff that, if he would purchase the silo, they would have an ensilage cutter and would hire it to him for his use at the proper time to fill said silo for an agreed charge of 25 cents per ton. He agreed with the defendants that he would hire the said cutter and pay the agreed price therefor, and with this understanding and agreement he purchased the silo and had the same erected on his farm near Oolagah. During the month of August, 1913, the plaintiff went to the defendants for the purpose of getting the ensilage cutter and was then and there informed they did not have a cutter; that some time prior thereto they had one, but sold it and they could not furnish him with a cutter. He thereafter tried to obtain a cutter from other sources, but was unable to do so. One cutter could have been obtained, but it was across the river from plaintiff's farm and could not be moved across the bridge.

The defendants demurred to the petition, which demurrer was overruled. They then filed an answer denying specifically the allegations in the petition and set up as an affirmative defense that the contract for the sale of the silo was in writing, and that the oral contract to furnish the cutter was an attempt to vary the terms of the written instrument. The defendants make numerous assignments of error. Many of these are waived because not discussed in their brief. They say that plaintiff's petition does not state a cause of action, and the trial court committed error in overruling the defendants' demurrer, but they do not point out in what particular it failed to state a cause of action. We have examined the petition and conclude that it does state a cause of action. They make a general complaint about the instructions given by the court to the jury, but they do not point out any specific error in the instructions. Neither do they point out any specific instruction that should have been given that was not given. We have examined the instructions and are of the opinion that they fairly cover the case and state the law.

[2] The only real contentions made by the defendants in their brief is that the plaintiff proceeded on the wrong theory as to his measure of damages; that the alleged oral contract was an attempt to vary the terms of the written contract, and that the verdict of the jury is against the weight of the evidence or not sustained by the evidence. We will dispose of these contentions in the order above named.

Defendants contend that plaintiff has proceeded on the theory of loss of profits. This is a very strained theory and is not borne out by the record. The plaintiff alleges that the cost of the material for silage and labor, including cost of cutting and machinery and all help necessary to have filled the silo with silage in the fall of 1913, would have been \$432; that this silage feed was worth \$7 per ton, or \$1,400 for the 200 tons. The plaintiff's petition says:

"This would have left plaintiff a profit on said silage feed of \$968."

The fact that the plaintiff used the word "profit" instead of "difference in value" is not material; that was merely the pleader's way of expressing it. The facts alleged in the petition disclosed there was a difference of \$968 between the cost of the material from which the silage would be made, the manufacturing of it into the ensilage, and the market value of the ensilage during the winter of 1913 and 1914.

The defendants in their brief state:

"Unless the plaintiff told the defendants at the time this contract is alleged to have been made that he would raise feed for the purpose of filling the silo, or purchase feed for that purpose, or that he had or would do these things, and told the defendants that he wanted the cutter for the purpose of cutting such feed for the purpose of filling the silo, these defendants could not be held to respond in damages under any consideration."

We do not know of any purpose a farmer or stockman has in erecting a silo on his farm nor any use to which it is to be put except for the purpose of providing ensilage as a feed. It cannot be presumed that the agents of a firm manufacturing silos was selling the silos to the farmers for any other purpose than that for which the silos were manufactured and intended to be used. Under this contention of defendants one would necessarily presume the defendants as agents of the silo company thought the plaintiff was having the silo erected as an ornament on his farm. The defendants are presumed to have contracted with the plaintiff with the view that plaintiff would use the silo that summer or fall to put ensilage in.

[1] The measure of damages is as stated in section 2852, Revised Laws of Oklahoma 1910:

"For the breach of an obligation arising from contract, the measure of damages, except where

otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Defendants have cited several Oklahoma authorities, but the only one applicable is *Mackey v. Boswell*, 63 Okl. 20, 162 Pac. 193. Paragraph 2 of the syllabus reads:

"Loss of profits in being unable to plant, cultivate, and harvest a crop, if within the contemplation of the parties at the time a contract is made, and if such a loss or damage as flowed directly or proximately from the breach of such contract, and, if capable of accurate measurement or estimate, is recoverable in an action for damages for the breach of such contract."

In our opinion plaintiff's theory of the measure of damages was correct, and the court submitted it to the jury under proper instructions.

[3] Defendants next contend that the contract for the sale of the silo was in writing, and, this being an oral contract, evidence could not be introduced tending to vary the terms of the written instrument. They have introduced in evidence a written contract between the Indiana Silo Company and plaintiff. This contract specifies the kind of a silo the plaintiff was purchasing, its dimensions, the kind of material with which it was to be constructed, the warranty of the material, the price and terms of payment. It is presumed this contract included all of the negotiations between the Indiana Silo Company and the plaintiff. There is no such presumption that it included all oral negotiations between the plaintiff and these defendants. Proof of an oral agreement between the plaintiff and these defendants did not in any way alter or vary the terms of the written contract with the Indiana Silo Company.

Defendant Swan testified that during each of the several conversations between himself and the plaintiff leading up to the purchase of the silo by the plaintiff the question of an ensilage cutter was discussed. He further admitted on the witness stand that on the evening the contract for the purchase of the silo was closed Eaton said that unless he could make arrangements for a cutter he had no use for the silo and would not buy one. We think the evidence was properly admitted to prove the oral agreement. The profits or prospective profits accruing to the defendants by the sale of the silo to the plaintiff is sufficient consideration to support the contract.

[4] We have examined the evidence, and think it was sufficient to take the case to the jury. The jury having found in favor of the plaintiff, and there being evidence reasonably tending to support the verdict, following a

long line of decisions by this court, the verdict of the jury will not be disturbed.

The judgment of the trial court is affirmed.

PITCHFORD, V. C. J., and JOHNSON, KENNAMER, and NICHOLSON, JJ., concur.

(82 Okl. 130)

STATE ex rel. ATTORNEY GENERAL v.
WARE. (No. 10124.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. Limitation of actions \S 11(1)—Statute does not run against state in action to enforce statutory bank stockholder's liability.

The statute of limitations does not run against the state in an action to enforce the statutory liability of the shareholder in an insolvent bank taken over by the State Bank Commissioner, together with its assets, for the purpose of realizing upon the same in the interest of the depositors of said bank, and to reimburse the bank guaranty fund for the sum paid out to said depositors or creditors.

2. Banks and banking \S 48(1)—Presumption of liability, on stock in insolvent bank from name in stock register held rebutted by showing of bona fide sale and attempted transfer.

The presumption of liability on shares of stock in an insolvent bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank.

3. Banks and banking \S 48(1)—Liability of shareholder held to cease upon sale of stock although transfer not made upon books.

Upon a reasonable construction of the statute imposing liability upon shareholders for the debts of state banks, and for all the objects intended to be accomplished by the provisions imposing liability on shareholders for such debts, the responsibility of the defendant ceased upon the surrender of certain stock certificates to the cashier of the bank, properly indorsed to the party to whom the shareholder had sold his stock, with the request that such officer make a transfer of the stock upon the books of the bank, and where such cashier promised to comply with such request, and afterwards informed the shareholder that said request had been complied with, and such shareholder, who was at the time a director of the bank, tendered his resignation as such, to the officers of the bank, informed them that he had sold and transferred his stock and that he could no longer act as a director, and such shareholder's connection with the bank thereafter ceased, although such transfer of stock was not, in fact, made upon the books of the bank.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

Action by the State, on relation of the Attorney General, against J. E. Ware, to enforce statutory stockholder's liability. Judgment for defendant, and plaintiff appeals. Affirmed.

S. P. Freeling, Atty. Gen., W. H. Zwick, Asst. Atty. Gen., and M. M. Thomas, of Oklahoma City, for plaintiff in error.

Everest, Vaught & Brewer, of Oklahoma City, for defendant in error.

JOHNSON, J. This action was commenced by the State of Oklahoma, on relation of the Attorney General, as plaintiff, against J. E. Ware, as defendant, to enforce the statutory liability of the defendant as a shareholder in the Planters' & Mechanics' Bank, a defunct concern, the assets of which were taken over by the Bank Commissioner of the state after the bank became insolvent.

The cause was tried to the court by stipulation of the parties upon an agreed statement of facts, and a judgment was rendered in favor of the defendant, to reverse which this proceeding in error was regularly commenced by the plaintiff. The stipulation upon which the cause was tried is as follows:

"Come now the parties hereto, the plaintiff, the state of Oklahoma, by S. P. Freeling, Attorney General, and J. I. Howard, his Assistant Attorney General, and the defendant, J. E. Ware, by his attorneys, Everest & Campbell, and stipulate and agree that said cause may be tried to the court without the intervention of a jury, upon the following agreed statement of facts, which facts are agreed by the parties to be the material facts in said controversy, and all the facts necessary to a correct determination thereof, and it is agreed as follows:

"(1) That on and prior to the 6th day of April, 1911, the Planters' & Mechanics' Bank was a banking corporation, duly organized, existing and doing business under and by virtue of the banking laws of the state of Oklahoma, with an authorized capital stock of \$50,000 divided into 500 shares of par value of \$100 each, with its principal place of business in Oklahoma City, Oklahoma county, state of Oklahoma.

"(2) That on the 6th day of April, 1911, the Bank Commissioner of the state of Oklahoma, acting under and by virtue of the laws of Oklahoma in such cases made and provided, took over the Planters' & Mechanics' Bank of Oklahoma City, Okl., for the reason that said bank was then in an insolvent and failing condition, and was unable to meet the demands of its creditors in the usual and customary manner, and, as such Bank Commissioner, took possession of books, record, and assets of the said bank for the purpose of winding up its affairs, collecting the debts due it, and for the purpose of converting its assets into cash and paying the claims of unsecured depositors of said bank, and said Bank Commissioner is proceeding under the laws to perform his duty thereunder.

"(3) That the cash available in said bank and that which thereafter becomes available out of the proceeds of the sale of the assets of said bank and the collection of notes and obli-

gations due it, was and is insufficient to secure the notes and obligations of the depositors of said bank, and the plaintiff by and through the State Banking Board and the Bank Commissioner thereof, was compelled to and did pay a large sum of money out of the depositors' guaranty fund of the state of Oklahoma, in addition to the cash immediately available from the sale of the assets of said bank, and the cash arising from the proceeds of the assets of said bank since said time, and that said sum so paid by the plaintiff exceeds the sum of \$100,000, and by reason thereof the state of Oklahoma, for the use and benefit of the Banking Board and the Bank Commissioner thereof, as custodians and administrators of the depositors' guaranty fund of the state of Oklahoma, had title to and a first prior and superior lien upon all of the assets of said bank, including the additional liability against the stockholders, officers, and directors thereof.

"(4) It is further admitted that on the 11th day of December, 1909, the Planters' & Mechanics' Bank issued to the defendant, J. E. Ware, certificate numbered 128 of said date, for 5 shares of the capital stock of said bank, of the par value or face value of \$500.

"(5) That on or about the first day of January, 1910, the defendant, J. E. Ware, sold, assigned, and transferred the said certificate numbered 128 for the said 5 shares of the capital stock in the Planters' & Mechanics' Bank aforesaid to one J. M. Postelle, who was then and there a stockholder of the said Planters' & Mechanics' Bank, and said certificate of stock was by the said J. E. Ware assigned upon the back thereof in the blank provided for the purpose, witnessed by the said Nicholas M. Ellis, cashier of said bank, and delivered to the said Planters' & Mechanics' Bank and the officers thereof, and particularly to the said Nicholas M. Ellis, cashier, whose duty it was to make transfers of stock on the books of said bank, and the said Ellis, acting for said bank, agreed to transfer the same and afterwards told the defendant, J. E. Ware, that said stock had been so transferred on the books of said bank. That, at the date of said transfer and delivery of said certificate, the said J. E. Ware received the sum of \$600 for said stock, being the book value thereof as shown by the books of said bank. That, prior to the date of said transfer and assignment of said certificate of stock, the said J. E. Ware was a director of said bank, and immediately upon the transfer notified the board of directors, and the president, cashier, and other officers of said bank, that he had sold said stock, and was no longer a shareholder in said bank, and that he could no longer act as director therein, and thereupon the said J. E. Ware, defendant, ceased to act as such director, and never thereafter participated in the said affairs of the said bank. That at the date of said transfer, to wit; about January 1, 1910, said Planters' & Mechanics' Bank was not insolvent, and was not taken charge of by the Bank Commissioner of the state of Oklahoma until the date heretofore stated, to wit April 6, 1911.

"(6) It is further agreed that the said Nicholas M. Ellis and the officers of said bank never actually canceled said surrendered certificate of stock, No. 128, belonging to the defendant aforesaid, and never reissued any stock in lieu thereof, and that at the time of the insolvency

of said bank, to wit; April 6, 1911, the said bank showed said certificate of stock in the name of the defendant J. E. Ware.

"(7) It is further agreed that the by-laws of the said bank provide as follows: '(5) The secretary shall keep a proper record and correct record of any stock issued or canceled, showing the date of issue or cancellation, certificate number, owner, address, number of shares and amount. (6) The stock may be transferred or assigned only on the books of the bank; must be surrendered, canceled, and new stock issued instead, in accordance with the banking laws.'

"And it is further agreed that said by-laws were in force at the time of the transfer and surrender for cancellation of the certificate of stock above described, originally owned by J. E. Ware. The questions to be decided by the court, as under the agreed statement of facts above set out, are: (1) Whether the said action is barred by the statute of limitations, this action having been commenced on the 11th day of July, 1916; and (2) whether, if not barred by the statute of limitations, the defendant, J. E. Ware, is liable in this action."

The two propositions involved in this appeal are thus stated by the Attorney General in his reply brief:

"Defendant in error discusses two propositions, the first being the statute of limitations and the second exoneration of defendant from liability as a stockholder, because of his attempted transfer of stock more than a year prior to the failure of the Planters' & Mechanics' Bank on April 6, 1911. If defendant is correct in his second proposition, and the transfer of his stock was complete without the full compliance of the bank's by-laws and an actual transfer on the books of the bank, then the statute of limitations is no longer a vital part of this appeal. However, we will discuss the propositions in the order presented by defendant."

[1] The first proposition, as to whether or not the statute of limitations runs against the state in this character of cases, is no longer an open question in this jurisdiction. It was held by this court in the case of *State ex rel. Freeling, Attorney General, v. Smith et al.*, 77 Okl. 277, 188 Pac. 96, in the syllabus, as follows:

"The statute of Limitations does not run against the state in an action on a promissory note held by the State Bank Commissioner as the assets of the insolvent bank"—citing *State ex rel. Taylor v. Cockrell*, 27 Okl. 630, 112 Pac. 1000; *Lovett v. Lankford*, 47 Okl. 12, 145 Pac. 767; *White v. State*, 50 Okl. 97, 150 Pac. 716.

Concerning the second proposition, the Attorney General, in his brief, says:

"Section 294, R. L. 1910, provides that the shares 'shall be transferred on the books of the bank in such manner as the by-laws thereof say direct.'

"Section 6 of this bank's by-laws provides: 'The stock may be transferred or assigned only on the books of the bank; must be surrendered

and canceled and new stock issued instead in accordance with the banking laws.'

"The whole question of liability of defendant in this case hinges on whether or not the terms of those by-laws must be fully complied with. On this question the authorities are divided. Defendant has cited the United States Supreme Court and the courts of Arkansas, Kentucky, and Tennessee to sustain his contention. Squarely in conflict with these views, and in addition to the cases cited in the principal brief, we shall quote the Supreme Courts of Ohio, Maine, Massachusetts, and others. Oklahoma has never passed on the question presented here, where the defendant has made his efforts at transfer. We must look then to the reasons for the views of the defendant courts and adopt the holdings of those authorities which are most sound in reason."

The first authority cited in his reply brief by the Attorney General in support of his position is the decision of this court in the case of *Blackert v. Lankford*, 176 Pac. 532. An examination of that case discloses that it does not apply to the exact situation disclosed by the record in the instant case, but applies to what the situation in the instant case would be if it were sought to hold the transferee in the instant case, Postelle, liable as owner of the stock, and the record of the bank disclosed that the stock had been transferred to him.

The facts in the *Blackert Case*, supra, and the findings of Hooker, C., who wrote the opinion, as stated by him, were as follows:

"The evidence in this case discloses that Mr. Blackert, the plaintiff in error, was cashier, director, and stockholder in the Bank of Commerce of Geary, * * * it being conclusively shown by the books of the defunct bank that the plaintiff in error was the owner of 14 shares of the capital stock of said bank in his own name." "It is further shown that in December, 1910, several months before the bank in question was declared insolvent, an assessment of 60 per cent. was levied on the stock of the bank in order to repair the capital stock thereof, and that the plaintiff in error paid a 60 per cent. assessment upon his stock, and contends here that he should be allowed a credit upon the amount sought to be recovered in this action by the payment then made by him. * * *

And on the 4th day of May, 1911, the governing board of the bank entered into an agreement with the Bank Commissioner and whereas, it was found that a deficit of about \$2,000 existed and that in consideration of the Commissioner advancing the said sum from the guaranty fund, the directors pledged the assets of the bank, and agreed that the Commissioner should proceed and collect the same in what may seem to be the most practical way, and that, the capital being impaired, the examiner levied 100 per cent. assessment on all the stockholders of said Bank of Commerce, to be paid as required by law, and that on the 5th day of

May, 1911, the Bank Commissioner entered into an agreement with the American State Bank whereby in consideration of \$36,321.04 in notes, and \$25,065.48, in cash and other assets had, undertook to pay all depositors, both individual and certificate of deposits, cashiers checks and rediscounts as shown by the daily statement of the books of the Bank of Commerce of Geary, it being expressly understood that the depositors were to be paid through the American State Bank of Geary.

In these circumstances it was held that the plaintiff, Blackert, was liable for the full statutory liability upon the stock held by him, paragraphs 5 and 6 of the syllabus being as follows:

"Where the capital stock of a banking corporation has become impaired, and an assessment against the stockholders is ordered, under section 288, Rev. Laws, 1910, to enable the bank to continue business, the payment of such assessment and the resumption of the business by the bank does not in any manner affect or discharge the stockholders from their general statutory liability for the debts of the bank upon its subsequent insolvency. The latter liability is designed solely for the benefit of the creditors, and constitutes a fund available only when the bank is insolvent and unable to meet its obligations in full."

"Where an action is instituted by the Bank Commissioner of the state to recover the double liability imposed by section 285, Rev. Laws, 1910, as a general rule, all persons whose names are on the books of the bank, as the absolute owners of stock are liable therefor, as parties dealing with the bank have a right to assume that the books of the bank show who are its stockholders, and as such stockholders they are bound for the liabilities of the bank in the manner provided by the statute, and, if one knowingly permits his name to appear upon the stock book of the bank as a shareholder, he will be estopped, in favor of an action brought by the Bank Commissioner to collect the double liability, from denying liability."

The records in the case fully disclose, both by the records of the bank and the entire record, that Blackert was the owner of the stock at the time the bank became insolvent, and knowingly permitted the bank records to show that he owned 14 shares of stock, and under the entire record there could be no doubt that he was liable under the statutes for the additional liability therein provided for, whereas, in the instant case one admittedly not the owner of the stock at the time the bank became insolvent is sought to be charged.

The exact proposition is thus stated in the reply brief of the attorney general:

"Is this defendant, who was the stockholder of record in the bank, who had sold his stock and delivered the same to the cashier of the bank for cancellation and issuance of new stock, and who was promised by the cashier that he would transfer it, and who was afterwards told

by the cashier that it had been transferred, exonerated from his liability as stockholder?"

And, as before shown, he states in his brief:

"Oklahoma has never passed upon the question presented here, where the defendant has made his effort at transfer"

—and cites in his brief the decisions of the courts of last resort of the following states supporting the contention that the defendant is liable, to wit: *Stanley v. Stanley*, 26 Me. 191; *Hurlbert v. Arthur*, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17; *Spreckels v. Nevada Bank*, 113 Cal. 277, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47; also, cases from Illinois, Massachusetts, New York, and Louisiana, Minnesota, Indiana, Ohio, and Kansas.

In the case of *Fisher v. Essex Bank*, 5 Gray (Mass.) 373, the Supreme Court of Massachusetts stated in the syllabus as follows:

"Shares in a bank, whose charter provides that they shall 'be transferable only at its banking house and in its books,' cannot be effectually transferred as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificate thereof, together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment."

The opinion, in part, says:

"It is necessary to fix some act, and some point of time, at which the property changes and vests in the vendee; and it will tend to the security of all parties concerned to make that turning point consist in an act which, whilst it may be easily proved, does at the same time give notoriety to the transfer. It would seem to us to be going beyond the rules of just exposition to hold that a plain provision of a statute law, calculated to promote the security of important legal rights of parties in important particulars, should be construed to be a regulation made for the convenience and protection of banks. The clause itself is too clear to admit of doubt; 'Shall be transferable only,' that is, capable of being transferred; the largest and broadest term to express alienation on one part, and acquisition on the other; and the word 'only' carries an implication as strong as negative words could make it, that is, in no other mode. It was not to prescribe one mode, leaving others unaffected; it made that mode exclusive.

"Nor is this position without high authority to support it. In *Union Bank v. Laird*, 2 Wheat. 390, it was held by the Supreme Court of the United States that, where shares were, by the act of incorporation, made transferable on the books, no person could acquire a legal title in any other mode."

In *Abilene State Bank v. Straham*, 89 Kan. 577, 132 Pac. 200, 46 L. R. A. (N. S.) 668, the syllabus is as follows:

"1. Bank Stock—Assigned—Not Transferred on Stock Book—Shareholder Liable.—To effect an assignment and disposition of shares of capital stock in a bank so as to relieve the assignor from the superadded liability of shareholders fixed by law he must procure a transfer of the stock on the books of the bank in accordance with the provisions of the banking act."

"2. Same—Such a transfer is essential to a release from liability of a shareholder who sells and assigns his stock to the bank itself in payment of a previously contracted debt owing by him to the bank."

Harpold v. Stobart, 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618, the Supreme Court of Ohio stated as follows:

"Where, in such case, the vendor causes an entry of transfer to be made by the secretary of the company, in a book then present at the company's office other than the stock book, with the expectation that it will be entered in another book then at the residence of the secretary, but no transfer is made in the stock book of the company, and, at the time of the accruing of the debts of the corporation, and at the time of the trial, such vendor appears by the stock book to be the owner of the shares, such entry of transfer is not sufficient to relieve the vendor of liability to the creditors of the corporation, notwithstanding the fact that the sale was made in good faith and for value, and that the vendor believed he had done all that was necessary to effect a transfer of the stock, and the further fact that the company thereafter treated the purchaser as the owner of the stock so sold. * * *

"The creditors have the right to resort to and rely upon the proper book of the company as showing who the stockholders are, and the amount of stock held by each, and they are presumed to have relied upon the record so found in this case. * * * And, where the name of an actual stockholder appears upon that book as owning a given number of shares, the entry is presumed to have been made with his consent; at least, this is so where it was correct when made, and, as between him and creditors of the corporation, he is estopped to contradict the record, or deny ownership of the shares."

Counsel for defendant submit in their brief in support of their contention, as follows:

"It is admitted that the defendant did transfer these certificates of stock to one J. M. Postelle; that the transfer was made at a time when the bank was solvent, and more than a year before it became insolvent; that Ware received the sum of \$600 for the transfer and assignment of the \$500 worth of stock; that he indorsed the certificates evidencing the ownership of this stock to the said J. M. Postelle, signed the same, and delivered it to the cashier of the bank for cancellation, and the issuance of new stock to the said Postelle; that the bank cashier, Mr. Ellis, said he would transfer it, and that he afterwards stated to the said Ware that he had transferred it, all of which took place long prior to the insolvency of said bank. We think, after a careful reading of the brief of the plaintiff in error, that no

case cited by him has any facts which are so strong, either in law or in equity, in favor of the defendant as the case at bar. Conceding for the sake of argument that the transferor or seller of the stock is put upon inquiry to know whether the stock surrendered has been actually canceled, which we do not admit, still, when the transferor of the stock has delivered the certificates to the proper officer of the bank for cancellation, has been told that it would be canceled, has made inquiry, and been told that it has been canceled, human ingenuity could go no further to accomplish exoneration from double liability in case of insolvency of the bank thereafter. However, we think the decisions cited by the plaintiff in error are against the great weight of authority, and that the rule announced by the Supreme Court of the United States in cases of this kind, as affecting the liability of owners of stock in national banks, is the correct rule, and is supported by sound reason and by the adjudicated cases in a majority of the states.

"The Supreme Court of the United States declared the rule to be as follows: 'Upon a reasonable construction of the statute imposing liability upon shareholders for the debts of national banks, and for all the objects intended to be accomplished by the provision imposing liability of shareholders for the debts of national banks, the responsibility of the defendants ceased upon the surrender of certain stock certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as the officer knew, a transfer of the stock on the books of the association to the purchaser; although such transfer was not in fact made.' Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 288.

"In the body of the case it is said: 'The right to have the transfer made, and thereby secure exemption from further responsibility, was secured to the defendants both by the statute and by the by-laws of the bank. They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of defendants delivered the certificates and power of attorney to the president of the bank, the latter had given any intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn's order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such avowal was made. No objection was made to the power of attorney, or to the discharge of the defendants from liability. So far as the record shows, nothing was said or done by the bank's officers to raise a doubt in the minds of the defendants' agents that the transfer would be made at once. * * * Their conduct was, under all the circumstances, that of careful, prudent business men, and it would be a harsh interpretation of their acts to hold (in the language in some of the cases, when considering the general question under a different state of facts) that they

allowed or permitted the name of Whitney to remain on the stock register as a shareholder.' See, also, *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373.

"In this case the doctrine was extended so as to exempt a stockholder from liability, even though both the bank and the purchaser were insolvent when the sale was made, there being no fraud in the transaction. The Supreme Court of Kentucky has followed the same rule. *Bracken v. Nicol*, 124 Ky. 628, 99 S. W. 920, 11 L. R. A. (N. S.) 818, 14 Ann. Cas. 896. The Court of Appeals of Kentucky says, in concluding, in the case last above named: 'And so we hold that a shareholder in a corporation, although he may be a director, who in perfect good faith, and under circumstances free from any suspicion of fraud or a desire to escape liability, sells his stock, and does everything connected with the transfer that he honestly believes is necessary to make it effective, and that a prudent business man should do, and who requests the officers in active charge of the corporation, and who have the control of its books in making the transfer, to do everything that is necessary to perfect it in a legal way, and is informed by them that there is nothing more to be done, will be relieved from future liability as a shareholder.'

"In *Weakley v. McClarty*, 136 Ky. 837, 125 S. W. 266, 136 Am. St. Rep. 279, the Court of Appeals of Kentucky followed the same rule, and cited as authority therefor *Bracken v. Nicol*, supra, *Whitney v. Butler*, supra; *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571, as precedents, so that this has become the settled rule of construction in Kentucky. In *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896, the Supreme Court of Arkansas passed upon the precise question involved, and held in the seventh and eighth syllabus as follows: 'Under Kirby's Dig. § 849, providing that a certificate of transfer of stock in any corporation organized under that chapter must be promptly filed in the county clerk's office, in order to avoid liability for the debts of the seller, where a stockholder in a bank in good faith sold his stock, and executed and delivered all the necessary instruments to allow transfer of the stock on the bank's books, and placed the same in the hands of the proper bank official, the mere fact that no certificate of the transfer was filed with the county clerk will not render him liable as a stockholder on the subsequent insolvency of the bank; the filing of such certificate being the duty of the transferee. Nor will the failure of the bank officers to make the transfer on the books of the bank continue to seller's liability as a stockholder.'"

This case elaborately considers and discusses the legal proposition involved, citing *Tucker v. Gilman*, 121 N. Y. 189, 24 N. E. 302; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *Cox v. Elmendorf*, 97 Tenn. 518, 37 S. W. 387; *Foster v. Row*, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

In the case of *Foster v. Row et al.*, above cited, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565, the court held in the seventh syllabus that a stockholder who transfers

his stock to the cashier, and was assured by the cashier that he would give him credit for the amount of the stock, notwithstanding the cashier had never transferred the stock on the books, the sale was complete, and the stockholder released from liability. In the tenth syllabus the court specially holds that the fact that the shares were transferable on the bank's books did not limit the right of transfer so as to justify its refusal to enter the transfer.

The court justifies its conclusion in this case, and cites the leading case in the United States, *Whitney v. Butler*, supra. The opinion just cited on pages 20, 21 of 120 Mich., on page 703 of 79 N. W., recites facts very similar to those in the case at bar. The case of *Cox v. Elmendorf*, above cited, was decided by the Supreme Court of Tennessee in 1896, and the court in that case held squarely that there was no liability under facts similar to those admitted in the case at bar. The syllabus in that case is as follows:

"Defendant, who was the owner of stock in a national bank, which, under its by-laws, was transferable only on the books of the bank, sold the same, and, after executing a written assignment to the purchaser, and a power of attorney in blank to make the transfer indorsed on her certificate of stock, delivered the certificate to the president of the bank, who promised to make the proper transfer on its books, but failed to do so, though the certificate was thereafter treated and used by the bank as the property of the purchaser. The bank subsequently became insolvent, and the receiver brought an action against defendant to recover an assessment made on the stock. Held, that defendant, having done in good faith all that a prudent person would be required to do towards the transfer of the stock, could not be held liable as a stockholder."

The Supreme Court of Tennessee followed the doctrine announced in the earlier case of *Green v. Ashe*, 130 Tenn. 615, 172 S. W. 293. This case discusses the principles involved quite elaborately. It cites, in addition to the cases already cited here, the case of *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142. In *Bank of Midland et al. v. Harris*, reported in 170 S. W. 67 (114 Ark. 344, Ann. Cas. 1916B, 1255), the Supreme Court of Arkansas uses the following language in the fifth syllabus preceding said opinion:

"Under Kirby's Dig. § 1990, making bank stockholders liable for public funds deposited and not paid on demand, a transfer of stock, though not recorded on the books of the corporation because the transferee was not then, but was to become, the proper transfer officer, was effectual to sever the relation of stockholder, if the transfer was made honestly and in good faith, and to relieve of liability for future deposits."

At the time of the insolvency of the *Planters' & Mechanics' Bank*, the law reg-

ulating the transfer of stock of an incorporated bank was expressed in section 38, found at page 138 of the 1907-08 Session Laws, which reads as follows:

"Sec. 38. The shares of stock of an incorporated bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws therefor may direct, but no transfer of stock shall be valid against a bank or any creditor thereof so long as the registered holder thereof shall be liable as a principal debtor, surety or otherwise to the bank for any debt, nor in such cases shall any dividend, interest, or profits be paid on such stock so long as such liabilities continue, but all such dividends, interest or profits shall be retained by the bank and applied to the discharge of such liabilities, and no stock shall be transferred on the books of any bank where the registered holder thereof is in debt to the bank for any matured and unpaid obligation."

The National Bank Act approved June 3, 1864 (13 Stat. 102, 106; R. S. § 5139; Barnes' Fed. Code § 9167 [U. S. Comp. St. § 9676]), contained the same provision as R. L. 1910, § 294, supra, that shares of stock shall be deemed to be personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. *George E. Earle, Jr., Receiver of Chestnut St. National Bank, v. Susan Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373, was a case construing the federal statute where the facts and the proceedings of the District Court as stated by White, J., were as follows:

"When the Chestnut Street National Bank of Philadelphia suspended payment and its doors were closed, there stood on the stock register 10 shares in the name of the defendant in error. A call having been made by the comptroller for the sum of the double liability, this suit was commenced to recover the amount. The defense was: First, that prior to the suspension of the bank, the defendant had, in good faith sold the stock standing in her name for a full market price, which had been paid her; second, that, in consummation of such sale, she had, by her agent delivered to the proper officer of the bank in its banking house, at the place where transfers were made, the stock certificate, with an adequate power of attorney to make the transfer, and requested that the stock be transferred; third, that the officer of the bank said that the transfer could be made as requested, and the defendant was ignorant of the fact that the officer had failed to discharge his duty; fourth, that, as the defendant had done everything which the law required her to do to secure the transfer, she had ceased to be a stockholder, and was not responsible.

"In submitting the case to the jury the court instructed, First, that the presence of the name of the defendant on the stock register created a presumption of liability. This, however, the jury was informed, was not conclusive, but might be rebutted. Such rebuttal, the court charged, would result, if it was proved that the

defendant has made a bona fide sale of her stock, and had, at the proper time and place, handed to the proper officer of the bank a power to transfer the same although the officer of the bank had neglected to fulfill his duty in the premises. Second, after charging fully and accurately as to the proof essential to show a bona fide sale of stock in the national bank, the court, having during the trial applied a like rule in passing on the admissibility of evidence, instructed the jury if the evidence established that a sale of such character had been made whilst the bank was a going concern the defendant would not be liable, because, unknown to her, the bank was, at the time of the sale, in fact insolvent. And the same principle was applied to the unknown insolvency of the person to whom the stock was sold. There was a verdict and judgment for the defendant, which was affirmed by the Circuit Court of Appeals. 107 Fed. Rep. 639. Thereupon this writ of error was prosecuted."

[2] The learned justice, passing upon this case, reviewing the action of the trial court, in the body of the opinion said: "The correctness of this ruling is not open to controversy." Syllabus 1, of the opinion is as follows:

"The presumption of liability for an assessment on shares of stock in an insolvent national bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank."

To the same effect was the opinion by Harlan, J., in the case of *Caroline J. Whitney et al. v. Peter Butler, Receiver*, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266, the facts in that case being very similar to the facts in the instant case, and the syllabus is as follows:

"Upon a reasonable construction of the statute imposing liability upon shareholders for the debts of national banks, and for all the objects intended to be accomplished by the provision imposing liability of shareholders for the debts of national banks, the responsibility of the defendants ceases upon the surrender of certain stock certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser, although such transfer was not in fact made."

As we have seen, the courts of last resort of many of the states named have so held.

[3] We think, upon review of the whole case, that the decision of the lower court was right and should be affirmed, because, under the facts as agreed upon and admitted, and upon which alone this case is to be decided, the defendant in error, Ware, when he had sold the stock, indorsed the certificate, surrendered it for cancellation to the cashier of the bank, and, upon inquiry thereafter,

had been informed by the officer of the bank having the books in charge that it had been so transferred, was thereafter exonerated from any future liability.

The judgment of the trial court is therefore affirmed.

HARRISON, O. J., and ELTING, MILLER, and KENNAMER, JJ., concur.

(82 Okl. 156)

KANSAS CITY SOUTHERN RY. CO. v. DOSHIER. (No. 10196.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

Railroads §446(2)—Killing of animal by train held question for jury.

Circumstantial evidence may be introduced to establish the killing of a cow by a train operated by a railway company. The finding of the cow, lying just outside of the rails and on the railroad right of way, with one leg broken in several places and otherwise bruised about the body, is sufficient circumstantial evidence that the cow was killed by the operation of the railroad to take the case to the jury.

Appeal from District Court, Le Flore County; W. H. Brown, Judge.

Action by A. G. Doshier against the Kansas City Southern Railway Company to recover damages for killing a cow. Judgment for plaintiff before a justice and on appeal in the district court, and defendant appeals. Affirmed.

James B. McDonough, of Ft. Smith, Ark., for plaintiff in error.

Tom W. Neal, of Poteau, for defendant in error.

MILLER, J. This action was commenced in the justice court before P. H. Green, a justice of the peace, at Poteau, in Le Flore county, by A. G. Doshier against the Kansas City Southern Railway Company to recover the sum of \$60 as damages for the killing of one red cow about three years old. The cow was alleged to have been killed on the 18th of October, 1917. A trial was had in the justice court and judgment rendered in favor of the plaintiff and against the defendant for the sum of \$60. The railway company appealed to the district court of Le Flore county, where the case was tried to a jury, which resulted in a verdict and judgment in favor of the plaintiff and against the railway company in the sum of \$60, to reverse which judgment the defendant perfected this appeal and appears here as plaintiff in error. For convenience the parties will be referred to as they appeared in the court below.

But one assignment of error is discussed by the plaintiff in error in its brief. It lays down this proposition:

"If the proof is sufficient to show that the cow was killed by the train of the defendant, then the judgment must be affirmed. If it is insufficient to establish that fact, the judgment must be reversed."

When the plaintiff rested his case, the defendant demurred to the evidence. The demurrer was overruled. The defendant did not offer any evidence, but asked for a peremptory instruction in favor of the defendant. The court refused to give the peremptory instruction, and submitted the case to the jury under proper instructions.

The only question is, Did the plaintiff's evidence make out a prima facie case?

There was not any witness testified that he saw the cow struck by a train operated by the defendant railway company. Two witnesses testified they saw the cow, with one hind leg broken in several places and otherwise bruised about the body, lying at the foot of a very small fill which constituted the railroad grade and just outside of the rails. The railroad right of way was not fenced at this place. About the time these witnesses saw the cow, the section men of the defendant railway company came along and shortly thereafter killed the cow by knocking her in the head and then burned her.

We have examined the evidence and think it was sufficient to take the case to the jury. It was submitted to the jury under proper instructions, and the jury returned a verdict in favor of the plaintiff. There being evidence to support the verdict of the jury, it will not be disturbed upon appeal.

The judgment of the trial court is affirmed.

PITCHFORD, V. C. J., and JOHNSON, KENNAMER, and NICHOLSON, JJ., concur.

(82 Okl. 89)

KEETER v. STATE ex rel. SAYE, CO. ATTY. (No. 9915.)

(Supreme Court of Oklahoma. May 31, 1921.)

(Syllabus by the Court.)

1. **Jury** §10 — Constitutional guaranty of right to jury trial construed.

The right to trial by jury, declared inviolate by section 19, art. 2, of the Constitution of Oklahoma, except as modified by the Constitution itself, has reference to the right as it existed in the territories at the time of the adoption of the Constitution, and the right to a jury trial therein referred to was not predicated upon the statutes existing in the territories at that time, but the right as guaranteed under the federal Constitution and according to the course of the common law.

2. **Jury** §19(15)—Statute authorizing seizure of goods unlawfully used held to violate right of jury trial.

Section 2, c. 188, Laws 1917, which provides, "The court having jurisdiction of the

property so seized shall without a jury order an immediate hearing as to whether the property so seized was being used for unlawful purposes, and take such legal evidence as is offered on each behalf and determine the same as in civil cases," is repugnant to the Seventh Amendment of the federal Constitution of the United States and section 19, art. 2, of the Constitution of the state of Oklahoma, because it violates the provisions of said Constitution guaranteeing the right of trial by jury, and is therefore void to the extent that it abridges the right of trial by jury.

3. Jury §19(15)—Claimant of property seized held entitled to jury trial.

In an action for the forfeiture of property under chapter 188, Laws 1917, wherein the claimant of said property, or party interested in the same, files proper pleading, raising an issue of fact sufficient to constitute a defense to a right of the state to forfeit said property, such party is entitled to a jury trial, and it being provided in said act that the court may determine said action as a civil case authorizes the court to proceed with said cause as provided for the trial of any other civil action.

4. Intoxicating liquors §250—Evidence held insufficient to forfeit automobile as used in transporting liquor.

In an action to forfeit an automobile, under chapter 188, Laws 1917, where the evidence introduced on behalf of the state fails to show that said automobile was used in transporting prohibited liquor from one place to another in this state, as provided in section 1 of said act, and that the claimant, at the close of the evidence introduced by the state, demurs to the evidence, it is the duty of the trial court to sustain the demurrer and dismiss the action. The evidence in this cause examined; held insufficient to support the judgment of the court.

Kane, Johnson, and McNeill, JJ., dissenting.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Action by the State, on the relation of Ben F. Saye, County Attorney, to forfeit one Hudson Super-six Automobile, wherein Lester Keeter is claimant. Judgment of forfeiture, and claimant appeals. Reversed and remanded, with directions to dismiss.

Bridges & Vertrees and J. H. Harper, all of Waurika, for plaintiff in error.

KENNAMER, J. This action was instituted in the county court of Jefferson county by the county attorney of said county on the 28th day of October, 1917, to forfeit to the state of Oklahoma one "Hudson Super-six automobile." The material part of the petition filed in this proceeding is as follows, to wit:

"That on the 26th day of October, 1917, the said Hugh Treadwell and George Allman seized and took into their possession and custody one Hudson Super-six automobile, No. —; that at the time it was so seized it was being used

by one Lester Keeter, herein defendant, to convey intoxicating liquor into Jefferson county, state of Oklahoma, in violation of the prohibitory laws of the state of Oklahoma; that such conveyance occurred in the presence of said affiant and the said George Allman at the ferry on Red river, about five miles southwest of the city of Waurika, Jefferson county, Okl."

Lester Keeter filed answer and interplea to the petition, alleging that he was the owner and entitled to the immediate possession of the car in controversy, denying that he had ever used the same in violation of the prohibitory laws of the state of Oklahoma, alleging the value of the car to be \$1,750. The cause was transferred to the district court, and on the 3d day of November, 1917, said cause was called for trial before Hon. Cham Jones, district judge, and the state appeared by Ben F. Saye, county attorney, and announced ready for trial; the claimant and interpleader, Lester Keeter, appeared in person and by his attorneys moved the court to grant the claimant a trial by jury of the controverted issues in the cause, which demand was by the court overruled, and claimant excepted. After the introduction of the testimony on behalf of the state the claimant demurred to the testimony, which demurrer was by the court overruled and exceptions allowed. Judgment was entered forfeiting the car. The claimant, Lester Keeter, prosecutes this appeal. Two questions are presented for decision: First, did the court err in refusing to grant the claimant a trial of the controverted issues by a jury? Second, did the court err in overruling the claimant's demurrer to the testimony of the state? We will first consider the question presented on the right of trial by a jury by the claimant in this cause. This proceeding is prosecuted under chapter 188 of the Session Laws of 1917, which reads as follows:

"Section 1. All vehicles, including automobiles, and all animals used in hauling or transporting any liquor the sale of which is prohibited by the laws of this state, from one place to another in this state in violation of the laws thereof, shall be forfeited to the state by order of the court issuing the process by virtue of which such vehicle and animals were seized, or before which the persons violating the law, or the vehicles or animals are taken by the officer or the officers making the seizure.

"Sec. 2. The court having jurisdiction of the property so seized shall without a jury order an immediate hearing as to whether the property so seized was being used for unlawful purposes, and take such legal evidence as are offered on each behalf and determine the same as in civil cases. Should the court find from a preponderance of the testimony that the property so seized was being used for the unlawful transportation of liquor under the laws of this state, it shall render judgment accordingly and declare said property forfeited to the state of Oklahoma. Thereupon, said property shall, un-

der the order of said court, be sold by the officer having the same in charge after ten days' notice published in a daily newspaper of the county wherein said sale is to take place, or if no daily newspaper is published in said county, then by posting five notices in conspicuous places in the city or town wherein such sale is to be made. Such sales shall be for cash."

It is contended by counsel for the claimant, plaintiff in error in this cause, that section 2 of said act of the Legislature of 1917, supra, which denies to the claimant the right of a trial by jury, violates section 19, art. 2, of the Constitution of the state of Oklahoma, which is as follows:

"The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, a jury shall consist of six men. This section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than twenty dollars. In civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein."

This court has heretofore construed section 19, supra, but upon a careful examination of the decisions we are convinced that the decisions construing said section are not in harmony. In the case of *Baker v. Newton*, 27 Okl. 445, 112 Pac. 1038, Mr. Justice Hayes, delivering the opinion of the court, said:

"The question therefore arises: What constitutes a trial by jury as guaranteed by the Constitution? This question has been under investigation by many courts of the nation, both state and federal, and there is unanimity in the opinions that the right of trial by jury secured by the Constitutions of the various states is simply the right to a trial by jury constituted substantially and with the same elements and incidents as existed when the Constitution was adopted. *Carroll v. Byers et al.* (Ariz.) 26 Pac. 599; *State ex rel. v. Withrow*, 133 Mo. 500; *Byers v. Commonwealth*, 42 Penn. St. 89; *Plimpton v. Somerset*, 33 Vt. 283. 'The trial by jury secured to the subject by the Constitution is a trial according to the course of common law and the same in substance as that which was in use when the Constitution was formed.' *East Kingston v. Towle*, 48 N. H. 64. See, also, *Copp v. Henniker*, 55 N. H. 179; *Hagany v. Cohnen et al.*, 29 Ohio St. 82. Judge Cooley, discussing these provisions, said: 'All the state Constitutions preserve the right of trial by jury, for civil as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable

in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before. But in doing this, they preserve the historical jury of twelve men with all its incidents, unless a contrary purpose' clearly appears.' *Cooley's Constitutional Limitations*, 589.

"The territory now embraced within the territorial limits of the state was, before the admission of the state, by virtue of section 3, art. 4, of the federal Constitution, under the jurisdiction of Congress, with power to make all needful rules and regulations with respect thereto. By section 31 of Act of Congress, May 2, 1890 (25 U. S. St. at L. c. 182, p. 81), the Constitution of the United States was specifically put in force in the Indian Territory. The same act authorized the establishment of an organized territorial government in Oklahoma Territory. Section 6 confers upon the territorial Legislature power over all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. See *Bradford v. Territory*, 1 Okl. 366. By these statutory provisions the federal Constitution, if it did not operate *ex proprio vigore* in this jurisdiction before the admission of the state, was put in force and the people were guaranteed by the Seventh Amendment thereto the right of trial by jury. *American Pub. Co. v. Fisher*, 166 U. S. 464. That amendment provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *' As to what constitutes the 'trial by jury' here preserved, has been decided in the Supreme Court of the United States. The jury must consist of twelve men, who shall be unanimous in their verdict. The trial must be under the superintendence of a judge empowered to instruct them in the law and to set aside their verdict, if, in his opinion, it is against the evidence or the law. *American Pub. Co. v. Fisher*, supra; *Capital Traction Co. v. Hof*, 174 U. S. 1. Power of the trial judge to instruct the jury upon the law and to set the verdict aside, if it is against the law or evidence, is as much an essential element of a trial by jury as twelve men and unanimity in their verdict. *Luce v. Garrett* (Ind. Ter.) 64 S. W. 613. Trial by jury in the Indian Territory and Oklahoma Territory at the time of the adoption of the Constitution was attended by all these incidents. It is true that in the trials in probate and justice courts of Oklahoma Territory the jury consisted of six men, and the justice of the peace was without power to instruct the jury; and in commissioners' courts of the Indian Territory, while the jury might consist of twelve men, it generally consisted of six, and the United States commissioner was without power to instruct the jury or to hear or grant a motion for a new trial; but from all these courts an appeal was allowed by the statute to a court where a trial with all the foregoing elements and incidents could be had, and the mandate of the Seventh Amendment thereby observed. *American Pub. Co. v. Fisher*, supra; *Luce v. Garrett*, supra; *Dennet v. McCoy* (Ind. Ter.) 60 S. W. 858. As before stated, under the Code of Civil Procedure governing the trial of causes before the justices of the peace in Oklahoma Terri-

tory, the jury was composed of six men, and the justice is prohibited from instructing the jury either upon the law or the facts. Sections 5019 and 5028, Wilson's Rev. & Ann. Statutes.

"It would follow that if trial by a jury is preserved by the state Constitution, as it existed at the time of the adoption of the Constitution, the jury trial, under the justice procedure, would fail to contain all the essential elements of such trial. The Seventh Amendment to the United States Constitution is, however, a limitation only upon the powers of the federal government, and does not affect the powers of the state; and the states may provide for a different trial than that preserved by the amendment to the citizens of the United States. The constitutional provision preserving trial by jury in this state specifically eliminates some of the features thereof as it existed before the admission of the state. Section 19, art. 2, after providing that the right of trial by jury shall be and remain inviolate, specifically provides that in county courts and courts not of record a jury shall consist of six men; and in all civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors shall have power to render a verdict. By these provisions unanimity in the verdict is no longer required in any civil case, and the number constituting the jury, as to county courts, is reduced from twelve to six; but, except as to these two important changes in the features of the jury trial as it existed at common law, the preceding clause of the section provides that the trial by jury shall be and remain inviolate. It was evidently intended by such declaration of right that those essential features of the jury trial as existed before the admission of the state, not specifically modified by the Constitution, should be preserved."

[1, 2] Upon a careful consideration of this case and the authorities cited therein, it is obvious that the rule is well established that under section 19 of the Bill of Rights of the Constitution that the trial by jury secured to the citizens of this state is the same right to a trial by jury as existed upon the admission of Oklahoma into the Union as a state, and the same right as a trial by jury according to the course of the common law as it existed when the Constitution of the state was adopted, except as modified by the provisions of the Constitution; and it has been almost uniformly held by the federal and state courts that the claimants in this class of cases are entitled to a trial by jury, and that acts depriving them of that right violate both the state and federal Constitutions and are void. *Garnhart et al. v. United States*, 16 Wall. 162-166, 21 L. Ed. 275; *United States v. Athens Armory*, Fed. Cas. No. 14,473; *Colon et al. v. Lisk et al.*, 153 N. Y. 188, 47 N. E. 802, 60 Am. St. Rep. 609.

In the case of *One Cadillac Automobile, Hargrove, Claimant, v. State*, 75 Okl. 134, 182 Pac. 227, this court held that the claimant was not entitled to a trial by jury, and that section 2 of chapter 188 of the Session

Laws of 1917 was not repugnant to the Constitution, but the decision adhered to the rule announced in the case of *Baker v. Newton*, supra, that section 19 of the Bill of Rights preserved to the people of this state the right of a trial by a jury according to the course of the common law as it existed upon the admission of Oklahoma into the Union, except where the right was modified by other provisions of the Constitution, and the opinion in part is as follows:

"At common law, in case of a forfeiture of real estate, it was necessary that jury should try the question as to whether a forfeiture should be decreed. 2 Blackstone's Comm. c. 18, p. 271. There were numerous instances, however, where summary proceedings were disposed of without the aid of a jury. 4 Blackstone's Comm. c. 20, p. 280; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. In all of the states of the American Union, it has been the practice to try persons charged with petty offenses before police magistrates who determine the question of guilt and mete out proper punishment without the intervention of a jury, and it has never been treated by any of the courts as an infraction of the constitutional guaranty of the right to a trial by jury; and the summary abatement of nuisance without judicial process or proceeding was well known to the common law long prior to the adoption of the federal or any of the state Constitutions, and it has never been supposed that the constitutional guaranty of a jury trial was intended to interfere with this jurisdiction and power. *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. In the last-cited case, the Supreme Court of the United States enumerated certain instances in which summary proceedings were resorted to without the intervention of a jury; among them, the killing of a diseased cattle, pulling down houses in the path of a conflagration, the destruction of decayed fruits, fish, unwholesome meats, infected clothing, obscene books, pictures, or instruments which can only be used for illegal purposes. The court observed that it was not easy to draw the line between cases where property illegally used might be destroyed summarily and where judicial proceedings were necessary for its condemnation. That case involved the constitutionality of an act of the Legislature of the state of New York (Laws 1880, c. 591, as amended by Laws 1883, c. 317), entitled 'An act for the appointment of game and fish protectors,' which authorized the protectors to seize, remove, and destroy any net, pound, or other means or device for capturing or catching fish in violation of the laws of the state. A game and fish protector had destroyed certain nets taken in unlawful fishing, and his authority to do so was upheld. A common illustration of legislation of this kind is the passage of laws providing for summary seizure and destruction of intoxicating liquors kept and intended for illegal sale and the fixtures used in connection with such illegal traffic and the summary destruction of gambling paraphernalia. It is generally held that such laws are not invalid because they deny the right of trial by jury. Our attention is called to no decision by this court, nor do we know of any, determining whether a

trial by jury existed in a proceeding of this character prior to statehood."

It is evident from a reading of that part of the decision, as above quoted, that the court classed property such as horses, mules, wagons, and automobiles, that are ordinarily used for lawful purposes, in the same class with property such as decayed fruits, fish, unwholesome meats, infected clothing, obscene books, pictures, and gambling paraphernalia, which are ordinarily used for an illegal and unlawful purpose and are public nuisances per se. In our judgment this was error. While property that is ordinarily used for unlawful purposes and is decreed to be a nuisance per se may be forfeited without a trial by jury under the police power of the state, that is altogether a different proposition than the right to forfeit property that is ordinarily used for lawful purposes, wherein an issue of fact may be joined as to whether or not the property was being used for an unlawful purpose. It is true that it is not necessary in every case that a jury trial be granted in order to constitute due process of law, yet it is equally as well settled that the Constitution of this state protects the citizens and their property, lawfully acquired and lawfully possessed, to the extent of guaranteeing to him a jury trial when the accusation is made that he has diverted his property from its ordinary lawful use to an illegal use. We concede there are numerous cases announcing the rule that private property may be destroyed in a summary proceeding, but an examination of this class of cases discloses that all such cases involve the right to abate a public nuisance, such as the destruction of diseased cattle in order to prevent the spread of contagious diseases, but in this class of cases the courts have held that if the property destroyed did not in fact constitute a nuisance, and that the same was wrongfully destroyed by the officer exercising quasi judicial power, such officer would be liable to the owner of the property for damages; and the reason for the rule that such quasi judicial officer exercising this summary power would be liable for the wrongful destruction of property is upon the ground that the exercise of such summary power is limited by the superior right guaranteeing to each person immunity from having his private property rights invaded except under the regular course of law sanctioned by the established customs and usages of the courts. *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983, 1 Ann. Cas. 342, and note.

If the Constitution fails to protect a citizen from being deprived of such property as wagons, buggies, horses, and automobiles without the right of a trial by jury, where the only issue involved is whether the owner of such property is a criminal and has committed a criminal offense in the unlawful use

of his property, then we know of no case that falls fairly within the meaning of the provisions of the Constitution under consideration. We would be confronted with the unreasonable situation that a deputy sheriff could file an accusation against any farmer in this state, charging him with having transported whisky in his wagon; the farmer could come into court, being a man whose reputation had never been challenged, and deny the accusation and demand that the issues joined be submitted to a jury before his team be declared forfeited; but under section 2 of the act of 1917, supra, the right of trial by jury must be denied. We cannot adhere to any such construction of the Constitution of this state.

Under the statute under consideration the adjudication had under said act is final unless appealed to the Supreme Court, and unless the claimant has the right of trial by jury in the proceeding instituted before the county or district courts of this state there is no court to which he may appeal where he is granted that right; the result is that he is deprived of property that is ordinarily used for lawful purposes without the right of trial by jury. It is said in the case of *One Cadillac Automobile, Hargrove, Claimant, v. State*, supra, that—

"A jury trial is not necessary to constitute due process of law, for there are many civil causes in this state that are triable before the court without the intervention of a jury."

While that is true, it is equally as well settled that, in that class of cases wherein a jury trial is not necessary in order to constitute due process of law, that condition existed on the admission of Oklahoma as a state into the Union and at the time of the adoption of the Constitution of this state, and there is no escape from the conclusion that in a proceeding of this kind, under the law as it existed prior to statehood, the claimant would have, as a matter of right, been entitled to a trial by jury according to the course of the common law and the federal Constitution, and, that being true, that right under the Constitution of this state remains with the claimant in such proceedings, and the Legislature is without power to take away from the citizen that protection.

The following cases (*Sothman v. State*, 66 Neb. 302, 92 N. W. 303; *State v. McManus*, 65 Kan. 720, 70 Pac. 700) are cited as authority that prior to the admission of Oklahoma into the Union claimants of this class of cases were not entitled to a jury trial. We do not believe the cases support that view. The first case was construing the statute of Nebraska wherein the right of trial by jury was prescribed at the time of the adoption of the Constitution of the state of Nebraska, and was a liquor case. The last case was a liquor case, and the question of the right of trial by jury was not presented.

It is undisputed that the Constitution of the United States and the common law were in force throughout the Indian Territory and the territory of Oklahoma upon the admission of Oklahoma into the Union, and the rule at that time was that in the trial of all causes that did not invoke the equitable or admiralty jurisdiction of the courts the party litigant was entitled to a jury trial.

In the case of *Parsons v. Bedford et al.*, 3 Pet. 433, 7 L. Ed. 732, the Supreme Court of the United States announced the rule to be:

"The amendment to the Constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

The rule will be found as follows in 12 R. C. L. 133:

"In the trial of all cases of seizure, on land or on waters not navigable, the court sits as a court of common law, and, as in all cases at common law where there are issues of fact to be determined, the trial must be by jury. In case, however, of seizure made on navigable waters the court sits as a court of admiralty, and, as in causes of admiralty and maritime jurisdiction generally, it is settled that the trial is to be by the court."

[3] Section 2 of the act of 1917 under consideration requires the action to be determined as civil cases. Therefore we conclude that the action is one in rem for the purpose of forfeiting property used in violation of law. Such actions are as old as the common law itself, and on the admission of Oklahoma into the Union and the adoption of the Constitution of this state such actions would have been triable according to the course of the common law, and the claimant would have been entitled to a jury trial.

The opinion in the case of *One Cadillac Automobile, Hargrove, Claimant, v. State*, supra, in part, is as follows:

"This proceeding is not an action for the recovery of specific real or personal property, but is a proceeding in rem, and is not one of that class of cases where a jury trial may be claimed by virtue of section 19, art. 2, of the Constitution.

"In *Shawnee National Bank v. United States*, 249 Fed. 583, 61 C. C. A. 509, the Circuit Court of Appeals for the Eighth Circuit held, in a proceeding to forfeit an automobile seized on land under Revised Stat. § 2140 (Comp. Stat. § 4141), on the ground that it had been used in conveying intoxicating liquors into the Indian country, that the parties were entitled to the usual rights and remedies incident to such an action, including the right to a trial by jury. That cause originated in the District Court of the United States for the Western District of Oklahoma, and the right of the parties to a jury trial was governed by the rule prevailing in the federal courts, and the case is not conclusive of the question in the case at bar. Where the

property involved is of minor value, such as dice, cards, gambling tables, bar fixtures, or fish nets, numerous decisions could be cited where similar property was involved. At the time most of these statutes were enacted and decisions construing them were rendered, the automobile and truck had not come into general use, and while an automobile is a valuable article of property, the manufacture of which is perfectly lawful, and while it is ordinarily used for lawful purposes, this does not prevent the Legislature from prohibiting the use thereof in aid of the illegal traffic in intoxicating liquors and authorizing its summary destruction where such illegal use has been established. *Lawton v. Steele*, supra; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557."

It is obvious from reading that part of the opinion above quoted that the learned justice in part based the decision upon the ground that a proceeding of this kind is not an action for the recovery of specific real or personal property, but is a proceeding in rem, and therefore is not one of that class of cases wherein a jury trial may be claimed.

While it is true that the proceeding is not one for the recovery of personal property, the effect of the proceeding is that if the state prevails in the action the owner of the property sought to be forfeited is deprived of his property. We are driven to the conclusion that the effect of the action is to deprive the owner of his property, and it is immaterial what kind of a proceeding it is, whether in rem, libel, or quasi criminal, there can be no mistake as to the effect of the action.

The case of *Shawnee First National Bank v. United States*, supra, 249 Fed. 583, 161 C. C. A. 509, referred to by the court, an action in the Eighth Circuit Court of Appeals to forfeit an automobile under Revised Statutes U. S. § 2140 (U. S. Compiled Statutes, § 4141), on the ground that it had been used in conveying intoxicating liquor into the Indian country, supports the rule that the claimant in the case at bar was entitled to a trial by a jury, for the reason it is authority to the effect that upon the admission of Oklahoma as a state into the Union, and at the time of the adoption of the Constitution of this state, in an action to forfeit such property as automobiles and other vehicles, the claimant was entitled to a jury trial, and it is for the reason that the rule prevailed prior to the adoption of our Constitution that claimants in this class of cases were entitled to jury trials that the right may be claimed since the adoption of the Constitution and was the right that the Constitution guaranteed should remain inviolate.

In the case of *State ex rel. West, Atty. Gen., v. Cobb*, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639, in an opinion delivered by Mr. Justice Dunn, this court said:

"It is insisted by the Attorney General that the defendant is not entitled to a jury trial

herein as a matter of right, and that if he is entitled to a jury trial, the machinery of the court is adequate to grant it to him. Section 19, art. 2, of the Bill of Rights of the Constitution, provides: "That the right of trial by jury shall be and remain inviolate." The construction of this general guaranty of the Constitution has been before the courts in a great many cases. The Supreme Court of Washington, in the case of *State v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39, which was likewise a proceeding in quo warranto, held in the syllabus that: "The constitutional provision declaring 'that the right of trial by jury shall remain inviolate' has reference to the right to jury trial as it existed in the territory at the time when the Constitution was adopted." * * *

"This is the construction to which it is susceptible, and which must be given where the provision appears in our own Constitution subject to such changes only as are made in the instrument itself. The case of *Bradford v. Territory ex rel. Woods*, 1 Okl. 386, 34 Pac. 66, was a proceeding in the nature of quo warranto, in the district court of Oklahoma county, and in that case the Supreme Court of the territory declared in the syllabus that: 'On the trial of an information in the nature of a quo warranto the respondent is entitled to a trial by jury, and to a unanimous verdict.' This holding was not predicated upon the statutes existing in the territory at that time, but upon the right of the defendant as the same was guaranteed under the federal Constitution. This case and this declaration was never departed from during the life of the territory, and in our judgment declared the law of the territory of Oklahoma on this subject."

It is apparent that the court in the case of *One Cadillac Automobile, Hargrove, Claimant, v. State*, supra, made the right of trial by jury dependent upon some statutory right existing at the time of the adoption of the Constitution of this state, and failed to observe the rule as announced in the case of *State ex rel. West, Atty. Gen., v. Cobb*, supra, and the case of *Baker v. Newton*, supra, in which this court held that the right of trial that was to remain inviolate and that was guaranteed in section 19, art. 2 of the Bill of Rights, was the right that existed under the federal Constitution and the course of the common law.

Therefore we conclude that the doctrine announced in the case of *One Cadillac Automobile, Hargrove, Claimant, v. State*, supra, is in conflict with the rule as announced in the cases of *State ex rel. West, Atty. Gen., v. Cobb*, supra, and of *Newton v. Baker*, supra. An examination of the authorities show conclusively that the rule announced in the two last-named cases is that the constitutional provision declaring that the right of trial by jury shall remain inviolate has reference to the right to jury trials as it existed in the territory at the time the Constitution was adopted, and that such right was not predicated upon the statutes existing in the

territory at that time, but upon the right of the citizen, as the same was guaranteed under the federal Constitution and according to the course of the common law, and this rule is supported by the overruling weight of authority.

The case of the *State v. O'Neill*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557, is cited in support of the contention that certain kinds of property may be forfeited in a summary manner where its illegal use has been established. The case involves the confiscation of intoxicating liquor. The case involves the power of an officer to seize, under certain circumstances, liquor intended for sale and distribution in violation of law, and the court held, under the Constitution of Vermont, that liquor that had been branded with unlawful intent by the conviction of the owners of the liquor was subject to confiscation under the police power of the state. This case does not in any way shed any light upon the proper construction of section 19, art. 2, of the Bill of Rights of our Constitution.

In the case of *The Jas. W. French—The Grace*—(D. C.) 5 Hughes, 429, 13 Fed. 916, the United States District Court for the Eastern District of Virginia, in a very able opinion by Judge Hughes, wherein the title to the vessel was involved, said vessel being held in possession by the sheriff of Elizabeth county, Va., by reason of the fact that the master of said vessel, Overton, had been tried and convicted under the laws of Virginia for using the vessel in taking fish from Chesapeake Bay contrary to law, in discussing the law applicable to condemnation and forfeiture of property, said:

"This was a proceeding at common law; and while it is true that in actions in rem in admiralty, property in the nature of ships may be divested from an owner without the verdict of a jury, yet I think it can be laid down with perfect truth, that in any proceeding at common law, even proceedings in rem, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. Condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury. See *Union Ins. Co. v. United States*, 6 Wall. 765; *Armstrong's Foundry*, 6 Wall. 769; *Morris's Cotton*, 8 Wall. 507. Proceedings in rem are unknown to the common law. 2 Brown's Civil and Adm. Laws, 111; *Percival v. Hickey*, 18 Johnson, 257, 292; 1 Kent, Comm. 378. Common-law courts have jurisdiction of them only by virtue of statutory enactment. If Congress gives this proceeding in common-law courts without requiring trial by jury, it violates article 7 of the amendment to the national Constitution. If the Legislature of Virginia gives this proceeding to its courts, or the right of condemning property without giving to its owner the right of trial by jury, it violates section

13 of the Bill of Rights. Such, also, was the emphatic, I might almost say indignant, ruling of Mr. Justice Curtis [C. Ct. 811], * * * and may be regarded as a fundamental canon of English and American jurisprudence."

In the case of *Copp v. Henniker*, 55 N. H. 193, 25 Am. Rep. 194, will be found an exhaustive review of the authorities construing the Bill of Rights in the various Constitutions of the states of the American Union, and the court, in part, said:

"In *Work v. State*, 2 Ohio St. 299, where the court say: 'The institution of the jury referred to in our Constitution * * * is precisely the same in every substantial respect as that recognized by the great charter, and its benefits secured to the freemen of England, again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same brought to this continent by our forefathers, and perseveringly claimed as their birthright in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence. Nor did their affection for it diminish or cool. They made it a corner stone in erecting the state governments. * * * Our opinion is, that the essential and distinguishing feature of the trial by jury, as known at the common law, and generally if not universally adopted in this country, was intended to be preserved; * * * that is beyond the power of the Legislature 'to impair the right or materially change its character.' * * * The trial by jury, secured to the subject by the Constitution, is a trial according to the course of the common law, and the same in substance as that which was in use when the Constitution was framed."

Statutes like the one under consideration, authorizing the forfeiting of property ordinarily used for lawful purposes, are very drastic in their operation, and it is the duty of the court to strictly construe the same; and we have carefully examined the record in this cause, and the undisputed testimony shows that the transportation complained of is an interstate one and not intrastate. The evidence fails to disclose, and in fact the complaint fails to allege, that liquor was transported from one place in the state to another. Therefore the demurrer to the testimony should have been sustained and the action dismissed.

The case of *One Cadillac Automobile, Hargrove, Claimant, v. State*, 75 Okl. 134, 182 Pac. 227, and the subsequent cases follow-

ing the same, in so far as they conflict with the rule announced in this cause as to the right of trial by jury, are overruled. We are cognizant of the fact that a jury trial is not an infallible mode of ascertaining truth, and like all human institutions it has its imperfections; still it remains the best protection for the citizen in his property rights as well as his liberty. It has stood the test of experience better than any other legal institution that ever existed among men, and it has met with universal approbation among those who lived under it, and by the greatest thinkers who have investigated it impartially. It is the imperative duty of the courts to jealously guard any unauthorized encroachment upon the right of trial by jury as guaranteed to the citizens by the Constitution. We therefore conclude that the court erred in not granting the claimant a jury trial in this cause. The evidence in this cause fails to show a transportation of liquor from one place in the state to another as prohibited by the law. The judgment herein must be reversed.

It has been suggested by counsel for claimant that on account of the statute denying the right of trial by jury the whole statute must fall. We cannot concur in this contention, for the reason the statute does provide that the cause may be determined as a civil case; then there is no reason why the proceeding to forfeit may not be instituted and proceeded with as other civil actions.

[4] Having concluded that the evidence was insufficient to warrant forfeiture of the car in question for the reason that it failed to disclose that liquor was transported in said car as prohibited in the act in question, it is not necessary to go into the question of jurisdiction presented in this cause on account of the dispute existing at that time as to the boundary line between Texas and Oklahoma. This question was settled in the case of *the State of Oklahoma v. State of Texas*, 254 U. S. —, 41 Sup. Ct. 420, 65 L. Ed. —, decided April 11, 1921, by the Supreme Court of the United States, and the same question was ably discussed and decided by Mr. Justice Doyle in the case of *Keeter v. State*, 196 Pac. 970, in an opinion rendered on April 18, 1921 (not yet officially reported).

The judgment is reversed, and the trial court directed to dismiss the action.

HARRISON, C. J., and MILLER, BLTING, and NICHOLSON, JJ., concur.

KANE, JOHNSON, and McNEILL, JJ., dissent.

(82 Okl. 137)

FIRST STATE BANK v. DENTON.
(No. 11182.)

(Supreme Court of Oklahoma. June 7, 1921.)

*(Syllabus by the Court.)***1. Malicious prosecution ¶35(2)—Dismissal of prosecution upon compromise defense.**

The general rule is where the dismissal of a criminal prosecution has been obtained by procurement of the party prosecuted, or by compromise or agreement of the parties, then an action for malicious prosecution cannot be maintained.

2. Malicious prosecution ¶72(1)—Instruction required on defense of dismissal of prosecution upon compromise.

In an action for damages for an alleged malicious prosecution, where defendant pleads as a defense that the dismissal of the criminal prosecution was obtained by the procurement of the defendant by a compromise and agreement, and there is evidence to support said plea, it is the duty of the court to instruct the jury, if they find, from the evidence that said criminal prosecution had been dismissed by procurement of the defendant by way of compromise or agreement of the parties, the action for malicious prosecution cannot be maintained.

3. Malicious prosecution ¶71(2)—Probable cause question of law.

In an action for malicious prosecution, the question of what amounts to probable cause is one of law for the court. It is therefore the duty of the court, when evidence has been introduced to prove or disprove probable cause, to submit to the jury its credibility, with the instruction that it amounted to probable cause, or it did not, as the case may be.

4. Malicious prosecution ¶71(4)—Materiality of facts known by prosecutor pleading advice question of law.

In an action for malicious prosecution, where defendant pleads as a defense that it had made a full, fair, and complete statement of all the material facts within his knowledge to the county attorney, and acted in good faith upon the advice of the county attorney in the institution of the criminal proceedings, and it is contended that certain facts were not disclosed by the defendant, the question of what are material facts, is one of law for the court.

Appeal from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Alferetta Denton against the First State Bank for malicious prosecution. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions for new trial.

Stuart & Oruce and Ledbetter, Stuart & Bell, all of Oklahoma City, for plaintiff in error.

Claude Nowlin and McLaurry, Hopps & Maupin, all of Oklahoma City, for defendant in error.

McNEILL, J. This action was commenced in the district court of Oklahoma county by Alferetta Denton against the First State Bank of Oklahoma City, to recover damages for an alleged malicious prosecution. The amended petition alleged that, on or about the 29th day of August, 1918, the defendant maliciously, falsely, and without probable cause made and caused to be filed before the justice of peace in Oklahoma City an affidavit and complaint duly sworn to by the defendant charging the plaintiff with having committed a certain crime, to wit, obtaining money under false pretenses; thereupon a warrant was issued and the plaintiff was arrested, and thereafter the case was dismissed by the plaintiff; that the arrest and prosecution was wholly unfounded, malicious, and without just and probable cause; and prayed for damages in the sum of \$25,000.

To the amended petition the defendant answered, first by general denial. For a second defense, defendant alleged that, prior to the time of filing the complaint and the issuing of the warrant, the defendant in good faith and without malice made a full, fair, and complete disclosure of all the facts to Charles Selby, the county attorney of Oklahoma City, and acting upon the advice of the county attorney, and believing there was probable cause that the defendant was guilty.

As a further defense, it was alleged that the prosecution was not dismissed by the justice of peace after hearing the evidence, but was dismissed upon agreement of plaintiff to settle said controversy and pay the money to the defendant, which she had received, and upon which the complaint was filed, and there was never any adjudication by the magistrate upon the evidence that plaintiff was not guilty of the crime charged, nor any adjudication that there were not probable grounds for holding her for trial. To this answer the plaintiff filed a general denial. The case was submitted to the jury, and a verdict returned in favor of plaintiff in the sum of \$8,000. Motion for new trial was filed and overruled, and judgment rendered on the verdict, and an appeal regularly prosecuted to this court.

For reversal of the case, the plaintiff in error assigns numerous assignments of error, among which are the giving of instructions Nos. 7, 10, and 11.

We will first consider the giving of instruction No. 7. It will be unnecessary to review all of the facts in the case further than to say that the warrant was issued last of August, and on the 18th day of September plaintiff was arrested at Kansas City, and returned to Oklahoma City, and taken before the justice of peace upon the 20th day of September, and entered a plea of not guilty. The case was continued from time to time, and later dismissed by the court on recommendation of the county attorney. No evi-

dence was taken, nor was the case tried upon its merits. The county attorney testified that after the defendant was arrested she informed him she desired to make no statement, but would leave that to her attorney. Thereafter her attorney approached him and started to discuss a settlement and the merits of the case. The court refused to permit the county attorney to detail the conversation between her attorney and the county attorney relating to the dismissal of the case. We think this was error, but the county attorney did testify that he told her attorney that he did not care to talk about the facts of the case, because he believed the plaintiff was guilty, but if she would make a settlement and pay the full amount of the overdraft he would give her the benefit of the doubt, and dismiss the case, and that this was agreed to between himself and plaintiff's attorney. He further testified the case was continued until the plaintiff could obtain the money to make the settlement, and in a couple of weeks, or about the middle of October, the justice of peace telephoned to him and advised him that Mrs. Denton was there, and had given him a check or draft for the amount of money due the bank, and the county attorney instructed the justice of peace over the phone that he had agreed with her attorney that if a settlement was made the case should be dismissed, and the case was dismissed.

While the plaintiff denied that she knew the case was being dismissed, or settled by agreement, or that she was paying the money to obtain a dismissal, we will not determine whether her evidence was sufficient to submit this question to the jury, but will content ourselves with determining whether the court properly submitted the defense of procuring the dismissal to the jury. In submitting this defense to the jury, the court gave instruction No. 7, which is as follows:

"In order to sustain an action for malicious prosecution, it is a sufficient termination of a criminal proceeding out of which it arose if there should be a dismissal of such prosecution before trial; and a judgment on the merits is not essential. However, if such dismissal, should be procured by the voluntary action of the defendant therein, and upon the consideration that for such dismissal she would pay the amount the defendant claimed was owing to it by the plaintiff herein, then such dismissal would not constitute such a termination of the proceedings as would show want of probable cause in the institution of such criminal action; but in such case such agreement or procurement must have been made either by the plaintiff herein personally or must have been authorized by her, or if made by her attorney she must have consented thereto or acquiesced therein."

To the giving of this instruction, the defendant duly excepted, and has assigned the giving of the same as reversible error. The court in this instruction advised the jury, if they believed the plaintiff procured a

dismissal of the criminal prosecution by paying the money to the bank it claimed was due it, then the fact of the dismissal of the case would not be sufficient evidence to show want of probable cause in the institution of the criminal action. It would also leave the jury to infer that, although the plaintiff had procured a dismissal of the case by the settlement, still the plaintiff could maintain her action for malicious prosecution if the jury believed from the evidence that no probable cause existed for instituting the criminal proceedings. In this we think the court committed reversible error.

[1, 2] The law is well settled that, where a criminal prosecution has been dismissed by the procurement by the party prosecuted by agreement or by compromise, said party cannot thereafter maintain an action for malicious prosecution. We will quote from a few of the leading cases supporting this general principle of law.

In the case of *Langford v. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. 697, it was said:

"But our cases uniformly hold that where a nolle prosequi is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution."

The first syllabus of the case announced the following rule:

"An action for malicious prosecution will not lie where the prosecution has been determined only by a nolle prosequi entered by the district attorney by the procurement of the plaintiff's attorney."

In the case of *Craig v. Ginn*, 3 Pennewill, 117, 48 Atl. 192, 94 Am. St. Rep. 77, 53 L. R. A. 715, it was said:

"But the rule seems to be well settled that, where the termination of the prosecution has been brought about by the procurement of the party prosecuted, or by compromise and agreement of the parties, then an action for malicious prosecution cannot be maintained"—citing a long line of decisions to support the above rule announced.

The same rule is announced in the case of *Campbell v. Bank & Trust Co.*, 30 Idaho, 552, 166 Pac. 258, where the court stated as follows:

"Where the termination of a prosecution has been brought about by the procurement of the defendant, or by a compromise or agreement of the parties, an action for malicious prosecution cannot be maintained."

See *Wickstrom v. Swanson*, 107 Minn. 482, 120 N. W. 1090; 26 Cyc. 58; *Langford v. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. 697; *Emery v. Ginnan*, 24 Ill. App. 65; *Singer Sewing Machine Co. v. Dyer*, 156 Ky. 156, 160 S. W. 917; *Waters v. Winn*, 142 Ga. 138, 82 S. E. 537, L. R. A. 1915A, 601, Ann. Cas. 1915D, 1248. The same rule is announced in 18 R. C. L. 25 and 26.

While this court has not passed directly on this question, the court, in the case of *Sawyer v. Shick*, 30 Okl. 353, 120 Pac. 581, stated as follows:

"In a suit for malicious prosecution the essential elements are * * * (3) its bona fide termination in favor of plaintiff."

This court, in the case of *Patterson v. Morgan*, 53 Okl. 95, 155 Pac. 694, stated as follows:

"That one of the essential elements entering into and necessary to be shown in a suit for damages arising out of an alleged malicious prosecution is that such prosecution has been legally terminated in plaintiff's favor, will not be denied. *Schrieber v. Clapp*, 13 Okl. 215, 74 Pac. 316; *Sawyer v. Shick*, 30 Okl. 353, 120 Pac. 581; *Chicago, R. I. & P. R. Co. v. Holliday*, 30 Okl. 680, 120 Pac. 927, 39 L. R. A. (N. S.) 205; *Flamm v. Wineland*, 40 Okl. 688, 139 Pac. 961; *Allison v. Bryan*, 151 Pac. 610."

It will be noticed in the case of *Sawyer v. Shick*, supra, the court announced the principle that there must be a bona fide termination of the suit in favor of plaintiff, and in the case of *Patterson v. Morgan*, supra, it was stated there must be a legal termination in plaintiff's favor. A suit that has been dismissed by reason of a compromise or by a settlement cannot be said to be a bona fide termination nor a legal termination in favor of either party.

There is, however, an exception to the general rule which is discussed in the case of *White v. International Text Book Co.*, 156 Iowa, 210, 136 N. W. 121, 42 L. R. A. (N. S.) 346, and, while the court attempted to instruct the jury regarding the exceptions in instruction No. 7, we think the same was not properly submitted to the jury if we concede the plaintiff's evidence was sufficient to bring her case within the exceptions to the general rule.

[3] The plaintiff in error argues that the giving of instructions Nos. 10 and 11 constitutes reversible error. Instruction No. 10 recites what were the undisputed facts. Instruction No. 11 recites what were the disputed facts, and then advised the jury it was for them to determine from all the evidence whether the plaintiff in error had probable cause to institute the criminal prosecution and to determine whether the defendant acted maliciously. The plaintiff in error complained, for the reason the question of probable cause is one of law for the court, and not for the jury. Such is the holding of this court in the case of *Dunnington v. Loeser*, 48 Okl. 636, 149 Pac. 1161, 150 Pac. 874, where the court stated as follows:

"In an action for malicious prosecution, the question of what amounts to probable cause is one of law for the court. It is therefore the duty of the court, when evidence has been given to prove or disprove probable cause to submit to the jury its credibility, with the in-

struction that certain facts amount to probable cause, or they do not, as the case may be."

See, also, *Hopkins v. Stites*, 173 Pac. 449. It was the duty of the court to advise the jury, as a matter of law, whether the undisputed evidence would amount to probable cause. It was likewise necessary, if the court held the undisputed evidence was insufficient to amount to probable cause, as a matter of law to them advise the jury what disputed facts they would have to find to exist before they could find there was want of probable cause. This court, in the case of *Hopkins v. Stites*, supra, said:

"The court having instructed the jury that that which constitutes probable cause is question of fact, while what constitutes probable cause is a question of law, the giving of instruction No. 8, the other instruction of the court not curing said error, must work a reversal of this case."

This principle of law is applicable to the case at bar.

[4] The second defense of plaintiff in error was that it had made a full and fair statement of all the material facts to the county attorney of Oklahoma county, and acted in good faith upon the advice of the county attorney. This court in considering that as a defense, has announced the rule as follows:

"Where the uncontroverted evidence shows that the prosecutor laid all the material facts within his knowledge before a competent attorney, and acted in good faith, upon the advice given, he is exonerated from all liability." *Allison v. Bryan*, 50 Okl. 677, 151 Pac. 610, and cases therein cited.

In the instant case the county attorney testified as to what facts were laid before him. There was a dispute as to whether a certain state of facts existed and as to whether they were revealed to the county attorney. It was the duty of the court as a matter of law to instruct the jury what were material facts and what were not. This the court did not do.

There are numerous other assignments of error, but it is unnecessary for us to consider these. It is however insisted by defendant in error that the instructions were harmless under section 6005, R. L. 1910, but in this we cannot agree, as this court, in the case of *Nero v. Nero*, 80 Okl. 185, 195 Pac. 492, stated as follows:

"If the court undertakes to instruct the jury as to the law, and does so incorrectly, this is prejudicial error."

See, also, *Dunnington v. Loeser*, supra, and cases therein cited.

For the reasons stated, the judgment of the court is reversed, and the cause remanded, with instructions to grant plaintiff in error a new trial.

HARRISON, C. J., and PITCHFORD, ELTING, and NICHOLSON, JJ., concur,

(82 Okl. 140)

CITY OF CUSHING v. BAY. (No. 10179.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

1. Trial \S 260(1)—Refusal of request covered is not error.

When the instructions of the court have in substance given that which is requested in a special instruction, it is not error for the court to refuse to give the special instruction.

2. Trial \S 219—Word of general meaning need not be defined.

It is not error for the court to refuse to define a word of general and accepted meaning, which is understood by men of reasonable intelligence in all walks of life, and has a well-understood, accepted, and general meaning.

3. Waters and water courses \S 76—Verdict for pollution of creek held sufficiently sustained by evidence.

Evidence examined and found sufficient to sustain the verdict returned by the jury.

Appeal from District Court, Payne County; John P. Hickam, Judge.

Action by A. A. Bay against the City of Cushing. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Grubbs, of Cushing, for plaintiff in error.

F. A. Rittenhouse, of Chandler, and R. A. Lowry, of Stillwater, for defendant in error.

PITCHFORD, J. This action was instituted in the district court of Payne county, Okl., by A. A. Bay, as plaintiff, against the city of Cushing, as defendant, to recover damages alleged to have been sustained by plaintiff by reason of the pollution of Cottonwood creek which flows across an 80-acre tract of land belonging to plaintiff and situated southeast of the city of Cushing, the alleged pollution being caused by the overflow of the city's septic tank into said creek. Judgment was recovered against the defendant, to reverse which this appeal is prosecuted.

[1] The defendant insists that the court committed error in refusing certain instructions requested by the defendant. Comparing the instructions given with those requested and refused, we find that the requested instructions were to all intents and purposes covered by those given by the court in its general charge. One of the contentions of the defendant is that there was error in the court in refusing to give a separate instruction on the burden of proof. We are unable to see wherein the jury could possibly have been misled by the failure of the court to make this a separate instruction. The instructions are to be regarded as a whole and considered together.

The jury were instructed that the burden of proof was upon the plaintiff to establish

the allegations of his petition, and were instructed that they must find from a preponderance of the evidence that the defendant had committed the acts charged in the petition.

In *Oil Fields & S. F. Ry. Co., v. Treese Cotton Co.*, 78 Okl. 25, 187 Pac. 201, the fifth paragraph of the syllabus is as follows:

"When the instruction of the court has in substance that which is requested in a special instruction, then it is not error for the court to refuse to give the special instruction."

In *Midland Valley Ry. Co. v. Clark*, 78 Okl. 121, 189 Pac. 184, the rule is stated as follows:

"No judgment will be set aside or new trial granted by an appellate court of this state in any case upon the ground of misdirection of the jury unless, in the opinion of the court to which the application is made after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

To the same effect, see *Harwell, King & Co. v. Duncan Brothers*, 80 Okl. 74, 194 Pac. 115.

[2] It is further contended by the defendant that the court committed error in not defining the term "preponderance of the evidence." We do not consider that this was necessary. The meaning of the word "preponderance" is understood by every one of ordinary intelligence. It has the same meaning when applied to evidence as applied in ordinary conversation. Webster's New International Dictionary defines the term, "to outweigh; to exceed or surpass in weight, force, influence, number, etc.; to overbalance."

In *Jameson v. Flourney et al.*, 76 Okl. 227, 184 Pac. 910, the second paragraph of the syllabus is as follows:

"It is not error for the court to refuse to define a word of general and accepted meaning, which is understood by men of reasonable intelligence in all walks of life, and has a well-understood, accepted, and general meaning."

[3] It is the further contention of defendant that the verdict of the jury is excessive. Plaintiff alleged damages in the sum of \$2,500. The jury returned a verdict for \$450. From an examination of the record, we are not prepared to say that the verdict was excessive. On the contrary, if the jury believed the evidence of the plaintiff, which they evidently did, then the evidence fully justified the amount of damages as shown by the verdict.

Finding no error in the record, we conclude that the judgment of the trial court should be affirmed; and it is so ordered.

HARRISON, C. J., and McNEILL, NICHOLSON, and ELTING, JJ., concur.

(82 Okl. 151)

HARRIS et al. v. CHEROKEE STATE BANK OF LENAPAH. (No. 10212.)

(Supreme Court of Oklahoma. June 7, 1921.)

*(Syllabus by the Court.)***1. Homestead ¶31—Mere intent to occupy unimproved lands in future not sufficient.**

The mere intention to occupy unimproved lands at some future time, unaccompanied with any overt act of preparation of the land for a home, such as the construction of buildings and making improvements thereon, without unreasonable delay, is insufficient to impress the land with the homestead character.

2. Homestead ¶95—Judgment lien not divested by subsequent occupation of land as homestead.

Where a judgment lien has attached, it cannot be divested by the subsequent occupation of the lands for homestead purposes.

Appeal from District Court, Nowata County; W. J. Campbell, Judge.

Action by Cherokee State Bank of Lenapah against Ada Harris and another. From an order confirming a sale of real estate under execution, defendants appeal. Affirmed.

W. H. Vann, of Lenapah, for plaintiffs in error.

Schwabe, Raymond & Wedell, of Nowata, for defendant in error.

NICHOLSON, J. In this case the plaintiffs in error, defendants below, objected to the confirmation of the sheriff's sale of certain lands owned by Ada Harris and situate in Nowata county, levied upon under a judgment in favor of the defendant in error and against the plaintiffs in error.

The only objection urged here is that the lands levied upon and sold constituted the homestead of plaintiffs in error, and were exempt from sale under execution. The parties have proceeded upon the theory that the question involved is properly determinable upon the motion for and objection to confirmation, and, without passing upon the propriety of this procedure, we will consider the questions as raised.

The evidence introduced on the hearing of the motion for confirmation and objections thereto shows in substance that Ada Harris, one of the plaintiffs in error, was a married woman, but that she and her husband, Henry Harris, were separated; that he was in Colorado; that she lived in Oklahoma, and they had two children, girls, age 9 and 11 years, who resided with her; that she is a Cherokee freedman, had always resided in Oklahoma and intended to continue residing here; that the land levied upon and sold was the allotment of Cal Harris, her deceased son, and that she acquired the same

by inheritance from him; that the land is unimproved, but she intended to keep it for their homestead, and that she formed this intention after she was dispossessed of her own allotment; it having been sold under foreclosure sale. She did not reside upon the land, but resided with her mother; that the plaintiffs in error had been in litigation for nearly two years, and had sickness in the family for two years past; that their expenses on account of litigation and sickness had been very heavy, and because thereof she was unable to improve the land; that she intended to move on said land as soon as she was able to make necessary preparations to live on it; that said land was incumbered by a mortgage of \$500, but she intended to pay this mortgage debt.

[1] The evidence fails to show that this land was acquired for a home, or that the intention to occupy the same as a home was accompanied with any overt act of preparation. The mere intention to occupy unimproved lands at some future time unaccompanied with any act of preparation of the land for a home, such as the construction of buildings and making improvements thereon without unreasonable delay, is insufficient to impress the land with the homestead character. *Laurie et al. v. Crouch*, 41 Okl. 589, 139 Pac. 304; *Hyde v. Ishmael*, 42 Okl. 279, 143 Pac. 1044; *McFarland v. Coyle* (Okl.) 172 Pac. 72; *McCray v. Miller*, 78 Okl. 16, 184 Pac. 781, 186 Pac. 1089; *Merritt v. Park National Bank of Sulphur*, 77 Okl. 148, 187 Pac. 232; *Johnson v. Johnston*, No. 10,126, 200 Pac. 204, not yet officially reported.

[2] Furthermore, it is disclosed by the record that the judgment upon which the execution herein was issued was rendered on the 10th day of November, 1916. The plaintiff in error Ada Harris testified that she formed her intention to occupy the land involved, as a homestead after she had been dispossessed of her other land in the foreclosure proceedings. The writ of assistance issued in the former action, and under which she was dispossessed, was issued on the 25th day of March, 1918, and served on the 26th day of March, 1918. Therefore, the lien of the judgment had attached to the land in controversy long before the plaintiff in error formed her intention of occupying the same as a home. Where a judgment lien has attached it cannot be divested by the subsequent occupation of the lands for homestead purposes. *Northwest Thresher Co. v. McCarroll et ux.*, 30 Okl. 25, 118 Pac. 352, Ann. Cas. 1913B, 1145.

Perceiving no error in the record, the order of the trial court confirming the sale is affirmed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

STATE v. SMITH. (No. A-2497.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)*(Syllabus by the Court.)*

1. Sunday \Rightarrow 4—Conducting moving picture show on Sunday not "servile labor" within statute.

Ordinarily, the selling of admission tickets and conducting on Sunday in an orderly manner a moving picture show is not "servile labor," and not prohibited within the meaning of section 2404, Rev. Laws 1910, and the first subdivision of section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

(Additional Syllabus by Editorial Staff.)

2. Sunday \Rightarrow 7—What is work of "necessity."

The word "necessity," as used in Rev. Laws 1910, § 2405, as amended by Laws 1913, c. 204, does not mean that which is indispensable, but means something more than that which is merely useful, advisable, or desirable; so that a thing which is merely useful or desirable in a town might be a necessity in a great city, and that which was a luxury a century ago may have become a necessity now.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessity.]

Appeal from County Court, Craig County;
E. M. Probasco, Judge.

Clint Smith was informed against for Sabbath breaking, by selling tickets for a moving picture performance. Demurrer to the information was sustained, and the State appeals. Affirmed, and cause dismissed.

R. McMillan, Asst. Atty. Gen., for the State.
W. P. Thompson, of Vinita, for defendant in error.

A. O. Harrison, of Bartlesville, amicus curia.

BESSEY, J. In this case an information was filed in the county court of Craig county, charging that Clint Smith, on the 17th day of March, 1915, committed the crime of Sabbath breaking, in that he willfully and unlawfully performed certain servile labor, to wit, sold tickets at and for a certain moving picture show and performance on the first day of the week, commonly called Sunday; said servile labor aforesaid not being a work of necessity or charity. To this information the defendant filed a demurrer, alleging three grounds, viz.: First, that the allegations in said information do not state a public offense against the laws of the state of Oklahoma; second, that the facts stated in said information are not sufficient to charge the defendant with any offense against the laws

of the state of Oklahoma; third, that the facts set forth in said information do not constitute "servile labor," as contemplated by the laws of the state of Oklahoma. On the 20th day of April, the court sustained the demurrer, from which ruling the state appeals.

The common law, as adopted by the states, does not prohibit citizens from pursuing ordinary labor on Sunday, nor from engaging in or conducting innocent amusements. If it is unlawful in this state to operate a moving picture show on Sunday, it must be so by reason of the express or necessarily implied provisions of our Sunday statute. City of Marengo v. Rowland, 263 Ill. 531, 105 N. E. 235, Ann. Cas. 1915C, 198; 25 R. C. L. 1414.

In approaching the question of whether or not the conducting of a moving picture entertainment on Sunday is a violation of our Sunday statute it becomes necessary to determine the meaning and legislative intent of a number of words and terms used in the statute, indicative of what is prohibited. In analyzing our statutes on this subject we find that the judicial decisions of many of the other states touching on the violation of Sunday laws are of little aid in construing our Sunday statutes, for the reason that the language used and the manifest legislative intent in so many states differ from our own. In most of the states in recent years the Sunday statutes have been frequently modified to meet the exigencies of modern conditions. Our statutes on this subject at the present time are as follows:

Section 2404, R. L. 1910: "The first day of the week being by very general consent set apart for rest and religious uses, the law forbids to be done on that day certain acts deemed useless and serious interruptions of the repose and religious liberty of the community. Any violation of this prohibition is Sabbath breaking."

Section 2405 (as amended): "The following are the acts forbidden to be done on the first day of the week, the doing of any of which is Sabbath breaking:

"First. Servile labor, except works of necessity or charity.

"Second. Trades, manufactures and mechanical employment.

"Third. All shooting, horse racing or gaming.

"Fourth. All manner of public selling, or offering, or exposing for sale publicly, of any commodities, except that meats, bread, and fish may be sold at any time before nine o'clock in the morning, and except that food and drink may be sold to be eaten and drank upon the premises where sold, and drugs, medicines, milk, ice and surgical appliances and burial supplies may be sold at any time of the day." Laws 1913, c. 204.

"Sec. 2406. It is a sufficient defense in proceedings for servile labor on the first day of the week, to show that the accused uniformly keeps another day of the week as holy time,

and does not labor upon that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time."

Section 2404, *supra*, has never been judicially construed in a case of this character. From the reading of this section it seems to be a preliminary declaration of a policy to become effective in the manner pointed out in the other sections of the statutes following. It was so construed, where an order of the corporation commission was made, compelling a telephone exchange to remain open on Sunday. *Twin Valley Tel. Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582.

Passing on, then, to the more definite prohibitions contained in section 2405 we find, excepting works of necessity or charity, all persons are forbidden from pursuing on Sunday: First, servile labor; second, trades; third, manufacturing or mechanical employment.

At the outset we must determine whether a moving picture exhibition on Sunday comes within the saving clause of the statute, "excepting works of necessity or charity." It is too clear for argument that ordinarily a moving picture show is not a work of charity. Can it, under any circumstances, be a work of necessity?

[2] "Necessity" is an elastic term. It does not mean that which is indispensable, but it means something more than that which is merely useful or advisable or desirable. No doubt a thing which is merely useful or desirable to the residents of a town might be a necessity to the residents of a great city. So, also, that which was luxury a century ago may have become a necessity now. There is always, however, a tendency which should not be sanctioned to claim accustomed luxuries as necessities, falling within the exception of the law. *State v. James*, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277; 1 Amer. Rul. Cases, 777.

From the great number of these shows now being operated in the various towns and cities of the state it is fair to assume that they are approved as desirable by the multitudes that patronize them, but we cannot say that they are ordinarily necessary, in the sense that it is sometimes necessary to operate trains on Sunday, or to deliver a Sunday newspaper, or to operate an automobile on Sunday for the pleasure or for the health and comfort of the family, or to operate a telephone exchange.

It may be argued that in a mining camp, where men toil all week underground, or at a manufacturing plant operated day and night, where there are no other means of innocent entertainment or recreation, moving picture shows might be a necessity. Doubt-

less, under such circumstances such entertainments are desirable to the great mass of toilers; but it has been held that in order to break the monotony of army life such exhibitions are not a necessity at a great army camp. *Rosenbaum v. State*, 131 Ark. 251, 199 S. W. 388, L. R. A. 1918B, 1109.

Moving picture exhibitions are a form of amusement not in existence at the time of the enactment of our original Sunday law, and the amendment of May 17, 1913, makes no reference to this or like forms of amusement. The fact, however, that some form of amusement, sport, business, or occupation has sprung into existence since the passage of the law would make no difference, if they came within the plain provisions of the spirit and letter of the statute. 25 R. C. L. 1427.

Moving picture shows are, or should be, instructive as well as entertaining, but the fact that many people can more conveniently attend them on Sunday does not bring them within the exception of being a necessity. It makes no difference whether this court thinks that picture shows on Sunday are in the main desirable, or that a majority of the people so consider them; it is for the Legislature to say whether or not they shall operate on Sunday. *Capital Theatre Co. v. Com.*, 178 Ky. 780, 199 S. W. 1076. Interpolating a personal view of the writer, it would be well to suppress many of them that depict acts of crime and sexual suggestions, on week days as well as on Sunday. This class of exhibitions has been much criticized by persons who, at the same time, encourage them by their patronage.

We hold, therefore, that ordinarily a moving picture show given on Sunday does not come within the exception of our statute as being either a work of necessity or charity.

We have, in some measure, a statutory guide in interpreting and defining words and phrases used in a statute. Section 2914, R. L. 1910, provides:

"Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears."

[1] With this rule of interpretation in mind, we will next endeavor to ascertain the meaning of "servile labor," and whether or not the conducting of a moving picture show is servile labor. Labor, in its usual sense, may be defined as "physical or mental toil; bodily or intellectual exertion, done wholly or partly for a purpose other than the pleasure derived from its performance." "Servile labor, applied to modern conditions, pertains to physical work; labor requiring bodily rather than mental effort; menial labor." *Webster's Int. Dict.* 1927; *Standard Dictionary*. According to this definition, a person who cranked his Ford on Sunday would be engaged in servile labor, though it might be a work of necessity or charity; while a bookkeeper who on Sunday pores over his books,

invoices, and sales slips, in order to make the books balance for the previous week, would not be engaged in servile labor. The statutes of most states use the words "labor," "work and labor," or "usual labor," without the qualifying adjective "servile," or any word of like import. This may seem like a capricious distinction, but, applying the statutory rule of interpretation of words, quoted above, and from aught that we can comprehend from the language of the act as a whole, the Legislature must have intended to make a distinction between manual and mental labor, otherwise they would have dispensed with the word "servile" and prohibited all labor, both mental and physical. This court has no right by judicial construction to amend a statute, and in this case say that the word "servile" means nothing, or to give this adjective a strained or fanciful interpretation.

So far as we have been able to find, of the states having a Sunday law in the same language as our statute, as in the Dakotas and New York, only New York has defined "servile labor," where it has been judicially construed a number of times. And since we have adopted what is known as the Fields Criminal Code, of which our Sunday law is a part, originating in the state of New York and written by a legislative commission presided over by David Dudley Fields, which completed its work in 1865, it would seem that the judicial construction placed on words and phrases contained in this Code by the courts of New York, the state of its origin, should be persuasive, if not binding, on the courts of this state; and especially so when none of the other states adopting this Code have given it a different construction. *Ex parte Bowes*, 8 Okl. Cr. 201, 127 Pac. 20.

In the case of *Campbell v. Inter. Ins. Ass'n*, 17 N. Y. Super. Ct. 316, it was held that "servile labor" meant one thing, and that "working," without that adjective, meant another; that the latter was a comprehensive word, intended to cover the efforts of both mind and body, while the former related to physical labor of a character more or less mental.

In the case of *Watts v. Van Ness*, 1 Hill (N. Y.) 76, it was held that the usual occupation of a clerk in an attorney's office was a species of servile labor, and constituted working, for which, when done on Sunday, he could recover no wages. It will be observed that the New York statute, at the time this decision was rendered, differed from ours, in that it contained both expressions, "servile labor" and "working," while ours contains the former only.

Where a person contracted to take lessons on Sunday to perfect himself in a special art of photography, it was urged that such services were not of a servile nature. The court pointed out that the General Assembly had amended the law (Session Laws N. Y. 1883, c. 358) so as to include all labor, and inferen-

tially held that if it were not for such amendment the defense for nonpayment for services would be good (*Bilordeaux v. Lithographing Co.*, 9 N. Y. Supp. 507).

In another New York case it was held that the loading of horses for shipment onto a sloop from the dock on Sunday was "servile" labor, and under the circumstances in that case not necessary, because the loading could as well have been postponed until the next day. *Merritt v. Earle*, 29 N. Y. 120, 86 Am. Dec. 292.

These New York cases are cited to show that there was a well-recognized distinction between "servile labor" and mere work or labor, and that this qualifying adjective had a fixed, settled meaning in the state from which this part of our Code was derived. Later the word "servile" was stricken from the New York statute, and the Sunday law there has since been amended in many other particulars. These changes must be kept in mind in analyzing the later New York decisions construing the Sunday statutes of that state, modified by amendments in recent years.

In Connecticut it was provided by statute that on Thanksgiving Day all persons should abstain from all kinds of "servile labor." Another portion of the statute provided:

"That no person on the Sabbath shall do any 'secular business,' works of necessity or mercy excepted."

Upon the question of the validity of civil process served on Thanksgiving Day, the court held that the words "servile" and "secular" were practically synonymous. The question at issue, having reference to Thanksgiving Day, and not pertaining to a violation of the Sunday law, the defining of the word "secular" was dictum and unnecessary, because that word applied alone to Sabbath breaking. In this case it was held, by a divided court, that court process served on Thanksgiving Day was void. *Gladwin v. Lewis*, 6 Conn. 49, 16 Am. Dec. 33.

The word "secular," as applied to labor and applicable to this case, is defined in Webster's International Dictionary as "labor not of a religious, spiritual or holy character; relating to temporal, as distinguished from religious interests." The Standard Dictionary defines "secular" as "pertaining to temporal things of this life."

As has been pointed out, the New York courts have held that the word "servile" has a distinct meaning, so intended by the law-makers, while the Connecticut court practically held that it meant nothing; the term "secular business" appearing in one statute being equivalent to the term "servile labor" appearing in another section of the statute. We may well inquire here, if this adjective had no particular significance, why change the language of the statute by judicial construction by transposition of adjectives?

Our court, in the case of *Krieger v. State*, 12 Okl. Cr. 566, 160 Pac. 36, seems to have followed the Connecticut case, and this too in the face of the fact that our statutes say that the words shall be given their ordinary meaning, unless a contrary purpose plainly appears; and in the face of the fact that the parent state from which we borrowed this law had given it a contrary, and to our mind more rational, construction. We think, and standard dictionaries indicate, that there is a marked difference between the meanings of the words "servile" and "secular," and that the lawmakers must have had that difference in mind when they qualified the word "labor" by the word "servile." For instance, it may have been the intention of the framers of this statute to prohibit a blacksmith from working on Sunday, for the reason that the pounding of his anvil and the keeping of his shop open on Sunday would disturb others who wished to keep Sunday as a holy day; the blacksmith would be engaged in servile labor. Likewise, on Sunday a bookkeeper, a judge, a clergyman, or a lawyer might clean the spark plugs of his automobile, pull weeds from his garden, or cut the grass with his lawnmower; this, too, would be servile labor. On the other hand, if a bookkeeper, a judge, a clergyman, or a lawyer should go to his office and close his door and engage in mental labor in such a way as not to disturb others in the quiet enjoyment of their Sabbath, this would not be servile labor within the meaning of the statute.

Sometimes we can more easily determine what a term means by ascertaining what it does not mean. An abstracter of titles, a draftsman, an architect, a building contractor, a railroad conductor, a dentist, a photographer, superintendents or managers of shops we think would not ordinarily be engaged in manual or servile labor. Work done in the professions and fine arts is not usually classified as manual or menial labor. 5 Words & Phrases, First Series, p. 4343. 24 Cyc. 809; 16 R. C. L. 413; *City of New Orleans v. Robira*, 42 La. Ann. 1098, 8 South. 402, 11 L. R. A. 141.

A Sunday law should not be a religious or an ecclesiastical act to promote religious doctrine, or religious rites or ceremonies. Ours is purely a civil government, which guarantees to every person the right to espouse and practice any religious creed he may choose, or to espouse and practice none. Good morals are of course encouraged, and enter into the foundation and superstructure of our free institutions.

The case of *Krieger v. State*, supra, was a case where a member of the religious sect known as Seventh Day Adventists was prosecuted for keeping his store open on Sunday. It was shown that the defendant, in keeping with the tenets of his faith, uniformly kept Saturday, the seventh day of the week, as a

day of rest and holy time; that he performed no labor and did no business on that day; and that he kept his store open on Sunday in a quiet and peaceable manner. It was held in that case that because of his religious belief that Saturday was the day ordained by God as a day of rest it came within the provisions of our statute (section 2406, R. L. 1910) exempting him from punishment for such servile labor on Sunday. There was nothing in this case calling for a definition of servile labor, as distinguished from or synonymous with secular labor because in either case the defendant was exempt from punishment by the plain, explicit provisions of the statute, providing:

"It is a sufficient defense in proceedings for servile labor on the first day of the week, to show that the accused uniformly keeps another day of the week as holy time, and does not labor on that day."

In view of the fact that the finding of the court in this case that the words "servile labor" and "secular labor" are synonymous was, under the circumstances in the case, unnecessary, such finding was in a sense dictum, and as such is not binding as a precedent. A judicial decision, in order to be a precedent and guide in determining issues in subsequent cases, involves only such points as are actually in point in the case decided, and not what is said by the court or some judge on points not necessarily involved. Such expressions, being mere obiter dicta, should not be considered as precedents. 7 R. C. L. 1003, § 31.

In the Connecticut case, supra, the question was on the construction of the validity of civil process issued and served on Thanksgiving Day, and a construction of the meaning of the words used in the Sunday law was not involved. In the Oklahoma case the decision hinged on the fact that the defendant was a Seventh Day Adventist, and came within the exception of section 2406, supra, exempting persons who keep some other time as holy day from the penalties imposed for working on Sunday. The decision in that case did not involve an interpretation of the words "servile" and "secular," because the defendant was plainly, under the testimony, within the exception granted to persons who habitually keep another day as holy time.

For the reasons stated we think the findings of the courts in these two cases that "servile" and "secular" are synonymous are not supported by the best reason and authority, and this court will not be bound to follow them as an established rule of judicial construction in this or similar cases.

At the time our Legislature amended the Sunday law of this state (act of May 17, 1913), adding to the prohibitions then existing, horse racing, hunting, and gaming, and providing that the public selling of commodities should be restricted, moving picture

shows were flourishing in all parts of the state, and in many places moving picture exhibitions were being held on Sunday. We think it is fair to assume that if it was the desire of the Legislature to prohibit such exhibitions on Sunday it would have then said so in specific terms. Penal statutes cannot be enlarged by implication or extended by inference. This court is without power to amend or repeal a general statutory provision, although the court may disapprove of some of its provisions or omissions. *White v. State*, 4 Okl. Cr. 163, 111 Pac. 1018; *City of Shawnee v. Landon*, 3 Okl. Cr. 440, 106 Pac. 652.

This case has been well and ably briefed by the Attorney General for the state, assisted by counsel for the state in other cases, *amicus curiae*. In a number of cases pending in this court the defendants are charged with violating the Sabbath day by performing servile labor in operating moving picture exhibitions on Sunday. In a number of other cases it is charged that such defendants are guilty of selling a commodity to the public, to wit, a privilege, in violation of our Sunday law. In still others it has been urged by the Attorney General that the conducting of such exhibitions might be a trade, within the meaning of the second subdivision of section 2405, *supra*. In this case the construction of the term "servile labor" alone is involved, and a construction of the other terms mentioned must be deferred until a case is reached involving these other terms.

Counsel for the state assume, at the beginning, that the words "servile labor" are obsolete and meaningless, and that the word "labor," without the qualifying adjective, should be read into the statute, or that possibly the words "secular labor" should be substituted. This conclusion was in a measure justified by reason of the expression of the court in the decision in the *Krieger Case*, *supra*. As before stated, however, this declaration cannot stand in the face of sound reason and established judicial construction. Under the conditions here this court has no right to legislate words out of the statute, or to substitute other words that may seem more appropriate, and especially is this the case where the Legislature itself has recently revised the statute.

Our own court, in the case of *Twin Valley Telephone Co. v. Mitchell*, 27 Okl. 388, 113 Pac. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C, 582, held that the girl at the switchboard in a rural telephone exchange must remain on duty on the Sabbath, during such fixed and reasonable hours as will give reasonable telephone service to subscribers. It would seem that the work at a telephone switchboard would be more exacting and fatiguing than to sit in a booth at the entrance to a moving picture show and sell tickets. Neither class of work, in our judgment, is of a menial or servile character. It

may be argued that rural telephone service is a necessity. Possibly so; in many cases it is at least desirable. Yet in many communities they have no such service, and in others none on Sunday. In that sense it is not a "necessity."

We pass now to a brief analysis of the decisions chiefly relied upon by the state. In the case of *Quarles v. State*, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192, cited in the briefs for the state, it was held that the managing of a theater and selling tickets therefor was in violation of a statute prohibiting all labor on Sunday, excepting the customary household duties of daily necessity, comfort, or charity. It will be seen that the language and apparent legislative purpose of this statute differed materially from ours. In the case of *City of Topeka v. Crawford*, 78 Kan. 583, 96 Pac. 862, 17 L. R. A. (N. S.) 1157, 16 Ann. Cas. 403, involving a statute similar to the one last mentioned, prohibiting all kinds of labor on Sunday, it was likewise held that the opening, managing, and selling theater tickets is "labor" within the meaning of the statute.

In the case of *People v. Joyce*, 174 App. Div. 574, 161 N. Y. Supp. 771, construing a statute prohibiting hunting, fishing, playing cards, horse racing, gaming, or other public sports, exercises, or shows, the court held that the prohibition included ordinary picture shows.

The statutes of Washington specifically prohibit the operation of playhouses and theaters on Sunday. The decisions cited from that state hold that the prohibition covers moving picture shows.

In the case of *People ex rel. Moffatt v. Zimmerman*, 48 Misc. Rep. 203, 95 N. Y. Supp. 136, at a time when the New York statute contained the words "servile labor," it was held that selling groceries on Sunday was servile labor, and a violation of the Sunday statute as it then existed.

The references made in the briefs to ancient Biblical, Babylonian, and Chaldaic history and philosophy, showing the origin and early evolution of the Sabbath as a day of rest, recreation, and religious observances, may be passed here as being more properly a subject for the consideration of legislators, political economists, priests, and clergymen. It appears from Biblical writings that when our Savior was here on earth there were 39 kinds of labor prohibited by Jewish law, and when the Scribes and Pharisees sought to enforce one of these provisions by arresting some of the Lord's disciples for gathering corn on the Sabbath day to appease their hunger, the Master then announced the doctrine that the Sabbath was ordained for man, and not man for the Sabbath. Matt. xii, 1-14.

We assume that it was in this spirit and for this purpose that our lawmakers made the declaration contained in section 2404,

supra, forbidding the doing of useless acts that might seriously interrupt the repose and religious liberty of the community, and then in the following sections more definitely stated the particular acts forbidden. We assume that all other acts not within the purview of the statute would not be considered a criminal interference with the repose and religious liberty of the community. If abuses of this character should exist or hereafter arise, the Legislature may add to the list of things now prohibited by appropriate legislation. That is a legislative and not a judicial function. If the lawmakers want to suppress moving pictures on Sunday, they can easily do so by including them in the list of acts prohibited on that day.

We therefore come to the conclusion that the operation of a moving picture show is not "servile labor," and not prohibited, within the meaning of this portion of our Sunday statute, and the order of the court, sustaining the demurrer to the information, is sustained, and the cause ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not participating.

BINKLEY v. STATE. (No. A-3601.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)

(Syllabus by the Court.)

Sunday §=4, 5—Operating moving picture show not "servile labor," nor "selling, offering or exposing" for sale any commodity within statute.

Ordinarily, the selling of tickets and the managing and operating of a moving picture show on Sunday is not "servile labor," nor "selling, offering or exposing for sale of any commodity," within the meaning of section 2404, Rev. Laws 1910, and section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Payne County; Wilberforce Jones, Judge.

J. F. Binkley was convicted of Sabbath breaking, and he appeals. Reversed.

Walter Mathews, of Cushing, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The amended information, upon which the defendant was tried, charged in substance that on Sunday, February 2, 1919, the defendant, J. F. Binkley, willfully and unlawfully, in the city of Cushing, kept

open, superintended, and managed a public picture show, and that he then and there sold to the public, for gain and profit, the privilege of admission to such show for the sum of 20 cents; and that he compelled his servants and employees, under his charge and control, to perform servile labor, in conducting such show, and that services were not works of necessity or charity.

To this amended information a demurrer was filed by the defendant, alleging that the information did not state facts sufficient to constitute a public offense; that more than one offense was charged in the amended information; that the things charged therein as being sold or offered or exposed for sale were not a commodity; that the work done did not constitute servile labor; and that the act or omission charged is not clearly and distinctly set forth, in ordinary and concise language, with such a degree of certainty and in such manner as to enable the defendant to understandingly know what is intended; or to enable the court to pronounce judgment upon a conviction according to the right of the case. This demurrer was by the court overruled, and the defendant allowed an exception.

The evidence disclosed that the defendant, on the Sunday alleged in the amended information, for a money consideration, admitted divers persons to a moving picture show in Cushing, Okl., there being operated and managed by the defendant. At the close of the testimony the defendant asked the court for a peremptory instruction, directing the jury to return a verdict of not guilty, for the reason that the allegations of the information and the testimony failed to show that a crime had been committed. This motion was overruled, and an exception reserved and allowed. The court thereafter instructed the jury that to keep open, manage, and superintend a theater and sell tickets therefor on Sunday is servile labor, within the meaning of the law. The court further instructed the jury that all manner of public selling, or offering or exposing for sale of any commodity, with certain exceptions not necessary to notice, is a punishable offense under our Sunday statute. These and other instructions given were excepted to by the defendant, and exceptions allowed by the court.

The issues here involved are similar to those decided in the case of the State v. Clint Smith, No. A-2497, 193 Pac. 879, just handed down by this court, but not officially reported, except that in this case it seems to have been the contention of the county attorney and the trial judge that the selling of theater tickets was a sale of a commodity or privilege within the meaning of subdivision 4, § 2405, R. L. 1910, as amended by the act of May 17, 1913 (chapter 204).

Webster's New International Dictionary de-

defines the word "commodity," in the sense here used, as "a parcel or quantity of goods, including everything movable that is bought or sold, as goods, wares, merchandise, products of land and manufactures." Black's Law Dictionary defines the term as "goods, wares, and merchandise of any kind; movables; articles of trade or commerce."

Applying these definitions and the context of subdivision 4, § 2405, supra, where the term "commodity" is used in connection with the sale of meat, bread, ice, drugs, etc., it would appear that the word does not refer to the sale of a privilege to attend a moving picture show.

The question of whether or not the sale of tickets to and the conducting and managing of a moving picture show is servile labor is discussed at length in the case of *State v. Clint Smith*, supra, in which it was held by this court that acts and conduct were not servile labor, within the meaning of the statutes. For the reasons there given and for the reasons herein stated, this case is reversed and the cause below ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not participating.

BINKLEY v. STATE. (No. A-3602.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)

(Syllabus by the Court.)

Sunday \S 4, 5—Operating moving picture show not "servile labor," nor "selling, offering or exposing" for sale any commodity within statute.

Ordinarily, the selling of tickets and the managing and operating of a moving picture show on Sunday is not "servile labor," nor "selling, offering or exposing for sale of any commodity" within the meaning of section 2404, Rev. Laws 1910, and section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Payne County; Wilberforce Jones, Judge.

J. F. Binkley was convicted of Sabbath breaking, and he appeals. Reversed.

Walter Mathews, of Cushing, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The amended information, upon which the defendant was tried, charged in substance that on Sunday, February 9, 1919, the defendant J. F. Binkley, willfully and unlawfully, in the city of Cushing, kept open, superintended, and managed a public picture show, and that he then and there

sold to the public, for gain and profit, the privilege of admission to such show for the sum of 20 cents; that he compelled his servants and employees, under his charge and control, to perform servile labor in conducting such show, and that such services were not works of necessity or charity.

To this amended information, a demurrer was filed by the defendant, alleging that the information did not state facts sufficient to constitute a public offense; that more than one offense was charged in the amended information; that the things charged therein as being sold or offered or exposed for sale were not a commodity; that the work done did not constitute servile labor; and that the act or omission charged is not clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable the defendant to understandingly know what is intended, or to enable the court to pronounce judgment upon a conviction, according to the right of the case. This demurrer was by the court overruled, and the defendant allowed an exception.

The evidence disclosed that the defendant on the Sunday alleged in the amended information, for a money consideration admitted divers persons to a moving picture show in Cushing, Okla., there being operated and managed by the defendant. At the close of the testimony the defendant asked the court for a peremptory instruction, directing the jury to return a verdict of not guilty, for the reason that the allegations of the information and the testimony introduced failed to show that a crime had been committed. This motion was overruled, and an exception reserved and allowed. The court thereafter instructed the jury that to keep open, manage and superintend a theater and sell tickets therefor on Sunday is servile labor, within the meaning of the law. The court further instructed the jury that all manner of public selling, or offering or exposing for sale of any commodity, with certain exceptions not necessary to notice, is a punishable offense under our Sunday statutes. These, and other instructions given, were excepted to by the defendant and exceptions allowed by the court.

The issues here involved are similar to those decided in the case of the *State v. Clint Smith*, No. A-2497, 198 Pac. 879, just handed down by this court, but not officially reported, except that in this case it seems to have been the contention of the county attorney and the trial judge that the selling of theater tickets was the sale of a commodity or privilege, within the meaning of subdivision 4, § 2405, R. L. 1910, as amended by act of May 17, 1913 (chapter 204).

Webster's New International Dictionary defines the word "commodity," in the sense here used, as a "parcel or quantity of goods,

including everything movable that is bought or sold, as goods, wares, merchandise, products of land and manufactures." Black's Law Dictionary defines the word as "goods, wares and merchandise of any kind; movables; articles of trade or commerce."

Applying these definitions and the context of subdivision 4, § 2405, *supra*, where the term "commodity" is used in connection with the sale of meat, bread, ice, drugs, etc., it would appear that the word does not refer to the sale of a privilege to attend a moving picture show.

The question of whether or not the sale of tickets to and the conducting and managing of a moving picture show is servile labor is discussed at length in the case of the *State v. Clint Smith*, *supra*, in which we held that such acts and conduct do not constitute servile labor within the meaning of the statutes. For the reasons there given and for the reasons herein stated, this case is reversed, and the cause below ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not participating.

RAMSEY v. STATE. (No. A-3442.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)

(Syllabus by the Court.)

Sunday \Rightarrow 4—Operating moving picture show on Sunday not "servile labor" within statute.

Ordinarily, the selling of admission tickets and conducting on Sunday in an orderly manner a moving picture show is not "servile labor," and not prohibited within the meaning of section 2404, Rev. Laws 1910, and the first subdivision of section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Washington County; Tom George, Judge pro tem.

A. L. Ramsey was convicted of Sabbath breaking, and he appeals. Reversed.

Craver & Heyl and J. R. Charlton, all of Bartlesville, and J. C. Daugherty, of Dewey, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The information charged, in substance, that on Sunday, the 2d day of December, 1917, A. L. Ramsey willfully and unlawfully performed servile labor in opening, managing, conducting, and operating a moving picture show by selling tickets of admission, admitting divers persons thereto, and operating a certain film machine therein,

which servile labor was not a work of necessity or charity.

To this information a demurrer was filed by the defendant, on the ground that the information failed to state a public offense, and that the facts recited therein did not constitute servile labor, within the meaning of the statutes of Oklahoma. The demurrer to the information was overruled, and the defendant allowed an exception.

The evidence discloses that the defendant on the day alleged sold tickets and admitted divers persons to a moving picture show in Dewey, Okl.; there was no evidence that the defendant owned or conducted the show, or that he had anything to do with the operation of the film machine.

At the close of the testimony the defendant asked for a peremptory instruction, acquitting the defendant on the ground that the testimony failed to show the commission of the crime charged, or any crime. This application was overruled, and an exception was reserved and allowed. Covering the same points, certain instructions, not necessary here to recite, were requested by the defendant and refused by the court, to which exceptions were saved. Exceptions were also taken and allowed to the instructions given.

The issues here involved are the same as decided in the case of the *State v. Clint Smith*, A-2497, 198 Pac. 879, recently decided, but not yet officially reported, and for the reasons there given this case is reversed, and the cause below is ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified, not sitting.

RAMSEY v. STATE. (No. A-3443.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)

(Syllabus by the Court.)

Sunday \Rightarrow 4—Conducting moving picture show on Sunday not "servile labor" within statute.

Ordinarily, the selling of admission tickets and conducting on Sunday in an orderly manner a moving picture show is not "servile labor," and not prohibited within the meaning of section 2404, Rev. Laws 1910, and the first subdivision of section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Washington County; Tom George, Judge pro tem.

A. L. Ramsey was convicted of Sabbath breaking, and he appeals. Reversed.

Craver & Heyl and J. R. Charlton, all of Bartlesville, and J. C. Daugherty, of Dewey, for plaintiff in error.

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S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The information charged, in substance, that on Sunday, the 9th day of December, 1917, A. L. Ramsey willfully and unlawfully performed servile labor in opening, managing, conducting, and operating a moving picture show by selling tickets of admission admitting divers persons thereto, and operating a certain film machine therein, which servile labor was not a work of necessity or charity.

To this information a demurrer was filed by the defendant, on the ground that the information failed to state a public offense, and that the facts recited therein did not constitute servile labor, within the meaning of the statutes of Oklahoma. The demurrer was overruled, and the defendant allowed an exception.

The evidence discloses that the defendant on the day alleged sold tickets and admitted divers persons to a moving picture show in Dewey, Oklahoma; there was no evidence that the defendant owned or conducted the show, or that he had anything to do with the operation of the film machine.

At the close of the testimony the defendant asked for a peremptory instruction, acquitting the defendant on the ground that the testimony failed to show the commission of the crime charged or any crime. The application was overruled, and an exception was reserved and allowed. Covering the same points, certain instructions, not necessary here to recite, were requested by the defendant and refused by the court, to which exceptions were saved. Exceptions were also taken and allowed to the instructions given.

The issues here involved are the same as decided in the case of the State v. Clint Smith, No. A-2497, 198 Pac. 879, recently decided, but not yet officially reported, and for the reasons there given this case is reversed, and the cause below is ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not sitting.

RAMSEY v. STATE. (No. A-3444.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)

(Syllabus by the Court.)

Sunday. ④—Conducting moving picture show on Sunday not "servile labor" within statute.

Ordinarily, the selling of admission tickets and conducting on Sunday in an orderly man-

ner a moving picture show is not "servile labor," and not prohibited, within the meaning of section 2404, Rev. Laws 1910, and the first subdivision of section 2405, R. L. 1910, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Washington County; Tom George, Judge pro tem.

A. L. Ramsey was convicted of Sabbath breaking, and he appeals. Reversed.

Craver & Heyl and J. R. Charlton, all of Bartlesville, and J. C. Daugherty, of Dewey, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The information charged, in substance, that on Sunday, December 16, 1917, A. L. Ramsey willfully and unlawfully performed servile labor in opening, managing, conducting, and operating a moving picture show by selling tickets of admission, admitting divers persons thereto, and operating a certain film machine therein, which servile labor was not a work of necessity or charity.

The evidence discloses that the defendant on the day alleged sold tickets and admitted divers persons to a moving picture show in Dewey, Okl.; there was no evidence that the defendant owned or conducted the show, or that he had anything to do with the operation of the film machine.

At the close of the testimony the defendant asked for a peremptory instruction, acquitting the defendant on the ground that the testimony failed to show the commission of the crime charged, or any crime. This application was overruled, and an exception was reserved and allowed. Covering the same points, certain instructions, not necessary here to recite, were requested by the defendant and refused by the court, to which exceptions were also taken and allowed. Exceptions were also saved to the instructions given.

The issues here involved are the same as decided in the case of the State v. Clint Smith, No. A-2497, 198 Pac. 879, recently decided, but not yet officially reported, and for the reasons there given this case is reversed, and the cause below is ordered dismissed.

DOYLE, P. J., concurs. MATSON, J., disqualified and not sitting.

RAMSEY v. STATE. (No. A-3445.)

(Criminal Court of Appeals of Oklahoma.
June 18, 1921.)

(Syllabus by the Court.)

Sunday ~~4~~—Conducting moving picture show on Sunday not "servile labor" within statute.

Ordinarily, the selling of admission tickets and conducting on Sunday in an orderly manner a moving picture show is not "servile labor," and not prohibited within the meaning of section 2404, Rev. Laws 1910, and the first subdivision of section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Washington County; Tom George, Judge pro tem.

A. L. Ramsey was convicted of Sabbath breaking, and he appeals. Reversed.

Craver & Heyl and J. R. Charlton, all of Bartlesville, and J. C. Daugherty, of Dewey, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The information charged, in substance, that on Sunday, December 23, 1917, A. L. Ramsey willfully and unlawfully performed servile labor in opening, managing, conducting, and operating a moving picture show by selling tickets of admission, admitting divers persons thereto, and operating a certain film machine therein, which servile labor was not a work of necessity or charity.

To this information a demurrer was filed by the defendant, on the ground that the information failed to state a public offense, and that the facts recited therein did not constitute servile labor within the meaning of the statutes of Oklahoma. This demurrer was overruled, and the defendant allowed an exception.

The evidence discloses that the defendant on the day alleged sold tickets and admitted divers persons to a moving picture show in Dewey, Okl.; there was no evidence that the defendant owned or conducted the show, or that he had anything to do with the operation of the film machine.

At the close of the testimony the defendant asked for a peremptory instruction, acquitting the defendant on the ground that the testimony failed to show the commission of the crime charged, or any crime. This application was overruled, and an exception was reserved and allowed. Covering the same points, certain instructions not necessary here to recite were requested by the defendant and refused by the court, to which exceptions were saved. Exceptions were

also taken and allowed to the instructions given.

The issues here involved are the same as decided in the case of the State v. Clint Smith, No. A-2497, 198 Pac. 879, recently decided, but not yet officially reported, and for the reasons there given this case is reversed, and the cause below is ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not sitting.

STATE v. HOUSE. (No. A-2613.)

(Criminal Court of Appeals of Oklahoma.
June 18, 1921.)

(Syllabus by the Court.)

Sunday ~~4~~—Conducting moving picture show on Sunday not "servile labor" within statute.

Ordinarily, the selling of admission tickets and conducting on Sunday in an orderly manner a moving picture show is not "servile labor," and not prohibited within the meaning of section 2404, Rev. Laws 1910, and the first subdivision of section 2405 as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Coal County; P. E. Wilhelm, Judge.

L. C. House was by information charged with Sabbath breaking. A demurrer to the information was sustained, and the State appeals. Affirmed.

S. P. Freeling, Atty. Gen., R. McMillan, Asst. Atty. Gen., and Geo. T. Ralls, Co. Atty., of Coalgate, for the State.

Trice & Moore, of Coalgate, for defendant in error.

BESSEY, J. L. C. House was by information, filed October 18, 1915, charged with Sabbath breaking by conducting a moving picture show on Sunday. To this information he interposed a demurrer, which was by the court sustained, and the state appeals. The charging part of the information is as follows:

"That he, the said L. C. House, did willfully and unlawfully keep open, run, operate, engage in and carry on his moving picture show in Coalgate, Okl., on the first day of the week, and the Lord's Day, which is commonly called Sunday, for the purpose of carrying on and doing business by running said moving picture show on said date, said business being the usual trade carried on by said defendant, and that the said defendant did charge and receive and collect an admittance fee of ten cents of and from all persons who entered said moving picture show and witnessed the said show.

That the keeping, running, operating, managing and carrying on said moving picture show was for money and for profit and gain, and was defendant's means of making a livelihood, and was a continuation of defendant's usual trade and business during the week; the same not being a work or trade of charity or necessity, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

The defendant interposed a demurrer to the information on the ground that the allegations contained in said information were insufficient to show any offense against the laws of the state of Oklahoma. The court sustained the demurrer, and the state refused to plead further. Whereupon the court rendered judgment, dismissing the cause, and the state prosecutes the appeal from the order and judgment sustaining the demurrer and dismissing the cause.

The issues here involved are similar to those decided in the case of the State v. Clint Smith, A-2497, 198 Pac. 879, recently decided, but not yet officially reported, and for the reasons there given the order and judgment of the trial court is affirmed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not sitting.

TREESE v. STATE. (No. A-3600.)

(Criminal Court of Appeals of Oklahoma.
June 16, 1921.)

(Syllabus by the Court.)

Sunday ~~is~~—Operating moving picture show not "servile labor," nor "selling, offering or exposing" for sale any commodity within statute.

Ordinarily, the selling of tickets and the managing and operating of a moving picture show on Sunday is not "servile labor," nor "selling, offering or exposing for sale of any commodity," within the meaning of section 2404, Rev. Laws 1910, and section 2405, as amended by Laws 1913, c. 204.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servile Labor.]

Appeal from County Court, Payne County; Wilberforce Jones, Judge.

A. L. Treese was convicted of Sabbath breaking, and he appeals. Reversed.

Walter Mathews, of Cushing, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. The amended information, upon which the defendant was tried, charged in substance that on Sunday, February 9,

1919, the defendant, A. L. Treese, willfully and unlawfully, in the city of Cushing, kept open, superintended, and managed a public picture show, and that he then and there sold to the public, for gain and profit, the privilege of admission to such show for the sum of 20 cents; and that he compelled his servants and employees, under his charge and control, to perform servile labor in conducting such show, and that such services were not works of necessity or charity.

To this information, so amended, a demurrer was filed by the defendant, alleging that the information did not state facts sufficient to constitute a public offense; that more than one offense was charged in the amended information; that the things charged therein as being sold or offered or exposed for sale were not a commodity; that the work done did not constitute servile labor; and that the act or omission charged is not clearly and distinctly set forth in ordinary and concise language, with such a degree of certainty and in such manner as to enable the defendant to understandingly know what is intended, or to enable the court to pronounce judgment upon a conviction according to the right of the case. This demurrer was by the court overruled, and the defendant allowed an exception.

The evidence disclosed that the defendant, on the Sunday alleged in the amended information, for a money consideration, admitted divers persons to a moving picture show in Cushing, Okl., there being operated and managed by the defendant. At the close of the testimony the defendant asked the court for a peremptory instruction, directing the jury to return a verdict of not guilty, for the reason that the allegations of the information and the testimony introduced failed to show that a crime had been committed. This motion was overruled, and an exception reserved and allowed. The court thereafter instructed the jury that to keep open, manage, and superintend a theater and sell tickets therefor on Sunday is servile labor, within the meaning of the law. The court further instructed the jury that all manner of public selling, or offering or exposing for sale of any commodity, with certain exceptions not necessary to notice here, is a punishable offense under our Sunday statute. These, and other instructions given, were excepted to by the defendant, and exceptions allowed by the court.

The issues here involved are similar to those decided in the case of the State v. Clint Smith, A-2497, 198 Pac. 879, just handed down by this court, but not officially reported, except that in this case it seems to have been the contention of the county attorney and the trial judge that the selling of theater tickets was the sale of a commodity or privilege, within the meaning of subdivision 4, § 2405,

R. L. 1910, as amended by act of May 17, 1913 (chapter 204).

Webster's New International Dictionary defines the word "commodity," in the sense here used, as "a parcel or quantity of goods, including everything movable that is bought or sold, as goods, wares, merchandise, products of land and manufactures." Black's Law Dictionary defines the term as "goods, wares, and merchandise of any kind; movables; articles of trade or commerce."

Applying these definitions and the context of subdivision 4, section 2405, *supra*, where the term "commodity" is used in connection with the sale of medicine, bread, meats, ice, drugs, etc., it would appear that the word does not refer to the sale of a privilege to attend a moving picture show.

The question of whether or not the sale of tickets to and the conducting and managing of a moving picture show is servile labor is discussed at length in the case of the State v. Clint Smith, *supra*, in which we held that such acts and conduct was not servile labor within the meaning of the statutes. For the reasons there given, and for the reasons herein stated, this case is reversed, and the cause below ordered dismissed.

DOYLE, P. J., concurs.

MATSON, J., disqualified and not participating.

(101 Or. 472)

BROSNAN v. BOGGS.

(Supreme Court of Oregon. June 14, 1921.)

1. Waters and water courses §217—Water master cannot give water rights.

Under L. O. L. §§ 6617, 6618 (Or. L. §§ 5706, 5707), as to duty of water masters, a water master is an executive officer, whose conduct is regulated by some adjudication of water rights, and his action must be founded on some decree, and, unless a party can show some such right, he is not protected in diverting or using water by any authorization by the water master.

2. Waters and water courses §130—Seepage water subject to prior appropriation.

If the proprietor of lands would enjoy seepage water, he must take it and use it before it leaves his premises, and, if he allows it to escape into the channel of the stream, he cannot pursue it and retake it as against the appropriator of the waters of that stream.

3. Appeal and error §231(1)—Objection must be particularized.

Under L. O. L. § 170, merely to object without giving any reason does not present any question for review in the Supreme Court.

4. Evidence §116—Explanation of testimony held not a "self-serving declaration."

Allowing party, as witness, to give an explanation of what he meant by his previously

given testimony, is not error, such explanation not being a "self-serving declaration," which is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial.

In Banc.

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by T. J. Brosnan against D. F. Boggs and others. From judgment for plaintiff, the named defendant appeals. Affirmed.

The original complaint in this cause was against Ivers, Boggs, Dolan, and Gombert. A demurrer to that pleading was sustained, and the plaintiff amended, making only Ivers and Boggs defendants. After alleging his rightful possession of certain realty in Malheur county, the plaintiff declares in substance that he has an adjudicated right to a certain portion of the water flowing in Willow creek, dating from the year 1872, for 192.68 acres of said land, which water he has used in producing crops and pasturage on the land. He says also that both Ivers and Boggs claim water rights in Willow creek, but that they are all inferior to his in time and right. He charges that Ivers and Boggs, acting together, built dams in the stream above his premises and maintained them during the irrigation season of 1918, diverting the water so that he could not use the same under his senior right. He claims damages on account thereof.

Boggs answered as follows:

"Comes now D. F. Boggs, and for himself alone, and answering to the amended complaint of the plaintiff, denies generally and specifically each and every allegation contained in said amended complaint, save and except what is herein modified, qualified, explained, or affirmatively alleged; and avers that all of the water used by defendant during the year of 1918, on the farm of defendant, or elsewhere, the same being the waters of Willow creek, Malheur county, were so used by defendant under the immediate control and supervision of George Gombert, water master of Malheur county, Or., and who, during all of the irrigating season of the year of 1918, was in charge of and in control of the distribution of the waters of the said stream; and that this defendant used no water for irrigating or for other purposes other than by the direction of him, the said George Gombert, water master, as aforesaid."

This was traversed by the reply.

Ivers died during the pendency of the action. His executors were substituted in his place and filed an answer, upon which issues were joined. The case went to trial, resulting in a judgment in favor of the plaintiff against both defendants. Boggs alone appealed; hence no further notice will be taken of the connection of Ivers with the case.

George W. Hayes, of Vale (Hawley & Hawley, of Boise, Idaho, on the brief), for appellant.

O. McGonagill, of Ontario, and Cary M. Rader, of Walla Walla, Wash. (Will R. King, of Washington, D. C., on the brief), for respondent.

BURNETT, C. J. (after stating the facts as above). [1] The first two points suggested by Boggs in his brief are these:

(1) "Since appellant took no water except that delivered to him by the water master, he is not liable for any damages sustained by the plaintiff." And (2) "The court erred in refusing to instruct the jury that the defendant had a right to construct dams in Willow creek in order to divert water."

It will be noted that Boggs does not plead any right in himself to the water, but says only that he took what the water master gave him. In substance this is like the plea of Adam when accused of eating the forbidden fruit:

"The woman whom thou gavest to be with me, she gave me of the tree, and I did eat." Genesis iii, 12.

In that instance the pleading was held to be bad, and in principle that has been the law ever since. Under sections 6617 and 6618, L. O. L. [5706 and 5707, Or. L.], cited by the defendant, it is the duty of the water master to divide the water of natural streams "among the several ditches and reservoirs, taking water therefrom, according to the rights of each, respectively. * * * The water master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. * * * Said water master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the head gates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled." The water master is an executive officer, whose conduct is regulated by some adjudication of the rights to the water which is to be divided. His action must be founded upon some decree, and unless a party can show some such right, he cannot be protected by the action of the water master, who in turn can justify only on some established right. As he has not pleaded a right to divert water from the stream, the defendant cannot complain because the court refused to instruct the jury that he had a right to build dams in the creek.

[2] The defendant excepted to an instruction reading in part as follows:

"Neither is the water master required to permit water to go down the stream when such action would amount to waste of the water. If

you find therefore in this case at any time that if the water had been allowed to flow down the stream without let or hindrance it would not, including any seepage water that may arise between that point and the plaintiff's premises, reach the plaintiff's premises, then the defendants cannot be blamed because the turning of the water down the stream in such an instance would amount to a waste."

The objection to the charge quoted in part was the inclusion of seepage water. Clearly the instruction had reference to water flowing in the channel of the creek. In *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642, the right of the landowner to water percolating the soil beneath the surface was recognized; but it was said in the same opinion:

"If such springs have a well-defined channel which conducts the water into a stream, an appropriation of the waters of the latter is ipso facto an application of the water of the spring to a beneficial use. *Low v. Rizer*, 25 Or. 551, 37 Pac. 82. When a stream is supplied by percolation, if the ownership of the water, after it reached the channel, continued in the person from whose land it imperceptibly emanated, thereby entitling him to recapture it in the stream at any point below, the right of prior appropriation would be practically denied; but, as such right is fully recognized and firmly established by the courts in the arid regions of the Pacific Coast states and territories, it follows that the right insisted upon does not exist."

The principle as to seepage water is that, if the proprietor of the lands would enjoy the same, he must take it and use it before it leaves his premises. If he allows it to escape into the channel of the stream, he cannot pursue it and retake it as against the appropriator of the waters of that stream. No doubt, all streams are fed more or less by seepage water which gets into the channel from no visible source. As indicated in *Boyce v. Cupper*, supra, it would destroy the whole irrigation system of the arid states, if such water could be pursued into the stream by the landowner on whose premises the seepage began. No error was committed on this point.

[3] Three other assignments of error are as follows:

"The court erred in permitting testimony as to the flow of Willow creek in 1917."

"The court erred in permitting Brosnan to testify as to what his pasturage was for the years 1916 and 1917."

"The court erred in permitting the witness Brosnan to testify as to what it cost him to dig a well upon his land."

On each of these points the language of the bill of exceptions is as follows:

"Defendant by his attorneys duly objected, which objection was overruled by the court."

No reason for the objection is assigned. Section 170, Or. L., settled this matter thus: "The point of exception shall be particular-

ly stated." Merely to object, without giving any reason for the exception, does not present any question for review in this court.

[4] We learn from the bill of exceptions that while the plaintiff was on the stand as a witness in his own behalf, he was allowed to give an explanation of some testimony he had given the day before, in effect that his land and that of the defendants was of the same character. In explaining his testimony he pointed out in substance the difference between the vegetation on his land and that of the defendant, and some other particulars not necessary to be mentioned. It is claimed that the court erred in refusing to strike out this explanation. In *Pacific Export Co. v. North Pacific Lumber Co.*, 46 Or. 194, 206, 80 Pac. 105, 110, a witness was allowed to explain what he meant by the use of certain language. The court there said:

"This was proper. The witness was still under examination, and if he gave out an erroneous impression of the facts as he understood them, he had a perfect right to make the correction in the presence of the jury. The same thing would be true if the erroneous impression were contained in a letter he had written relative to the subject, but the whole would be a matter for the jury's consideration as to the weight that should be attached to it."

The explanation here in question is not a self-serving declaration, as argued by counsel. Such a declaration is one made by a party in his own interest at some time and place out of court, and of course cannot as a general rule be admitted in evidence. It does not refer to testimony which he gives as a witness at the trial. If a party, appearing as a witness in his own behalf, were denied the right of giving testimony favorable to himself, the privilege of being a witness, although a party, would be destroyed.

On the questions presented in the brief for review there was no error in the proceedings in the circuit court.

The judgment is therefore affirmed.

(101 Or. 14)

IN RE NELSON'S ESTATE.

JOHNSON v. TAYLOR et al.

(Supreme Court of Oregon. June 21, 1921.)

1. Appeal and error \S 417(3) — Attorney of another state not admitted within the state cannot sign notice of appeal.

Under Or. L. $\S\S$ 1074, 1078, defining "attorney," and sections 1081 and 1093—1, providing for appearance by attorneys of other states and for their admission to practice, an attorney admitted to practice in two other states, but not in Oregon, is not an attorney who can sign a notice of appeal under section 550.

2. Appeal and error \S 417(3)—Notice signed by one not party or attorney does not give jurisdiction.

A notice of appeal is jurisdictional, and must comply with every requirement of the law, and therefore a notice not signed by the party or by a regularly admitted attorney of the court as required by Or. L. \S 550, is ineffectual for any purpose.

In Banc.

Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

In the matter of the estate of Jackson Nelson, deceased. On appeal by Lee Johnson from an order of the probate court appointing T. D. Taylor and another as executors and administrators of the estate of Jackson Nelson, deceased. The appeal was dismissed by the circuit court, and Johnson appeals. Affirmed.

This is an appeal from an order of the circuit court dismissing the appeal of Lee Johnson from an order of the county court, which latter order was made in the course of certain probate proceedings, the particulars of which are as follows: In October, 1919, Jackson Nelson died in Umatilla county, Or., leaving a will whereby he appointed David Taylor his executor, providing that, in case David Taylor should die before the testator, T. D. Taylor and sons of David Taylor should be joint executors. The will was admitted to probate on October 27, and David Taylor was designated by the court as executor. David Taylor died on March 29, 1920, and on April 28 Lee Johnson filed a petition to be appointed administrator with the will annexed of the estate of Jackson Nelson, on the ground that he was the principal creditor of said estate. On the same date T. D. Taylor and W. R. Taylor filed a petition to be appointed executors and administrators with the will annexed of said estate, setting up the provisions of the will designating them under certain circumstances to be executors, and that David Taylor was the chief beneficiary under the will of Jackson Nelson. Thereupon the county court, on May 5, 1920, made an order appointing the Taylors as executors and administrators with the will annexed of said estate. A notice of appeal, regular in form, was served upon the Taylors, which notice was subscribed, "J. W. Brooks, Attorney for Petitioner, Lee Johnson." Brooks was a regularly admitted attorney in North Carolina, and was a regularly admitted and practicing attorney of the state of Washington, but had not been admitted to practice in Oregon at that time, or at any other time previous to the hearing of the motion hereinafter referred to. On July 7, 1920, on motion of James A. Fee, attorney for the Taylors, the appeal was dismissed for the reason that the notice of appeal was not signed by the peti-

tioner or by any attorney authorized to practice in this state. From this order the petitioner, Johnson, appeals.

J. W. Brooks, of Walla Walla, Wash., for appellant.

James A. Fee, of Pendleton (Fee & Fee, of Pendleton, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1] Section 550, Or. L. (Olson's Compilation) provides that a party desiring to appeal shall "cause a notice signed by himself or attorney to be served upon the adverse party." Section 1074 defines "attorney" as follows:

"An attorney is a person authorized to appear for and represent a party, in the written proceedings in any action, suit, or proceeding, in any stage thereof. An attorney, other than the one who represents the party in the written proceedings, may also appear for and represent a party in court, or before a judicial officer, and then he is known, in the particular action, suit, or proceeding, as counsel only, and his authority is limited to the matters that transpire in the court or before such officer at the time."

Section 1076 is as follows:

"An attorney is a public officer, but any person may act in that capacity who has been admitted as such by the Supreme Court of this state, or may hereafter be admitted, as provided in this chapter."

Section 1081 provides that:

"Whenever it appears that a person of any other state or country is an attorney of the highest court of record in such state or country, he may appear as counsel for a party in a particular action, suit, or proceeding then pending in court, or before a judicial officer of this state, but not otherwise; provided, however, that upon proof that he is a person of good moral character, which may be proved by any evidence satisfactory to the court, he may be admitted generally, by the Supreme Court, as an attorney, in all respects as if he were a citizen of this state, and shall be permitted to practice in all courts of this state; provided, that the state or country of which such applicant is a resident or citizen admits to its bar, and to practice in its courts, attorneys who are citizens of this state."

Section 1093—1 provides that:

"It shall be unlawful for any person, firm, association of persons or corporation to engage in the practice of law within the state of Oregon after the taking effect of this act, without first having been duly admitted and licensed as an attorney at law in the courts of this state."

[2] From a mere inspection of these sections it clearly appears that Mr. Brooks was not an attorney within the meaning of our laws; and, not being so, he had no authority to sign a notice of appeal. A notice of appeal is jurisdictional, and every requirement of

the law prescribing the time and means of taking the appeal is jurisdictional and cannot be waived either by the parties or the court. A notice not signed by the party or by a regularly admitted attorney of this court is inefficient for any purpose.

The decree of the circuit court is affirmed.

(101 Or. 18)

NORTH POWDER MILLING & MERCANTILE CO. v. PACIFIC FRUIT EXPRESS CO.

(Supreme Court of Oregon. June 21, 1921.)

1. Waters and water courses \S 138—Occasional diversion of water under temporary license held not to support easement or claim by adverse user.

Where defendant used the surplus water leaving plaintiff's ditch by a spillway, the fact that occasionally, under a temporary license, it obstructed the ditch below the spillway in order to divert water into the spillway would not support a claim of an easement in the ditch or a claim by adverse user.

2. Waters and water courses \S 152(11)—Where decree did not adjudicate ownership of ditch, water master held without authority to permit taking of water from ditch.

Where in a proceeding to adjudicate water rights the finding of the board of control and circuit court that L. appropriated waters by diverting them through a ditch into plaintiff's millrace and then diverting them from the millrace was unsupported by L.'s claim or testimony, and the decree merely adjudged that L. was the owner of $2\frac{1}{2}$ second feet of water without pretending to settle the ownership of any particular ditch or of the right to use it, conceding that the board had jurisdiction of such questions, the water master had no authority to authorize defendant, L.'s successor in title, to take water from plaintiff's ditch.

3. Waters and water courses \S 152(5)—Water master held not necessary party to suit to enjoin taking of water from plaintiff's ditch.

Where the decree in a proceeding to establish water rights did not pretend to settle the ownership of any particular ditch or the right to use the same, the water master, who has claimed to have permitted defendant to take water from plaintiff's ditch, was not a necessary party to a suit to enjoin such taking.

4. Waters and water courses \S 152(3)—Interference with ditch and appliances under claim of right enjoined, though there had been only one occasion causing serious injury.

Where defendant claimed the right to enter plaintiff's ditch and tamper with its appliances, not only at present but in the future, for the purpose of taking water therefrom, and had on several occasions interfered with such appliances, plaintiff was entitled to an injunction, though only one of such interferences had occasioned serious injury; the others being calculated to produce some injury.

In Banc.

Appeal from Circuit Court, Union County;
J. W. Knowles, Judge.

Suit by the North Powder Milling & Mercantile Company against the Pacific Fruit Express Company. From a decree for plaintiff, defendant appeals. Affirmed.

The plaintiff is a corporation engaged in operating a flouring mill at North Powder in Union county, Or. The defendant is a corporation engaged in the cutting, storing, and shipping of ice from a pond above and contiguous to the mill owned and operated by the plaintiff. This suit is brought by the plaintiff to enjoin the defendant from taking water from a ditch owned by the former and passing near defendant's ice pond. The complaint alleges:

"That plaintiff is the owner of an adjudicated water right of and to the waters of North Powder river to the extent of 25 second feet thereof for power purposes, with a date of priority of the year 1870, which water right has been and now is used for the generation of power for the operation of a flourmill owned by plaintiff which is situated in the northeast quarter of the southeast quarter of section 22, township 6, south of range 39, east of the Willamette meridian in Union county, state of Oregon.

"That plaintiff's predecessors in interest, in the year 1870, for the purpose of conducting the water so adjudicated, from the said North Powder river to the said mill, built and constructed dams at the point of diversion, a ditch from the said dam to a point near the mill site, and a millrace, all for the purpose of generating power to operate said mill; and said 25 second feet of water was conveyed through said ditch and said millrace in the year 1870 for the purpose of generating said power as aforesaid, and has been so conducted and so used each and every year thereafter, and is now being so used in the manufacture of flour and other mill products for a beneficial purpose.

"That during certain seasons of the year, when there is an abundant rainfall and when the melting snow runs down said river, the flow of water in said plaintiff's ditch is greater than 25 second feet. To prevent this surplus from flowing on into the said millrace at these seasons of the year, plaintiff constructed at a convenient place along the said ditch a tap and box so regulated and sized that no more than the adjudicated amount of water can run on down into said millrace; and near the said tap and box plaintiff has constructed and continuously maintained a waste gate whereby and through which the surplus during the said seasons, over and above the 25 second feet aforesaid, runs off and enters a waste ditch through which the said surplus returns to the channel of said river.

"The plaintiff herein has been at all times mentioned herein and is now the sole owner of all the ditches, rights of way for ditches, taps, boxes, gates, millrace, mill, dam, and all things connected therewith and hereinbefore mentioned.

"That plaintiff conducts and operates a milling business producing a brand of flour and

mill products of excellent quality and good price, which flour and mill products bring a good price in the market, and give to plaintiff a large profit. That, however, the quality of the flour and mill products so produced is dependent upon an unbroken flow of 25 second feet of water for power purposes, and if the continuity or volume of said flow is interrupted or decreased or increased, said interruption, increase, or decrease changes the speed of the machinery used in the said milling operations, and so causes an inferior brand of flour and mill products to be produced, which inferior brand of flour and products when placed upon the market by plaintiff brings a lower price than the best products, and injures the reputation of the products produced by plaintiff. The extent of the injury thus caused is unknown to plaintiff, is irreparable, and is impossible to estimate in money.

"For many years prior hereto, defendant and its predecessors in interest have repeatedly and without leave, license, or permission of plaintiff gone upon plaintiff's ditch and millrace and interfered with the same, and interfered with the adjustment of the tap and box and waste gate as hereinbefore described, and have by this said interference diminished and otherwise interfered with the continuity and volume of the flow of water of 25 second feet as hereinbefore described, and have thus caused damage to plaintiff as alleged in paragraph 7 of this complaint. That defendant now threatens to continue to do the same with the avowed purpose of causing plaintiff damage as alleged, and causing plaintiff to shut down and cease to operate its said mill, and defendant did, on the 25th day of October, 1919, so go upon said ditch, and so interfere with said tap, box, and waste gate as alleged, and threatens to continue to do so in the future to plaintiff's irreparable and inestimable damage, unless restrained by an order of this honorable court."

The defendant answered, denying plaintiff's ownership of the ditch in question, and alleging that plaintiff's predecessors in interest and those of the defendant jointly maintained the ditch since 1886. For a further defense the following matter is pleaded in bar:

"That in the year 1886 Andrew O. Lun appropriated the waters of North Powder river for ice-making purposes by diverting the same into and through the millrace of plaintiff, and diverting from said millrace into and through a ditch to the ice plant of said defendant; that said water was at said date and has ever since been diverted from the channel of said river into a reservoir, and thence into said ice plant, and that plaintiff's predecessor, Andrew O. Lun, thereby became and was entitled to the use of said waters for said purpose.

"That in the year 1912 a proceeding was held before the board of control of the state of Oregon [renamed state water board, Laws 1913, chapter 82] for water district No. 2, entitled 'In the matter of the determination of the relative rights of the various claimants to the waters of North Powder river and its tributaries, a tributary of Powder river,' and in said proceeding various claims were made for the right to use the waters of said North Powder

river, and various contests filed, and in and by the order of said board of control [state water board] dated January 22, 1912, the said Andrew O. Lun was adjudged to be the owner of a water right of and to the waters of North Powder river for ice-making purposes, with the date of priority of the year 1886 to the extent of 2.5 second feet thereof, the same to be taken by diverting the same through the ditch and millrace of North Powder Milling & Mercantile Company, and from thence diverting same into and through a ditch to the ice plant of the said Andrew O. Lun.

"That thereafter appeals were prosecuted from said order of said board of control [state water board] to the circuit court of the state of Oregon for Union county, and from said circuit court to the Supreme Court of the state of Oregon, and that the final decree in said cause was thereafter entered, affirming the decision of the said board of control [state water board] with respect to the said water right of said Andrew O. Lun, and that the said Andrew O. Lun thereby became the owner of an adjudicated water right of 2.5 second feet of the waters of North Powder river for ice-making purposes diverted in the manner hereinbefore described.

"That thereafter defendant by conveyance from said Andrew O. Lun became the owner of said water right and of said ice plant and ice-making business, and defendant has ever since been and is now entitled to said adjudicated water right hereinbefore described.

"That plaintiff was a party to said proceeding before said board of control [state water board], and was and is bound by the said determination as finally settled by the Supreme Court of the state of Oregon, and that said decree entered in the circuit court of the state of Oregon for the county of Union, pursuant to the mandate of the Supreme Court of the state of Oregon, was and is a complete settlement of the matters now sought to be litigated by plaintiff, and was and is a bar to this suit."

The defendant further pleads that plaintiff and defendant are the joint owners of the ditch in question, and that defendant lawfully diverted its share of the water by direction and permission of the water master of the water district, and not otherwise.

The new matter in the answer was put in issue by appropriate denials. The case was heard, findings were made, and a decree was entered in accordance with plaintiff's contention, from which decree the defendant appeals.

Crawford & Eakin, of La Grande (A. O. Spencer and John F. Reilly, both of Portland, on the brief), for appellant.

Frank C. McColloch, of Baker (McColloch & McColloch, of Baker City, on the brief), for respondent.

MCBRIDE, J. (after stating the facts as above). [1] Without going into a detailed recital of the evidence, it suffices to say that it falls to show satisfactorily that defendant's predecessors in interest assisted in the construction or maintenance of the ditch in

question, or that there was ever any agreement between them, or defendant, and plaintiff's predecessors in interest, that defendant should use the ditch for the diversion of the 2.5 second feet of water which defendant's predecessor had appropriated for the purpose of filling his ice pond. The evidence does indicate that surplus water escaping through the spillway near the ice pond was habitually conducted by defendant into its pond for the purpose of filling it; and that when the mill was not running defendant sometimes, but not frequently, obstructed the ditch below the spillway, and secured thereby a large flow of the water in the ditch, to be diverted through the spillway into its ice pond; but this diversion was never made under a claim of right, and never rose above the dignity of a mere temporary license to use that method of filling the pond with water which was useless to the plaintiff. The evidence is not sufficiently strong to establish a claim of an easement in the ditch or a claim by adverse user. The circuit court so found, and we think the finding is justified. In fact, no easement, license, or adverse user is formally pleaded in the answer.

[2] The defendant claims joint ownership by reason of joint construction and maintenance, and an adjudicated right in the ditch by reason of the findings of the water board and the decree rendered by the circuit court in the adjudication of the water rights pertaining to the North Powder river. The decision of this question is rendered difficult, not only on account of the important legal points involved in the construction of certain provisions of the Water Code, but on account of the obscurity of the findings and decree of the court as to what rights were adjudicated to Lun, defendant's predecessor in interest. The intent of the findings or decree can perhaps be best understood by reading the same in the light of the claims made before the water board by the respective parties. Lun's statement of claim and his testimony in support thereof are as follows:

"Q. Do you claim a right to any of the waters of — or any of its tributaries? A. Yes.

"Q. State whether water is taken from the main stream, or a tributary thereof. If from a tributary, give its name. A. Water is taken from the main stream.

"Q. What is the nature of the use on which your claim is based? A. Irrigation, domestic, stock water, and for natural ice making.

"Q. Upon what is your claim based? A. Appropriation, diversion, and beneficial use, and riparian ownership.

"Q. State the date of initiation of the water right which you claim to own. A. 1870 by predecessor.

"Q. State the date when water was first used for irrigation or other beneficial purpose. A. 1870 by N. Tarter, a predecessor.

"Q. State the means of utilizing such water. If diverted through a ditch, give its name. A. By dams, ditches, laterals, and a ditch known as

Harlan ditch, from which ditch the southeast quarter of the northwest quarter of section 27, south of range 39 east of the Willamette meridian, has been irrigated from the year 1884 until present time, and I also irrigate from the millrace.

"Q. Are you the owner of said ditch or works? If not, state your proportionate interest therein. A. I own two-thirds of the Harlan ditch and all of a ditch 3 feet wide and 2 feet deep, taken out of the main stream in the southeast quarter of section 28, in the year 1891.

"Q. State the date of beginning construction. A. Ditch, 1870; ice pond, 1886."

Upon this there appears a finding by the board, which finding was adopted by the court, as follows:

"That in the year 1886, said defendant [claimant] Andrew Lun appropriated the waters of said North Powder river for ice-making purposes, by diverting the same into and through a ditch and thence into the millrace of the North Powder Milling & Mercantile Company, and diversion from said millrace into and through a ditch to the ice pond of said claimant; that said water is also diverted from the channel of said river into a reservoir and thence into said ice pond."

The decree of the circuit court in that adjudication reads thus:

"That said findings and modified order and determination of the said board of control [state water board] are here now made the findings and order of determination of the relative rights of all claimants of, in, and to the waters of North Powder river and its tributaries, and for the purpose of definitely fixing and settling the amount of water to which each of said users is entitled, with the date of priority, including the ditch through which the same is diverted and the lands upon which the same has been used, the tabulated statement made by the said board of control [state water board], and filed and submitted to the court as a part of their order of determination, and as modified by this court and the said Supreme Court is here now adopted and approved, and is made part of this decree as follows. * * *

The tabulation referred to, so far as it concerned Lun's right, is as follows:

"Name and P. O. address of appropriator, Andrew O. Lun.

"Date of rel. priority, 1886.

"Amt. Sec. Ft., 2.50.

"No. ac., None.

"Use, ice making Oct. 15 to Mar. 15.

"Name of ditch and interest, small ditches.

"Description of land or place of use, * * * ice ponds."

The finding, as will be noted, is entirely outside of anything in Lun's claim in respect to the manner of his obtaining water for his ice pond. In his claim it is asserted that he takes the water for his ice pond from the main stream. In stating his means of utilizing his appropriation he says that it is done

by "dams, ditches, laterals and a ditch known as the Harlan ditch," and adds, "and I also irrigate from the millrace." In answer concerning his ownership of ditches he states: "I own two-thirds of the Harlan ditch and all of a ditch 3 feet wide and 2 feet deep, taken out of the main stream in the southeast quarter of section twenty-eight in 1891." There is no ditch specified in Lun's claim or testimony taking water from the North Powder river and thence into the millrace of the North Powder Milling and Mercantile Company. How this finding came to be made, in view of the proof, is a mystery; and there is no finding as to Lun's right or interest in the millrace or the nature or extent of his use of it. His only claim is comprised in the one sentence, "I also irrigate from the millrace," a declaration not at variance with plaintiff's contention that Lun used the waste water from its spillway when it turned the same through the spillway in reducing the amount flowing to its mill, with the exception of temporary incursions mostly since the adjudication above mentioned, and to which the plaintiff is now objecting.

It will be noted also that in his claim and proof before the water board Lun did not assert any ownership in the mill company's ditch, and although he was asked to state his interest in the ditches by which he utilized his appropriation he expressly enumerated the Harlan ditch and another ditch not connected with the matters here in controversy. Nor is there in the decree itself any adjudication that defendant, Lun's successor, has any interest in the mill ditch or any right to its use for carrying his appropriation of water to the vicinity of its ice pond. We have merely a finding, not based upon claim or substantiated by testimony.

A finding, not followed by a decree to put it into effect, is like faith without works, "dead, being alone." The decree establishes only the order regarding Lun's priority to an appropriation of 2.5 second feet of water for ice-making purposes, the same to be used through small ditches. It does not pretend to settle the ownership of any particular ditch or right to use the same. Indeed, it may well be doubted whether the jurisdiction of the water board goes to the extent of authorizing it to settle controversies as to the ownership of ditches. *Oppenlander v. Ditch Co.*, 18 Colo. 142, 31 Pac. 854; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056; *Hallett v. Carpenter*, 37 Colo. 80, 86 Pac. 317. But, conceding that it has such jurisdiction, it has not so decreed in the instance now being considered, and it is unnecessary to follow that branch of the discussion.

Since no right to use plaintiff's ditch was adjudicated to defendant by the decree establishing the order of the water board, it follows that the water master had no right to permit defendant to take water from plaintiff's ditch at any time. Indeed, that

official testifies that he did not go beyond what would appear to be his legitimate authority, namely, to permit defendant to take its 2.5 second feet of water while the mill was closed down, without designating the means by which it might be conveyed. However, it is evident that his permission under the circumstances could reasonably be construed only as a permission to take it from plaintiff's ditch.

[3] The water master was not a necessary party to this suit. Counsel for defendant cite *Nault v. Palmer*, 96 Or. 538, 190 Pac. 346, as being favorable to their contention in this regard, but no question as to the ownership of ditches or the effect of an adjudication upon that subject was there involved. The decree in that case was definite and certain as to the amount of each appropriation and as to the channels through which the same should be applied, and the only contention was that the water master had permitted the defendants to use their appropriation in such a manner and at such a time as virtually to destroy the priority given plaintiff by the decree. Here the decree gave defendant no right to use the millrace as a conduit for the water required to fill its ice pond, and the water master was without authority to go beyond the decree and give defendant authority to enter upon a ditch owned exclusively by plaintiff, and interfere with plaintiff's appliances therein for the purpose of satisfying defendant's appropriation of the waters of the river. If done against plaintiff's wishes, it would be a trespass, not only on the part of the defendant, but also the officer who assumed to give it permission to invade plaintiff's ditch.

It is in evidence that before the completion of the new dam erected by plaintiff, defendant conducted some water from the river by means of a ditch built by Lun, making the diversion immediately below and near plaintiff's ditch, and that since that time a pumping plant for the purpose of filling the ice-pond by forcing water from plaintiff's tail-race has been installed and used by defendant. From aught that appears in the testimony, both of these methods are still available. It does not stand to reason that, if Lun and defendant were claiming that they had a legal right to use plaintiff's ditch for the purpose of filling their pond, they would ever have resorted to other and perhaps more expensive methods. If they had believed that they had the legal right to employ the inexpensive process of gravity to bring their water to the pond, they would not have installed an expensive pumping engine and gone to the additional expense of an engineer to run it. The claim of an easement in the ditch is evidently an afterthought, probably suggested by the inconsiderate findings which somehow crept into the record of the water board.

[4] It is contended that the nature of the injury complained of is so small and the alleged interferences so infrequent that they may be redressed by an action for damages, and that a resort to equity is unnecessary. It is true that while several interferences with plaintiff's appliances are in evidence, there is but one which is shown to have occasioned very serious injury, although in the nature of things each of them was calculated to produce some injury by interrupting the manufacture of flour and causing a deterioration of quality where it was manufactured under conditions produced by an insufficient supply of water. But the defendant claims the right to enter plaintiff's ditch and tamper with its appliances, not only at present but in the future, which in our view is a claim of right to commit continuing and successive trespasses on plaintiff's property. Under such circumstances it is hornbook law that the aid of equity may be invoked.

The decree of the circuit court is affirmed.

(109 Or. 254)

J. M. DOUGAN CO. v. VAN RIPER, Klamath County Treasurer, et al.

(Supreme Court of Oregon. June 8, 1921.)

1. Pleading \S 362(3)—Portions of answer in part material and in part immaterial secure from motion to strike.

Portions of an answer to a petition for mandamus which are either entirely material or in part material and in part immaterial are secure from attack made by motion to strike.

2. Counties \S 150—County which had exceeded debt limit could not contract for courthouse to be paid for out of general fund.

A county in debt in an amount exceeding the constitutional limit could not contract for construction of a courthouse to be paid for out of its general fund, and could legally contract only for the building of a courthouse to be paid for out of special funds.

3. Counties \S 161—Special levies made for courthouse on one block not available to contractor for courthouse on other block.

Special levies by a county for certain years, made expressly for a courthouse on one block, cannot be availed of by a contractor to construct another courthouse on another block as a special fund available for payment of his warrants, though all taxes collected for courthouse construction, including both, were commingled in one fund.

4. Counties \S 161—Courthouse contractor entitled to look to special fund as it legally is.

A contractor with a county to construct a courthouse is entitled to look to the special courthouse fund as it was and legally is, and is not bound by what might have but was not done in respect of such fund.

5. **Mandamus** \S 164(2)—Allegations of answer to courthouse contractor's petition for mandamus relative to levy for other courthouse immaterial to issues.

In mandamus proceedings by contractors with a county to construct a courthouse to compel the treasurer to pay a money decree previously obtained against the county on account of an unpaid warrant given the contractors, allegations in the answer as to the proposed levy for another new courthouse, begun, but not finished, were foreign to the issues.

6. **Statutes** \S 217—Phrase must be read in light of origin and history of statute.

A phrase used in a statute must be read in the light of the origin and history of the statute.

7. **Taxation** \S 527—Statute authorizing reception of county orders in payment of "county taxes" excluded state taxes.

When Or. L. \S 3406, providing county orders payable out of county revenue shall be received in payment of county taxes, etc., was originally enacted, the words "county taxes" were used to exclude at least state taxes and possibly other taxes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County Tax.]

8. **Taxation** \S 527—Statute authorizing reception of county orders in payment of taxes receives strict construction.

A rule of strict construction is applied to statutes like Or. L. \S 3406, providing that county orders payable out of county revenue shall be received in payment of county taxes without regard to priority of presentment, number, etc.

9. **Counties** \S 161—Reception of county warrants on other funds in payment of special courthouse taxes equivalent to borrowing from courthouse fund.

However Or. L. \S 3406, providing county orders payable out of county revenue shall be received in payment of county taxes, etc., may be construed, whenever a county warrant drawn on some other fund was presented and received in payment of special courthouse taxes, it was in the final analysis equivalent to borrowing from the courthouse fund moneys with which to pay the debt of the other fund, and the courthouse contractor, as creditor of the special courthouse fund, is entitled to have restored to such fund cash in an amount equal to the amount of warrants on other funds received in payment of special courthouse taxes since the date to which the contract for the courthouse referred.

10. **Judgment** \S 702—Taxpayers and sheriff need not pay in cash courthouse taxes paid by surrender and cancellation of county warrants pursuant to judgment.

Where, pursuant to judgment against him in a taxpayer's action, the sheriff of a county received in payment of special courthouse taxes certain county warrants and turned them over to the county treasurer and was given credit therefor, while the warrants were canceled and retired, the taxpayer, at instance of

the contractor for a new courthouse, need not again pay such taxes, and the sheriff need not pay, whether or not reception of the warrants in payment of taxes was proper.

11. **Counties** \S 161—Restoration of depleted special courthouse fund cannot be made by taking moneys from nondebtor special fund.

Restoration to a special courthouse fund depleted by the reception of county orders in payment of special courthouse taxes cannot be made by taking moneys from a nondebtor special fund, warrants of which have not been received in payment of the courthouse taxes.

12. **Taxation** \S 912—Courthouse contractor's claim against county subordinate to that of state for taxes.

If there are not enough moneys in the hands of a county treasurer to pay both state taxes and a contractor with the county to build a courthouse, the contractor's claim must be subordinated to that of the state.

In Banc. Petition for mandamus by the J. M. Dougan Company, a copartnership consisting of J. M. Dougan and others, against G. K. Van Riper, as county treasurer of Klamath county, and Klamath County, wherein defendants filed an amended answer, and petitioners filed motion to strike out certain portions of such answer, and demurrer to certain of the separate defenses pleaded, also a motion for judgment on the pleadings. Motion for judgment on the pleadings and demurrer to the answer overruled, and plaintiffs allowed 10 days within which to file reply.

This is a proceeding commenced in this court by J. M. Dougan and R. E. Chrisman, partners doing business as J. M. Dougan Company, and J. M. Dougan, for the purpose of compelling, by means of a writ of mandamus, Klamath county to pay a money decree previously obtained by the plaintiffs against the county.

On March 20, 1918, the plaintiffs whom we shall hereinafter designate as Dougan, entered into a contract with Klamath county for the construction of a courthouse on block 35 for \$131,775. At sometime after June 30, 1911, the county began the construction of a courthouse on block 10 in Hot Springs addition. A large sum of money, about \$145,915.12, was expended on the courthouse begun on lot 10. However, work ceased on that building in about the latter part of 1914 and it has not yet been completed. A recall election held on April 22, 1918, resulted in the recall of the county judge who with one of the county commissioners had signed the contract with Dougan. Immediately after the execution of the contract with the county, Dougan commenced the work of constructing the courthouse on block 35; and on April 17 and April 18, 1918, Dougan was paid \$41,548 on his contract. Dougan completed the

courthouse, and on February 27, 1919, the superintending architect issued a certificate showing that Dougan was entitled to receive the balance due on the contract as well as payment for extras, amounting in the aggregate, for the extras and the balance due on the original price, to \$92,674.95. Upon the refusal of the county to pay, Dougan brought a suit against Klamath county, the county judge and the two county commissioners, the county clerk, the county treasurer, John Koontz, Frank Ward, Charles Loomis, Marion Hanks, Frank H. McCornack, and E. E. McClaren; and in that suit Dougan prayed for a decree requiring the county to accept the courthouse constructed by Dougan and, out of the special courthouse fund, to pay Dougan's claim for \$92,674.95. That suit in equity, after a trial in the circuit court, was appealed to this court, and it was decided here on November 30, 1920, in an opinion written by Mr. Justice Johns. *J. M. Dougan Co. v. Klamath County*, 193 Pac. 645. This court ruled that Dougan was entitled to recover from the county the sum of \$92,674.95, the full amount of his claim, together with costs and disbursements which were taxed at \$1,093. A mandate was issued from this court on March 5, 1921, and on March 7, 1921, the circuit court for Klamath county entered a decree pursuant to the mandate.

In the alternative writ of mandamus in the instant proceeding it is stated that on March 23, 1921, Dougan duly satisfied the money decree of record in conformity with section 361, Or. L., and that Dougan received from the county clerk one warrant for \$1,093 drawn on the county's general fund and three warrants drawn on the special courthouse fund for the following several amounts: \$65,000, \$7,102.48, and \$20,572.47. On the same day, March 23, 1921, Dougan presented the warrants to G. K. Van Riper, the county treasurer, for payment. The county treasurer paid the warrant for \$65,000 and the one for \$7,102.48, making an aggregate payment of \$72,102.48. The county treasurer represented to Dougan that \$72,102.48 was all the cash on hand in the special courthouse fund under his control, and that for that reason he could not pay the warrant for \$20,572.47 drawn on the special courthouse fund. The treasurer also refused to pay the warrant for \$1,093 drawn on the general fund, claiming that he had no money in his hands which could be legally used in payment of this warrant.

After the refusal of the county treasurer to pay the two warrants mentioned, Dougan filed in this court a petition for a writ of mandamus, and, based on the petition, an alternative writ was issued out of this court under date of April 5, 1921. The defendants filed an amended answer. Dougan has filed not only a motion to strike out certain portions of the amended answer, but also a

demurrer to the second, third, and fourth separate defenses pleaded in the amended answer. Dougan has also filed a motion for a judgment on the pleadings.

Harrison Allen, of Portland, and A. E. Reames, of Medford, for plaintiffs.

Jay Bowerman, of Portland (Fred H. Mills, of Klamath Falls, on the brief), for defendants.

HARRIS, J. (after stating the facts as above). [1] The motion to strike assails twelve several portions of the amended answer. Although within some of these several twelve portions are lesser parts which might be properly stricken from the pleading, in each instance the lesser part is accompanied by and connected with other matter properly and rightfully pleaded. In other words, the twelve portions are either entirely material, and therefore rightfully pleaded, or in part material, and in part immaterial, and therefore secure from the attack made by the motion, because to allow the motion in any one of the twelve instances would be to strike out material matter. A detailed discussion of each of the items enumerated in the motion to strike would unduly extend this opinion; and hence we will not discuss the motion to strike further than to declare that, for the reason already expressed, it is overruled.

In the instant proceeding Dougan is asserting and the defendants are denying that the county treasurer has in his hands funds available for the payment of the two unpaid warrants held by Dougan; and consequently a clearer understanding of the pleadings may be had if we first give an account of the various levies made for courthouse construction. In the years 1909, 1910, and 1912 special levies were made for courthouse construction; but these levies were not limited to any particular site. Special levies for courthouse construction were made in 1913 and 1914; but each of these two levies was made expressly for use on the building which was in course of construction on block 10 in Hot Springs addition. In 1915, 1916, and 1917 special levies were made for courthouse construction without making express reference to any particular site. In 1918 a special levy was made for the express purpose of completing the courthouse on block 10 in Hot Springs addition.

[2] Klamath county was in debt in an amount exceeding the constitutional limit; and therefore, as stated by Mr. Justice Johns in the opinion in the main case, the county could not contract for the construction of a courthouse to be paid for out of its general fund and could legally contract only for the building of a courthouse to be paid for out of special funds. It was decided in the main case that the county court had lawful authority to make the Dougan contract, and that the contract was therefore legal; and that the

determination is now a finality. It was determined in the main case that the contract was made with reference to the special courthouse fund, and that both parties contemplated and understood that the contract price should be paid out of that special fund, and that it could not be paid out of the general fund; and that determination is likewise a finality. Before deciding the main case an attempt was made by this court to ascertain from the record the exact amount of money which on March 20, 1918, had been collected and properly belonged at that time to the special courthouse fund. The purpose of the attempt was to settle the controversy as to the amount of money which belonged to and should be in the special courthouse fund; but we found it impossible to calculate from the data found in the record in the main case the amount of money which then properly belonged to the special courthouse fund. In the opinion rendered in the main case it was said in substance that the Dougan contract was made with reference to the special courthouse fund as it existed and was in course of collection on March 20, 1918, and that the whole amount of the special courthouse fund, as defined in the opinion, should be applied upon the payment and pro tanto satisfaction of Dougan's claim. In the instant proceeding the parties do not agree in their interpretation of the language used in the opinion in the main case concerning the amount of the special courthouse fund. We did not intend to decide or even intimate that the amount of the courthouse fund available to Dougan was greater or less than the amount of the Dougan claim; for, as already explained, we were without sufficient data to calculate the amount of money properly belonging to the special courthouse fund. Nor did we intend to decide that the Dougan contract was made with reference to the seeming condition of the special courthouse fund on March 20, 1918, and not to the condition in which it ought to have been. It was, of course, decided that Dougan could look only to the special courthouse fund for payment; but, because the data appearing in the record was insufficient, it was our purpose to leave undecided the question as to the amount of money then belonging to the special courthouse fund. We did not intend to say that Dougan was obliged to look to the special courthouse fund as it actually existed on March 20, 1918, regardless of whether or not moneys had been previously diverted from that fund or charges had been improperly made against it. Dougan contends that the opinion in the main case decides not only that a fund existed, but also that there was in such existing fund a sum sufficient to meet the obligation of the contract. As previously explained, we did not determine the amount of money in the fund. The defendants contend that when we stated that the Dougan contract

was made with reference to the special courthouse fund as it was on March 20, 1918, we ruled that inquiry concerning collections must begin with, and cannot go back of, March 20, 1918. A large amount of county warrants were received prior to March 20, 1918, in payment of taxes levied for courthouse construction. We did not intend to decide that Dougan could not inquire into such payments so made prior to the date of the contract. When deciding the main case we intended to leave at large the question of the amount of the special courthouse fund; and hence the contentions made by the litigants in respect of the effect of the main case cannot be sustained.

[3] At this point in the discussion we should remind ourselves that in the opinion rendered in the main case we ruled that not all the special levies made for courthouse construction are available to Dougan. The special levies for the years 1913, 1914, and 1918 were made expressly for the building on block 10; and hence none of the moneys derived from these three levies are, as the situation now is, available to Dougan. Nearly all of the moneys collected upon the levies of 1909, 1910, and 1912 were used in payment of work done on the Hot Springs courthouse. However, it appears from the amended answer that a portion of the 1909, 1910, and 1912 levies became delinquent, and that during and between the years 1916 and 1919 comparatively small amounts were collected on the levies of 1909, 1910, and 1912. It also appears from the answer that during and between the years 1916 and 1919 taxes were collected on the levies of 1913 and 1914. It further appears that all taxes collected for courthouse construction were placed in one fund which is known as the special courthouse fund; and consequently taxes collected on the levies of 1913, 1914, and 1918 were commingled with the taxes collected on the levies of 1909, 1910, 1912, 1915, 1916, and 1917. Although on March 20, 1918, the special courthouse fund contained all unexpended taxes which had been collected for courthouse construction, Dougan was not entitled to look to the levies of 1913 and 1914 for payment. Nor is Dougan now entitled to look to the 1918 levy for payment of his warrants. In short, whatever moneys remained in the special courthouse fund on March 20, 1918, from the levies of 1909, 1910, and 1912 were available to Dougan; but any moneys derived from the levies of 1913 and 1914, although in the courthouse fund on March 20, 1918, and at that time commingled with the moneys raised from levies made prior to 1913 and with moneys derived from levies made subsequent to 1914, were not available to Dougan; nor are the taxes derived from the 1918 levy available to Dougan. In the final analysis Dougan can look only to moneys derived from the levies of 1909, 1910,

1912, 1915, 1916, and 1917. Since practically all of the taxes specially levied in 1909 and 1910 and 1912 were not only collected, but also expended, prior to the date of the execution of the Dougan contract and a comparatively inconsiderable portion of these levies was collected and was in the special courthouse fund on March 20, 1918, the levies of 1915, 1916, and 1917 naturally become the main subjects of this controversy.

It is averred in the writ that on March 20, 1918, after first deducting the disbursements previously made from the special courthouse fund, the sum of \$133,241.97 remained in the treasury from the levies of 1915, 1916, and 1917. This averment is denied by the defendants who say that the amount, including cash and taxes in course of collection, did not exceed \$124,755.46.

Dougan alleges that, although the levies of 1915, 1916, and 1917 produced a fund which had in it or should have had in it on March 20, 1918, after deducting all disbursements, more than \$133,241.97, the county impaired the fund in two respects: (1) By accepting general fund county warrants in payment of the special levies of 1915, 1916, and 1917; and (2) by illegally and wrongfully paying to others than the plaintiffs more than \$25,000 out of the special courthouse fund.

Dougan avers that, when collecting taxes in 1915, 1916, and 1917, the tax collector received general fund county warrants in payment for the special courthouse taxes as well as in payment for other taxes. General fund county warrants, Dougan says, aggregating more than \$45,000, were received from taxpayers in satisfaction of these special taxes. Dougan takes the position that it was unlawful to accept general fund county warrants in satisfaction of the special taxes levied for courthouse purposes, and that by taking such warrants the county in effect borrowed more than \$45,000 from the special courthouse fund and then loaned that sum of money to the general fund for the purpose of retiring warrants drawn upon and payable out of the general fund.

It is averred in general terms in the writ that the county has since March 20, 1918, illegally and wrongfully paid out of the special courthouse fund "to others than these plaintiffs" more than the sum of \$25,000 "no part of which was payable out of said special courthouse fund." The writ declares that this was equivalent to borrowing \$25,000 from the special courthouse fund, and that therefore, if this sum of \$25,000 and the additional sum of \$45,000, represented by retired general fund county warrants accepted in payment of special taxes, were restored to the special fund, then more than enough moneys would be available for the payment of Dougan's unpaid warrant drawn on the special courthouse fund. The writ

continues by averring that more than the sum of \$26,000 is in the general fund and is available for general county purposes and can be used for the purpose of paying the warrant drawn on the general fund for \$1,093 and can also be used for the purpose of restoring to the special courthouse fund enough money to pay the special fund warrant for \$20,572.47.

In brief, the writ averred that there was in the special courthouse fund on March 20, 1918, a sum amounting to more than \$133,241.97, after deducting all disbursements theretofore made; that a sum amounting to more than \$45,000 had been in effect borrowed from the special fund in order to pay and retire general fund county warrants; that the sum of \$25,000 was unlawfully paid out of the special courthouse fund and in effect was borrowed from it; that \$70,000 should be restored to the special courthouse fund; that there is in the county treasury more than \$26,000 belonging to the general fund and available for the purpose of paying Dougan's two unpaid warrants.

The defendants deny that the special courthouse fund contained on March 20, 1918, the sum of \$133,241.97. The defendants deny that \$25,000 or any moneys whatever were unlawfully paid out of the special courthouse fund. Although the defendants admit that there are moneys in the hands of the treasurer, they deny that any of these moneys can be used for paying the two warrants held by Dougan.

The amended answer contains four further and separate defenses. In the first separate defense it is alleged that on March 20, 1918, the cash on hand in the special courthouse fund derived from the special levies of 1915, 1916, and 1917 amounted to \$66,882.82, and the taxes in course of collection amounted to \$57,872.64, making an aggregate of \$124,755.46. The defendants say that of the taxes, amounting to \$57,872.64, which were on March 20, 1918, in course of collection, the sheriff collected up to March 22, 1921, the total sum of \$47,361.51 in cash and received county warrants to the extent of \$10,376.40. If to the sum of \$66,882.82 the cash on hand on March 20, 1918, is added the sum of \$47,361.51, cash collected subsequent to March 20, 1918, the total sum will be found to be \$114,244.33 derived from the levies of 1915, 1916, and 1917. There was also in the hands of the county treasurer on March 20, 1918, \$6,359.65 derived from the levies of 1909, 1910, 1912, 1913, and 1914; and hence, if this sum be added, the county treasurer is chargeable with cash totaling \$120,603.98. The defendants say that the whole sum of \$120,603.98 has been disbursed, and that no more cash remains in the courthouse fund.

The defendants refer to the employment of E. E. McClaren, Houghtaling, and Dougan

as architects, and say that under the terms of their employment the sum of \$10,047.87 became due and owing to the architects on March 20, 1918, and was payable out of the special courthouse fund, and that therefore the net amount from the levies of 1915, 1916, and 1917 available on March 20, 1918, was \$114,707.59. In other words, the defendants aver that \$131,755, the price named in the Dougan contract, and \$10,047.87, the amount due the architects, aggregated \$141,802.87 or \$17,047.41 more than the amount of the special courthouse fund on March 20, 1918, "including taxes collected and all that remained to be collected" from the levies of 1915, 1916, and 1917.

The defendants continue by repeating that from the levies of 1915, 1916, and 1917, the cash collected and the taxes which on March 20, 1918, were in course of collection aggregated \$124,755.46, and then they proceed to specify the items of disbursements charged against the special courthouse fund. In March and April, 1918, E. E. McClaren was paid \$3,559.12; Houghtaling and Dougan were paid \$3,394.38; in April, 1918, Dougan was paid \$41,548, and in March, 1921, \$65,000 and \$7,102.48, making a total of \$120,603.98. As previously explained, the cash which was on hand on March 20, 1918, plus the cash subsequently collected on levies for the year 1917 and on levies for years prior to 1917 aggregated \$120,603.98; and therefore, according to the answer, Dougan and the architects have been paid every dollar of that sum, and not a cent of cash now remains in the special courthouse fund.

The defendants proceed with their first separate defense by giving an account of the collections made under the levy of 1918 and the disbursements charged against those collections. As previously explained, the levy of 1918 was made expressly for the courthouse on block 10. The sheriff collected under this levy and turned over to the county treasurer the sum of \$21,008.53. The answer lists the items which have been charged against the levy of 1918, and it appears that disbursements amounting to \$10,310.39 have been made, leaving an unexpended balance of \$10,698.14. The defendants say that, because the levy of 1918 was made expressly for the Hot Springs courthouse on block 10, this unexpended amount of \$10,698.14 was on March 23, 1921, segregated from the special courthouse fund and placed in a fund "to be known as the Hot Springs courthouse fund." The defendants aver that the Hot Springs courthouse can be completed by an expenditure of \$75,000 or more, depending upon the finish, and that when so completed the building and land will be worth \$250,000; that by reason of inferior work, cheap construction, defective plumbing, absence of a heating plant, and failure to install electric light fixtures, it will cost "in excess of \$30,000 to complete" the court-

house on block 35 so as to render it suitable for occupancy; that the county court has determined to sell block 35 and the courthouse on it and to complete the courthouse on block 10; and that it is the purpose of the county court to expend on the Hot Springs courthouse the balance remaining from the 1918 levy.

The defendants next explain the facts, as understood by the defendants, concerning collection made in the years 1916, 1917, 1918, and 1919 on the levies of 1909, 1910, 1912, 1913, and 1914. During the four years period the sum of \$277.77 was collected on the 1909 levy, \$174.48 on the 1910 levy, and \$588.25 on the 1912 levy, making an aggregate of \$1,040.50. During the same four years period the sum of \$3,981.96 was collected on the 1913 levy, and \$4,746.22 on the levy of 1914, making an aggregate of \$8,728.18. The total amount collected on these five levies during that period of four years was \$9,768.68. The defendants say that from these "collections warrants have been paid to an amount so that the balance remaining in said special courthouse fund from the levies made in 1914" and prior thereto is approximately \$6,359.65, and these moneys the defendants say have been paid to Dougan.

The defendants further explain in the first separate defense that beginning with the year 1913 the sheriff, who is the tax collector, permitted taxpayers to turn in county warrants in payment of taxes, including taxes levied for courthouse construction. According to the amended answer, "a full statement of reception of county warrants in payment of taxes specially levied for courthouse construction is as follows": 1913, \$31,528.61; 1914, \$45,856.40; 1915, \$36,862.27; 1916, \$20,235.03; 1917, \$14,510.23; 1918, \$10,377.77—aggregating \$159,370.31. The defendants say that a portion of the warrants received during 1918 was received prior to March 20, 1918, but that the defendants have not had an opportunity to make an exact computation of the amount so received prior to March 20, 1918.

[4] The defendants say that the county, when making levies in 1913 and in subsequent years, took into consideration the fact that county warrants would be presented and received in payment of taxes, including special courthouse levies, and that when making the levies the county calculated the amount of cash desired and also calculated the amount of the county warrants which would probably be received in payment of special courthouse taxes, and then made a levy sufficiently large to produce such calculated amount of desired cash. In other words the defendants say that the special courthouse fund actually received as much cash as it would have received if the levies had been originally made on the theory that the special courthouse taxes were payable in cash only, for the reason that, if the taxes

had been deemed to be payable in cash only, the levies would have been lower. This phase of the answer is immaterial. Dougan is entitled to look to the special courthouse fund as it was and as it legally is and is not bound by what might have been but was not done.

In the second separate defense it is stated that in December, 1920, the county would have levied a tax sufficient to raise \$50,000 to be used towards completing the Hot Springs courthouse, and that the county would also have levied a tax sufficient to produce \$14,000 for miscellaneous purposes, including the payment of the expenses of the main suit, but that in a suit brought by Frank Ward in the circuit court for Klamath county the county court was enjoined from levying such proposed taxes. The defendants say that, if the county had been permitted to levy the tax of \$14,000, it would have had funds available for the payment of the warrant for \$1,093. In its second separate defense it is charged by the defendants that Frank Ward and his associates and the plaintiffs have conspired together to compel the county court to accept and use the courthouse on block 35 and abandon the courthouse on block 10, and that the suit as brought by Frank Ward "is a part of the general scheme engaged in between" Ward "and his associates and the plaintiffs herein."

[6] Obviously all that is said about the proposed levy for the Hot Springs courthouse is entirely foreign to the present inquiry. No part of the second separate defense is material except possibly that portion which refers to the proposal of the county to levy a tax for miscellaneous purposes; and if this minor portion is material at all it is material only to the extent that it relates to the question of whether or not the county treasurer has without just excuse refused to pay the warrant for \$1,093. It is stated in the writ that the county treasurer has without just excuse refused to pay, and based upon that allegation it is claimed a fine should be imposed upon the county treasurer. The whole of this separate defense is immaterial so far as it relates to the other unpaid warrant. Although it may be doubtful whether the second separate defense is material or competent for any purpose, we will for the present at least resolve the doubt in favor of the pleading in order that every phase of the controversy possible of determination in this litigation may be presented.

The third separate defense is an extended statement concerning the moneys in the hands of the county treasurer. In this separate defense it is averred that in compliance with the budget law estimates were made of the amounts needed for different purposes for the year 1921, and that the levy was made substantially in conformity with the budget. The items which made up

the budget are enumerated in the amended answer; and among the enumerated items appear items for various special funds. This separate defense contains an itemized statement of the moneys belonging to the respective funds. The defendants explain that, when the budget was made up, it was estimated that the sum of \$90,000 would be sufficient to pay the state tax, and that the levy was made accordingly. It is also explained in the amended answer that the amount of the state tax actually charged against Klamath county was \$127,313.50, or \$37,313.50 more than was estimated when the budget and levy were made. It would not serve any useful purpose to give a detail statement of the third separate defense, but it is sufficient merely to say that this defense admits that the county treasurer has in his hands money in excess of \$26,000, but, borrowing the language used by the defendants in their brief, the defendants affirmatively say that "the funds in the hands of said treasurer are made up of various special funds specially levied and collected for other purposes than general county purposes, and that none of said money is available for the payment of plaintiffs."

The county treasurer's books show that among the different funds is one known as the general and state tax fund. This fund at present amounts to \$41,682, and it includes: (1) Taxes collected for payment of states taxes of Klamath county; and (2) taxes collected on special levies made in 1917, 1918, and 1919 for the redemption of outstanding warrants. The defendants say that if Dougan's warrants are paid out of the general and state tax fund, there will not be sufficient moneys with which to pay the first half of the taxes due from Klamath county.

The fourth separate defense explains why the sheriff received county warrants in payment of taxes levied for courthouse construction. In 1913 the taxes levied upon property owned by B. S. Grigsby aggregated \$16.10. On February 13, 1913, Grigsby tendered to C. C. Lowe, the sheriff and tax collector, \$7.98 in cash and four county warrants of the face value of \$7.60 and demanded a receipt in full for his taxes, claiming that the cash and warrants, and a rebate of 3 per cent. at that time allowed by statute, entitled him to a receipt in full. The sheriff refused to accept the warrants. Upon the petition of Grigsby an alternative writ of mandamus was issued out of the circuit court requiring Lowe to accept the warrants or show cause for not doing so. Grigsby contended that the sheriff was legally bound to accept the county warrants in payment "of the following items of the levy made by the county court": State, general, salary, circuit court, jail, county poor, and courthouse purposes. The levy for courthouse purposes, it will be remembered, was a special one made for the construction of the

courthouse on block 10. The litigation begun by Grigsby terminated on March 3, 1913, by the issuance of a peremptory writ of mandamus commanding the sheriff to receive the county warrants tendered by Grigsby.

No appeal was taken from the judgment rendered in the circuit court; nor was the judgment afterwards modified or otherwise disturbed by the circuit court. Acting upon the authority of the judgment rendered in *Grigsby v. Lowe*, the successive sheriffs of Klamath county during the years 1913 to 1918, inclusive, permitted taxpayers "to turn in county warrants in payment of taxes levied for all county purposes as well as taxes levied for the purpose of paying the state tax due from Klamath county, and during said years taxes levied for the purpose of new courthouse construction or for the purpose of completing the courthouse on block 10, Hot Springs addition, were not paid in money to the extent of \$159,370.31, but in lieu thereof the tax collector of said county * * * received county warrants issued for various purposes in payment of taxes to said amount which had been levied for the purpose of new courthouse construction or the completion of the Hot Springs courthouse."

By prosecuting this proceeding the plaintiffs are attempting to enforce payment of the money decree rendered in the main case. The only fund out of which payment can be enforced is the special courthouse fund; and the only moneys which may be treated as having belonged to that fund are the taxes collected, or in process of collection, on the levies of 1909, 1910, 1912, 1915, 1916, and 1917. The litigants disagree upon the amount which was in the special courthouse fund on March 20, 1918. Dougan says that from the levies of 1915, 1916, and 1917 there remained \$133,241.97. The defendants say that the amount, including cash on hand and moneys in course of collection, was \$124,755.46.

Dougan says that, if the special courthouse fund contained the moneys which rightfully belong to it, and therefore ought now to be in it, there would be in such fund more than enough moneys to satisfy the two unpaid warrants held by Dougan. The plaintiffs say that the special courthouse fund has been depleted in two particulars: (1) By paying claims not lawfully chargeable against this fund; and (2) by receiving county warrants in payment of special courthouse taxes. The defendants deny that any moneys were wrongfully paid out of the special courthouse fund. The defendants admit that county warrants were received in payment of taxes levied for courthouse purposes; and consequently this phase of the controversy becomes important. The importance of the questions arising out of the county warrants is emphasized when we remind ourselves that the defendants claim that the county treasurer has paid to the architects and Dou-

gan every dollar of money that was in the special courthouse fund on March 20, 1918, and also every dollar which since that time has been collected on the levies of 1916, 1917, and 1918. Moreover, the defendants claim that among the moneys in the special courthouse fund on October 20, 1918, were moneys collected on the levies of 1913 and 1914, and that, although not entitled to these moneys, Dougan and the architects received them. In brief, the defendants say that Dougan and the architects have received \$120,603.98, and that this sum included all the moneys which have been collected on the 1915, 1916, and 1917 levies as well as all the moneys which remained from collections made during the four years period from 1916 to 1919, inclusive, on the levies of 1909, 1910, 1912, 1913, and 1914. If the sum of \$120,603.98, and this includes the moneys derived from the levies of 1913 and 1914, is taken as the maximum amount belonging to the special courthouse fund, then the fund has been exhausted and Dougan must fail in this proceeding. But Dougan says and the defendants admit that county warrants were received in payment of special taxes levied for courthouse construction. Dougan also says, while the defendants deny, that the acceptance of such warrants was unlawful.

The arguments of counsel, as made in their briefs, have been based upon the assumption that the warrants received in payment of special taxes levied for courthouse construction were warrants drawn upon the general fund. It is stated, however, by the defendants that some of the warrants were not general fund warrants; and from this statement we infer that some of the warrants were drawn on special funds other than the special courthouse fund. In our view it makes no difference whether the warrants so received were warrants drawn on the general fund or on some special fund other than the special courthouse fund.

The propriety of the acceptance of county warrants depends upon the construction to be given to section 3406, Or. L., which reads as follows:

"County orders shall be redeemed by the treasurer according to the priority of the time of presentment; provided, that such orders, payable out of the county revenue, shall be received in payment of county taxes without any regard to priority of presentment or number; but such treasurer shall not pay any balance thereon over and above such tax, when there are outstanding orders unpaid for want of funds."

[6-8] So far as it is material here, this section declares that county orders, payable out of the county revenue, shall be received in payment of county taxes. At first blush it might appear from a reading of section 3406, Or. L., standing alone, that a special tax levied for courthouse construction is a county tax, and that all county warrants whether

drawn upon a special fund created by taxes or upon the general fund created by taxes are warrants payable out of the county revenue, and therefore receivable in payment of taxes levied for courthouse construction. Section 3406, Or. L., has a history, and the words "county taxes" as used in this section must be read in the light of the origin and history of the section. This statutory provision was originally enacted in 1854, and, aside from the addition of the word "that" after the word "provided," the section has continued without change to be the statutory law of this jurisdiction since the date of its enactment in 1854. This section must be read and construed in the light of other sections enacted with it by the same Legislative Assembly in 1854. See Dady's Code, pp. 929 and 900 et seq. The words "county taxes" are found in many different sections of the Code (Olson's Compilation), but they do not necessarily mean the same thing in all sections. It has been ruled, for example, that a tax levied and collected for the purpose of paying the "state taxes" is nevertheless in fact "a county tax levied for county purposes" (Northup v. Hoyt, 31 Or. 524, 530, 49 Pac. 754, 756); and yet, when section 3406, Or. L., is read in the light of other statutory provisions enacted with it in 1854, and when read in the light of statutory provisions now existing, it becomes manifest that the words "county taxes" as used in section 3406 have a limited meaning and do not include taxes levied for the purpose of paying the county's obligation to the state, notwithstanding such taxes may be said to be, as declared in Northup v. Hoyt, in fact "a county tax levied for county purposes." The words "state taxes" are now found in different sections of our Code (Olson's Compilation), and ever since 1854 they have appeared in statutes dealing with the subject of taxes; and the fact that the words "state taxes" have so appeared makes it plain that when section 3406 was originally enacted the words "county taxes" were used with the purpose of excluding at least "state taxes" and possibly other taxes. We do not find it necessary at this time to decide whether the language of section 3406 is further limited so as to exclude a special tax levied for courthouse construction; and hence we prefer to postpone the decision of that question until the case is finally presented on all the facts, and we are afforded the benefit of such study and thought as counsel may give to the question. However, it is proper to say that there are strong reasons in support of the argument that the statute does not permit the use of county warrants in payment of special taxes, and that, speaking broadly, county warrants can be used to pay only such taxes as are levied for what Mr. Justice McBride has referred to as "the common and constantly recurring expenditures which go to make up

the usual county budget." Obenchain v. Daggett, 68 Or. 374, 330, 187 Pac. 212, 214. We cannot agree with the contention of Dougan that the opinion rendered in Obenchain v. Daggett construed section 3406, Or. L., or must be treated as having directly overruled the conclusion reached by the circuit court in Grigsby v. Lowe. The facts in one case were different from those in the other. Both cases did not deal with the same statute. The reasoning employed in Obenchain v. Daggett may furnish substantial ground for the contention that special taxes cannot be paid with county warrants, but the opinion rendered in the case goes no further than to declare that cash cannot be taken from a fund of special taxes and used to pay warrants drawn on some other fund. A rule of strict construction is applied to statutes like section 3406. 27 A. & E. Ency. L. (2d Ed.) 752.

[9] Throughout this discussion it must be remembered that the taxes levied for courthouse construction were special taxes, and when collected were available for no purpose except the special purpose for which they were levied and collected. Whenever a county warrant drawn upon some other fund was presented and received in payment of the special courthouse taxes, it was in the final analysis equivalent to borrowing from the courthouse fund moneys with which to pay the debt of the other fund; and therefore the lending fund stands in the position of a creditor of the borrowing fund, and the latter stands in the position of a debtor, and hence must pay its debt by restoring to the lending fund the amount borrowed from it. It makes no difference whether we construe section 3406, Or. L., to mean that county warrants are receivable in payment of both special and ordinary taxes, or whether we construe the section to mean that only ordinary taxes are payable in county warrants; for in either event the borrowing fund must at some time and by some means pay its debt to the lending fund.

The warrants which were received in payment of taxes may be divided into two classes: (1) Those received prior to March 20, 1918; and (2) those received subsequent to that date. Obviously Dougan as a creditor of the special courthouse fund is entitled to have restored to that fund cash in an amount equal to the amount of the warrants received since March 20, 1918. We do not now decide whether Dougan is entitled to insist upon a restoration being made on account of warrants received prior to March 20, 1918; for we prefer to postpone decision of that question until such time as we are advised of all the material facts and are given the benefit of the views of counsel for the respective litigants.

[10] In view of the judgment rendered in Grigsby v. Lowe and the uninterrupted ob-

servance of that judgment by Lowe and his successors in office, the acceptance of warrants must be treated as payment, even though it be ultimately decided that section 3406 does not entitle a taxpayer to pay a special tax with a county warrant. Lowe was the sheriff of Klamath county, and the matter litigated involved in a large measure a public question. Lowe and his successors in office turned over to the treasurer the warrants received by them and were given credit for the amount of such warrants. The warrants were canceled and retired, and the indebtedness of the county was satisfied and lessened to the extent of the amount of the warrants so retired. To say in these circumstances that the sheriffs should account in cash to the county or to Dougan to the extent of the warrants received in payment of the special courthouse taxes, or to say that the special courthouse taxes were not paid, and that the taxpayers still owe taxes to the extent of the warrants surrendered by them, would be a travesty upon right and justice. We cannot agree with any contention that the taxpayers must again pay or that the sheriffs must pay; for the taxpayers have already paid by surrendering the county warrants, and the sheriffs have duly accounted for the payments by delivering the warrants to the treasurer, and the county has been paid by the reception and cancellation of these warrants. See *Rose v. Port of Portland*, 82 Or. 541, 574, 162 Pac. 498; 23 Cyc. 1270; 15 R. O. L. 1030.

Thus far we have decided that restoration must be made to the special courthouse fund to the extent that warrants have been accepted since March 20, 1918, although we have left open and undecided the question as to whether or not restoration must be made on account of warrants received before that date. We next inquire whether there are now in the hands of the county treasurer moneys with which restoration can be lawfully made. Dougan says that the treasurer has moneys which are available; but defendants say that, although the treasurer has moneys, none of such moneys are available to Dougan. According to the answer, most, if not all, of these moneys are special taxes which were levied and collected for special purposes, and therefore the defendants say such taxes cannot be diverted to some other purpose. Moreover, the defendants claim that, if Dougan is paid out of the moneys now in the hands of the county treasurer, not enough will remain to pay the "state taxes."

[11] Ordinarily moneys collected on a levy made for a special purpose, for example, the construction of a courthouse, cannot be diverted from such special purpose; and therefore, if all the moneys in the hands of the county treasurer belong to special funds, as such funds are defined in *Obenchain v. Dag-*

gett, 68 Or. 374, 137 Pac. 212, it is certain that moneys cannot be taken from any special fund which has not been a borrower of the special courthouse fund, and it is a debatable question as to whether restoration can be made to the special courthouse fund by taking from another special fund moneys collected on a special levy, made for a different and particular purpose, even though the latter special fund is a debtor of the special courthouse fund. In other words, it is certain that restoration cannot be made by taking moneys from a nondebtor special fund, and it is a debatable question whether restoration can be made by taking moneys from a debtor special fund if that fund contains no moneys except moneys collected on a levy made for a definite and particular purpose. The question as to whether moneys raised on a special levy and now in a debtor special fund can be taken from that fund and transferred to the special courthouse fund is a question which we leave open until the cause is presented on the merits.

[12] If there are not enough moneys in the hands of the treasurer to pay both the "state taxes" and Dougan, then Dougan's claim must be subordinated to that of the state; for the obligation of the county to the state must be first satisfied.

From what we have thus far stated it follows that the demurrer must be overruled. The amended answer, by denials and by affirmative allegations, presents questions of fact which must be determined before a judgment can be rendered for Dougan or for the defendants; and hence the motion for a judgment on the pleadings must be denied.

If it should develop that there are now in the treasury no moneys available with which to make restoration to the special courthouse fund, then it may be that Dougan's only remedy, if he has any, is to compel the levy of special taxes for the purpose of restoring moneys which in effect were borrowed from the special courthouse fund.

The county court properly segregated from the special courthouse fund the moneys which were collected on the levy of 1918; for that levy was made expressly for the Hot Springs courthouse.

If the county should conclude not to proceed further with the Hot Springs courthouse and decides to dispose of its interest in that property, and if any moneys collected on the 1918 levy should remain unexpended, then it is possible that such unexpended moneys would of necessity be transferred to the general fund and become available to Dougan. If, however, the county court lawfully proceeds with the construction of the Hot Springs courthouse, then the moneys collected on the 1918 levy can be used for no purpose except the construction of the Hot Springs courthouse. It is admitted that the Hot Springs courthouse is not completed. It is alleged in

the amended answer that the courthouse on block 35 cannot be made suitable for occupancy without the expenditure of approximately \$30,000, and that the county court has determined to sell block 35 and complete the building on block 10. While we wish to make it plain that we do not attempt to say or even intimate whether either one of the two buildings must, on account of acts done by the county court, be deemed *the* courthouse of the county, and while the law clearly gives to the county court the power to provide a courthouse building when necessary, yet it is proper in this connection to suggest that county courts are not empowered to build courthouses by wholesale; and consequently, if it cannot be said that, because of what has been already done, one and not the other of the two buildings is *the* courthouse of the county, then the legally constituted authorities must decide upon the selection of one building as *the* courthouse for Klamath county; for any taxpayer can prevent the maintenance of two buildings as courthouses when one is amply sufficient for courthouse purposes. If one building must be deemed now to be *the* courthouse or is selected as *the* courthouse, it may nevertheless be lawful and proper to expend moneys on the other with the view of disposing of it to advantage; but of course that question is not now presented for decision.

The motion to strike, the motion for a judgment on the pleadings, and the demurrer to the amended answer are overruled; and the plaintiffs are allowed 10 days within which to file a reply.

BENSON, J., not sitting.

(101 Or. 463)

ALLEN et al. v. LEVENS, County Judge, et al.*
(Supreme Court of Oregon. June 21, 1921.)

Elections § 305(4)—Appeal in election contest must be taken within time fixed by contest statute.

The right of appeal in a proceeding to contest an election depends upon the election contest statute, and must be taken in conformity therewith, and not under the statute relating to appeals in civil cases, and therefore a notice of appeal in an election contest case, which was not taken within 30 days after the entry of judgment, as required by Or. L. § 7334, gives the appellate court no jurisdiction.

In Banc.

Appeal from Circuit Court, Harney County; Dalton Biggs, Judge.

Proceedings by R. B. Allen and others against H. C. Levens, County Judge, and others, constituting the county court of Harney County, Or., to contest an election held

to determine whether an irrigation district should be established. From a judgment dismissing the proceeding after general demurrer to the petition was sustained, contestants appeal. Affirmed.

The plaintiffs brought this proceeding to contest an election held in Harney county to determine whether or not an irrigation district to be known as "Harney Basin Irrigation District No. 1" should be established. The circuit court sustained a general demurrer to their petition, and, as the plaintiffs refused to plead further, dismissed the proceeding. The judgment was entered October 14, 1920. The notice of appeal to this court was given December 4, 1920.

Edwin Snow, of Boise, Idaho, and C. B. McConnell, of Burns (Hawley & Hawley and Fremont Wood, all of Boise, Idaho, on the brief), for appellants.

R. M. Duncan, of Vale (Geo. S. Sizemore, Dist. Atty., of Burns, and McCulloch & Duncan on the brief), for respondents.

BURNETT, C. J. Treating of the contest of election in such cases, it is laid down in section 7334, Or. L.:

"The court having jurisdiction shall speedily try such contests, and determine, upon the hearing, whether the election was fairly conducted and in substantial compliance with the requirements of this act, and enter its judgment accordingly. Such contest must be brought within sixty days after the canvass of the vote and declaration of the result. The right of appeal is hereby given to either party to the record within thirty days after the entry of judgment."

It is said in *Tazwell v. Davis*, 64 Or. 325, 341, 130 Pac. 400, 405, by Mr. Justice Bean, delivering judgment:

"The right of appeal from the decisions of inferior courts in election cases does not exist, unless it has been conferred by some constitutional or statutory provision. City of Portland v. Nottingham, 58 Or. 1, 113 Pac. 28. Statutes authorizing appeals to be taken from judgments rendered in civil cases do not apply to contested election proceedings under the statute, as they are not civil cases"—citing authorities.

We may derive from this language the doctrine that the statute under which this contest is conducted is complete within itself, and that, being sui generis, the party desiring to avail himself of an appeal under its terms must comply therewith, and serve his notice of appeal within 30 days after the entry of the judgment. If this is not done strictly in compliance with the statute, this court has no jurisdiction to decide the cause on the issues presented in the record below.

In *Livesley v. Landon*, 69 Or. 275, 138 Pac. 853, Mr. Justice Ramsey distinguished between the ordinary suit or action and proceedings under an election contest, holding that the latter are peculiar to themselves,

and are governed exclusively by the statute creating them, and finally decided that there is no right of appeal except when it is conferred by statute. The doctrine is thus succinctly stated in *Donart v. Stewart*, 63 Or. 76, 82, 126 Pac. 608:

"An appeal is a right conferred by statute upon superior courts to review the final determinations of inferior judicial tribunals, when causes tried therein are properly brought up for that purpose, and in the transfer of such proceedings the mode prescribed in the enactment granting the privilege is the measure of the bestowed power in the exercise of which neither court nor party can restrict, enlarge, or diminish the authority given."

At the very threshold of our investigation we are halted by this principle, and any treatment we should give the questions suggested by the pleadings would be mere obiter dictum, having no force or effect, because we have no jurisdiction. The consequence is that the judgment of the court below cannot be disturbed. It must stand as affirmed.

BROWN, J., took no part in the consideration of this case.

(102 Or. 80)

C. R. SHAW WHOLESALE CO. v. HACKBARTH.

(Supreme Court of Oregon. June 21, 1921.)

1. Contracts \S 335(1) — Party suing for breach must generally allege performance or readiness to perform.

As a general rule a complaint to recover damages for breach of contract must allege full performance or readiness and ability to perform on the part of plaintiff.

2. Pleadings \S 433(3, 5)—Defective complaint after findings by trial court construed in favor of the pleader; complaint not stating cause of action not cured by judgment.

Under the statute giving the findings of the court in an action at law tried without a jury the force and effect of a verdict, and the rule that where defendant answers after his demurrer has been overruled the complaint is to be construed most strictly in favor of the pleader, a complaint will be sustained after a judgment for plaintiff on the findings of the court if it contains a defective statement of a cause of action, but not if it fails to state a cause of action.

3. Sales \S 411—Buyer need not offer to perform if contract repudiated by seller before time for delivery.

Where the seller definitely repudiated his contract for the sale of lumber before the time for delivery of the lumber, a complaint by the buyer to recover damages for the breach of the contract need not allege that the buyer offered to perform, or that he was ready and able to perform.

4. Pleading \S 433(7) — Complaint stating cause of action for breach of contract to sell lumber held sufficient after judgment.

A complaint abounding in generalities, but which did allege that defendant agreed to sell plaintiff a stated quantity of lumber of the kinds described for the price agreed upon by the parties, delivery to be made on the stated date, set forth a cause of action so that the complaint is sufficient after judgment for plaintiff though the cause of action may have been defectively stated.

5. Contracts \S 10(4)—Contract for purchase of stated quantity of lumber of three different grades is mutual.

A contract whereby the plaintiff agreed to buy and the defendant agreed to sell a stated quantity of lumber of a specific grade or better at agreed prices for three different grades is mutual and enforceable by the plaintiff.

6. Contracts \S 22(3)—Mailing acceptance of terms of offer closes contract.

Where a definite proposition made by letter is accepted by a letter, the acceptance being within a reasonable time and before knowledge of any retraction of the offer, the contract is closed by mailing the acceptance duly addressed.

7. Sales \S 32—Letters exchanged held to have established contract for sale of lumber.

A letter by defendant offering to sell to plaintiff lumber as specified in a former letter, which was definitely accepted by plaintiff, who forwarded an order for the lumber, shows a definite agreement for the sale of the lumber on which the minds of the parties met.

8. Sales \S 89—Proposal to change terms of contract as agreed on does not affect contract.

A subsequent letter by the seller attempting to open new negotiations respecting the terms of the contract previously agreed on which was not acceded to by the buyer cannot affect the contract of sale, and such letter was properly excluded from evidence in an action for the breach of the contract agreed upon.

9. Appeal and error \S 1011(1)—Trial court's findings on conflicting evidence are conclusive.

The findings by the trial court that the agreement shown by letters was subsequently orally modified by the contracting parties, which was based on direct conflict in the testimony, is conclusive on appeal since the Supreme Court cannot deal with the weight of the evidence.

10. Sales \S 1(4)—Contract for stated quantity of lumber of three grades held sufficiently definite.

A contract by a dealer to purchase a stated quantity of lumber from a manufacturer, the grade, number 3 or better, at stated prices for each grade, would be performed by the delivery of any specified grade as the lumber came from the log, and is sufficiently definite to sustain an action for damages for the breach of the contract where the evidence showed the market price of each grade of the lumber had advanced by the same amount.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by O. R. Shaw Wholesale Company against A. Hackbarth, doing business as the Lapwai Lumber Company, for damages for breach of a contract. Judgment for plaintiff, after trial by the court without a jury, and defendant appeals. Affirmed.

Plaintiff brings this action for damages for breach of a contract. The cause was tried by the court without a jury. From a judgment in favor of plaintiff, defendant appeals.

The material facts alleged are as follows: Plaintiff is an Idaho corporation. Defendant, A. Hackbarth, is doing business as the Lapwai Lumber Company, in Wallowa county, Or. About April 4, 1917, the defendant—"contracted and agreed with the plaintiff to sell plaintiff 250,000 feet 8/4 shop lumber, surfaced two sides, of grades No. 8 and better at the quoted and agreed price of \$26 for No. 3, \$32 for No. 2, and \$40 for No. 1; delivery to be made by September 15, 1917, on freight rate of 52 cents."

The defendant neglected and refused to deliver any part of the lumber at any time. At the time agreed upon for the delivery of the lumber, and since, the market value thereof per 1,000 feet was as follows: \$33.50 for No. 8; \$40.50 for No. 2; and \$50.50 for No. 1. Plaintiff was damaged in the sum of \$2,000. A general demurrer was filed to the complaint, which, upon being overruled, defendant answered, admitting the corporate character of plaintiff, and the name in which defendant was doing business, and denied the other allegations of the complaint. For a further answer the defendant pleaded that no note or memorandum in writing expressing the consideration of the alleged contract was ever subscribed by the defendant; that no part of the lumber alleged to have been contracted for was ever received or accepted by plaintiff, or paid for by plaintiff; and that the alleged contract is void within the statute of frauds. The reply put in issue the new matter of the answer. Upon the trial plaintiff sought to prove, over the objections and exceptions of counsel for defendant, the contract by the production of correspondence between the plaintiff and defendant, the gist of which, so far as material is as follows:

Plaintiff's Exhibit A.

"Enterprise, Oregon, Mar. 21, 1917.

"O. R. Shaw Wholesale Co., Boise, Ida.—Gentlemen: * * * I haven't any lumber to offer at the present time and regarding the shop lumber I would be willing to contract providing I got the price I am holding it for this on a 52¢ rate

5/4 and 6/4 #1, \$38.00.
" #2, \$30.00.
" " #3, \$26.00.
\$2.00 more for 8/4 #1 and 2 S2S.

"I expect this will look rather high to you, but according to what we have to pay for manufacturing our material this is only a fair price, and will stay with these prices until I see that conditions changes and I prefer selling 8/4 as I have contracted several hundred thousand of the 5/4 and 6/4 to be shipped Aug. & Sept.
"Yours truly,
Lapwai Lumber Co."

Plaintiff's answer reads:

Plaintiff's Exhibit B.

"March 22d, 1917.

"Lapwai Lumber Co., Enterprise, Oregon—Gentlemen: Your favor of March 21st at hand regarding shop. We would be willing to take the shop lumber at the prices you quote, although you are above the market on No. 2. However we would take our chances on the No. 2. Now you let us know just how many thousand feet of each thickness 5/4, 6/4 and 8/4 you will let us have at the prices you name, and we will send you a blanket order for such amounts. In accepting such an order, it would have to be definitely understood that you would furnish the full amounts of each thickness, because we will make contracts with our customers to furnish exactly those amounts, and we will have to depend upon you furnishing the stock you agreed to furnish.

"Just at this time there is an extreme scarcity of shop lumber, especially No. 2, but we are inclined to think that as the mills come on the market with the new cut, prices will more likely decline, and we think that you are making a good trade by selling outright at the prices you are now making. However we want to keep in touch with you and get started by making this deal on the shop. A little later on, if you are willing, we would consider some kind of a proposition of a million feet of yard stock, common and finish. * * *

"Yours very truly,

"O. R. Shaw Wholesale Co."

The next letter reads thus:

Plaintiff's Exhibit C.

"Enterprise, Oregon, April 8, 1917.

"O. R. Shaw Wholesale Co., Boise, Idaho—Gentlemen: Your letter of the 22d received. I would be willing to let you have about 250 thousand 8/4 #3 and better shop at the prices I quoted you, but in case they should change the freight rates, different arrangements would have to be made at such time. This is not all the shop I will have, but it is all I want to contract at the present time.

"Yours truly,

"Lapwai Lumber Company,

"By A. Hackbarth."

Plaintiff then wrote defendant as follows:

Plaintiff's Exhibit D.

"April 4th, 1917.

"Lapwai Lumber Co., Enterprise, Oregon—Gentlemen: Your favor of the 3d at hand, and are inclosing order for the 250 M. ft. of 8/4 shop. This we expect to ship all to one customer, and will send you shipping instructions in ample time.

"The writer is planning a trip to Eastern

Oregon and will undoubtedly see you the latter part of next week.

"Yours truly,
"C. R. Shaw Wholesale Co."

Mr. J. G. Doerr, an officer of the plaintiff company, testified in explanation of the order inclosed, thus:

"This is a substantial copy of that order. The original sheet of that order, of course, has printed matter on, which the duplicate copy does not have—does not carry. It shows who it is addressed to."

A copy of the order follows:

Plaintiff's Exhibit E.

"No. 5180.

"April 4th, 7.

"C. R. Shaw Wholesale Co.

"To follow by Sept. 15th, 52¢ rate, reg. 250,000 8/4 #3 shop and better S2S

#3 @ 26.00

#2 @ 32.00

#1 @ 40.00

"Lapwai Lumber Co., Enterprise, Oregon.

"As per your letters March 21st and April 3d."

In about a month and a half defendant wrote plaintiff this letter:

Plaintiff's Exhibit F.

"Enterprise, Oregon, May 16, 1917.

"C. R. Shaw Wholesale Co., Boise, Idaho—Gentlemen: I think I will have to raise the price on the shop mentioned, which was about 250,000 feet, on account of the war, as I have to raise my contractors about 1/2 and it is no more than right to do the same with you and if you have it contracted tell the other fellow the same as we were not figuring on war at that time.

"Yours truly, Lapwai Lumber Co.

"By A. Hackbarth."

Defendant also wrote a letter which reads thus:

Plaintiff's Exhibit G.

"Enterprise, Oregon, June 4, 1917.

"C. R. Shaw Wholesale Co., Boise, Ida.—Gentlemen: Your letter of the 29th received regarding the 2x12 at \$14. I don't want any of it at that price as I can get considerable more money of course, I suppose you are figuring this on a shop deal but I want you to strictly understand that I am doing with you the same as I do with my contractors. I had a contract let for my logging, and also he was under bonds to furnish the logs, but I did not see that he could do it for the price he was getting after everything got as high as it is now, and looks as if it may go higher. I have raised my contractor 1/2 and all other expenses are nearly 1/2 so don't mention the shop any more as I will not furnish it at all unless it is down at that price whenever it is dry. Whenever it is dry I want the market price whether it is high or low and if it is too low I will not sell any and will not manufacture any more. I am willing for you to handle my stock but do not want

to sell for any such price as you offered me for the 2-inch.

"Yours truly, Lapwai Lumber Co.

"By A. Hackbarth."

(We underscore the material part.)

Plaintiff wrote defendant thus:

Plaintiff's Exhibit H.

"October 13, 1917.

"Lapwai Lumber Co., Enterprise, Oregon—Gentlemen: Please ship as soon as possible to ourselves at Oshkosh, Wisconsin, the 250 M. ft. of 2" shop on our order No. 5180 of April 4th. Please route shipments OWR&N OSL UP CM & STP., and advise about how fast our cars will go forward.

"Yours truly,

"C. R. Shaw Wholesale Co."

Plaintiff also wrote the following letter:

Plaintiff's Exhibit I.

"December 6th, 1917.

"Lapwai Lumber Co., Enterprise, Oregon—Gentlemen: Please let us know when you intend to ship the 2" shop to Oshkosh on our order No. 5180 of April 4th, and oblige

"Yours truly,

"C. R. Shaw Wholesale Co."

Defendant offered in evidence the following letter:

Defendant's Exhibit 1.

"Enterprise, Oregon, Aug. 2, 1917.

"C. R. Shaw Wholesale Co., Boise, Ida.—Gentlemen: Your letter of the 28th received regarding the O select. We do not want to sell this big amount to one person as I think we will run out of clears and cannot fill our yard orders. Regarding the shop lumber it seems to me that you are figuring on pretty low prices, but as you are always mentioning the 250,000 which you are figuring you would be entitled to, but as conditions have changed as I told you before I don't think you would be entitled to it, and in this way I will let you have 200,000 8/4 1, 2 and 3 shop at the price which you mentioned July 30th, allowing you \$1 commission, but I must know within the next week as I am figuring on going East, and if you cannot handle it perhaps I can dispose of it on my trip.

"Yours truly, Lapwai Lumber Co.,

"By A. Hackbarth."

Plaintiff's counsel objected to this letter, as not pertaining to the transaction contained in the letters forming the contract, which objection was sustained and exceptions duly saved by counsel for defendant. Plaintiff further introduced testimony tending to show that about September 15, 1917, the prices of lumber were about \$8 per 1,000 higher than they were in April when the contract was made; and that the letters "reg." on the heading of the order, Exhibit E, are an abbreviation of the word "regular," and signify that the lumber would be paid for 60 days after delivery. Mr. J. H. Mimnaugh, a witness for plaintiff, testified to the effect that the market price of shop lumber 8/4 on July

27, 1917, was No. 3, \$30; No. 2, \$38; No. 1, \$48; and that the prices advanced right along until the latter part of September, when it was at least \$1 per thousand more than in July.

At the close of plaintiff's case defendant moved the court for a nonsuit, for the reason that plaintiff had not proved a contract for the sale and delivery of the lumber in question. The trial court found for the plaintiff, among other things, finding that at the time for the delivery of lumber as agreed upon it was worth on the market \$5 per 1,000 more than the contract price, and rendered judgment in favor of plaintiff in the sum of \$1,250.

Thos. M. Dill, of Enterprise, for appellant.
J. A. Burleigh, of Enterprise, for respondent.

BEAN, J. (after stating the facts as above). [1] The first contention of defendant is that the complaint does not state facts sufficient to constitute a cause of action; that there is no allegation in the complaint of any performance by plaintiff, and no consideration for the agreement alleged. Defendant cites *Davis Lumber Co. v. Coats Lumber Co.*, 85 Or. 542, 167 Pac. 507, and other like cases, in support of the proposition that—

"Before the plaintiff can put the defendant in default and claim damages for the breach of a contract, he must allege full performance or readiness and ability to perform on his part."

[2] This general rule is not questioned. Under our statute, in an action at law tried by the court without the intervention of a jury, the findings of the court have the force and effect of a verdict of a jury. Therefore the question in regard to the complaint is whether or not it is sufficient after verdict. The rule in this state is that, where a defendant answers after his demurrer to the complaint has been overruled, the complaint is to be construed most strictly in favor of the pleader. It will be sustained where it contains a defective statement of a cause of action, but not where it fails to state a cause of action. *Olds v. Cary*, 13 Or. 362, 10 Pac. 789; *Oregon & C. R. R. Co. v. Jackson County*, 38 Or. 589, 597, 64 Pac. 307, 65 Pac. 369; *West v. Eley*, 39 Or. 461, 65 Pac. 798; *Shultz v. Shively*, 72 Or. 450, 453, 143 Pac. 1115. Therefore a different question arises in the present case than where the sufficiency of a complaint is determined upon a demurrer.

[3] As to the first criticism of the complaint, it will be noticed that defendant would not recognize the contract, and absolutely refused to ship the lumber before the time for performance of the agreement arrived. The rule in England is well settled that—

"The positive and absolute refusal by one party to carry out the contract is in itself an immediate complete breach of it on his part,

and gives immediate right of action." 1 Beach on Mod. Law of Contracts, § 409.

The only extent to which the doctrine is carried in the state of New York is that a renunciation of a contract before the time for performance arrives will dispense with the performance of conditions precedent or concurrent, or the offer to perform. Massachusetts courts adopt the doctrine that a renunciation may give cause for treating the contract as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering to perform in order to enforce his rights. Illinois follows the Massachusetts rule, but holds the promisee need not wait until the day of performance before making new arrangements. It seems the federal courts, and those of Iowa, West Virginia, and Michigan, go to the full extent of the English cases, and allow an action to be brought at once upon renunciation. 1 Beach on Mod. Law of Contracts, §§ 409-412.

It is well settled in this state that, in the case of an executory contract for the sale of property, where the seller, before the date for performance, repudiates the contract and refuses to deliver the goods or to be bound by the contract, and had not signified a change of mind in regard thereto, it is not incumbent upon the buyer in an action for a breach of the contract to tender a delivery of the goods on the date specified in the contract. The law does not require the doing of a vain or useless act. Therefore it was not necessary for plaintiff to plead performance of the contract or readiness to perform, after defendant, by his letters of May 16 and June 4, 1917, had repudiated the contract and refused to ship the lumber as agreed. *Gullaume v. K. S. D. Land Co.*, 48 Or. 400, 86 Pac. 883, 88 Pac. 586; *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515; *West v. Wash. Ry. Co.*, 49 Or. 436, 90 Pac. 666; *Merrill v. Hexter*, 52 Or. 138, 94 Pac. 972, 96 Pac. 865.

[4,5] While the complaint abounds in glittering generalities, a careful study of the averments as to the contract, made by the parties discloses that defendant agreed with plaintiff to sell plaintiff 250,000 feet of lumber of the kind described. The parties also agreed upon the price to be paid therefor by plaintiff. It was stipulated by them that delivery of the lumber should be made by September 15, 1917. It may be that the cause of action is defectively stated. We think that a cause of action is set forth in the complaint, and that the pleading is good after verdict. The contract as alleged was mutual. See *Ward v. McKinley*, 97 Or. 45, 191 Pac. 322.

[6] The motion for a nonsuit challenges the sufficiency of the contract of sale, as shown by the letters introduced in evidence. The prevailing rule is, as to sales or contracts to sell by letter, that, if a definite proposition is made and accepted by letter, the acceptance

being within a reasonable time, and before knowledge of any retraction, the contract is closed by mailing the acceptance duly addressed. Benjamin on Sales, American Notes, p. 72.

[7, 8] The defendant, by his letter of April 31, 1917, offered to sell the lumber to plaintiff as specified definitely in his former letter of March 21, 1917. Plaintiff accepted the offer, and forwarded an order for the 250,000 feet of lumber on April 4, 1917. It appears from the entire correspondence that there was a bona fide intent on both sides to come to a definite agreement for the sale of the lumber. The minds of the parties met, as the evidence tended to show. The contract was binding upon, and could have been enforced by, either party. The subsequent letter of defendant, attempting to open new negotiations not acceded to by plaintiff, cannot affect the contract, and the offer of such letter in evidence was properly refused by the trial court. *Williams v. Burdick*, 63 Or. 41, 125 Pac. 844, 128 Pac. 603; 13 C. J. p. 298, § 114.

[9] It is claimed by defendant that the agreement as shown by the letters in evidence was modified by a subsequent oral arrangement between the contracting parties. There was a direct conflict in the testimony upon this point. The trial court found plaintiff's version of the matter was correct. This question is set at rest by the substitute for a verdict. We have no duty to deal with the weight of the evidence.

[10] Some claim is made by defendant that the agreement was not definite as to the quantity of each grade, or number, of lumber. The defendant was manufacturing lumber, and, under the contract as finally agreed upon, any of the grades of lumber mentioned as it came from the log would fill the requirement. The testimony on the part of plaintiff tended to show that the price of each grade advanced \$5 per 1,000 during the period between the time of the agreement and the date for delivery. The trial court allowed only the amount the price had increased. Hence the claim does not embrace a material matter. The testimony was sufficient to pass the case to a jury, and the motion for a nonsuit was correctly overruled.

We find no error in the record. The judgment of the trial court is affirmed.

BENSON, J., not sitting.

(101 Or. 322)

MASTERS et al. v. BIDLER et al.

(Supreme Court of Oregon. June 21, 1921.)

1. Appeal and error \S 1002—On conflicting evidence, jury must decide what was said by one sought to be held liable for goods intended for another.

Where the evidence conflicted as to whether defendant's promise to pay for goods sold

his son-in-law applied only to one or more automobiles, or whether it also included automobile accessories, it was the province of the jury to decide what language was used.

2. Frauds, statute of \S 23(3)—Verbal collateral promise to pay for goods sold another cannot be enforced.

A collateral promise to pay for goods furnished another cannot be enforced, when not in writing.

3. Frauds, statute of \S 26(1)—Promise is original, and not collateral, when goods sold on promisor's credit exclusively.

If a sale of goods to be furnished to defendant's son-in-law was on defendant's credit exclusively, and not on the son-in-law's credit, defendant's promise to pay therefor was original, and not collateral.

4. Frauds, statute of \S 23(3)—Original promise to pay for goods to be delivered to another not a promise to answer for another's debt.

If one, by an original and not by a collateral promise, agrees to pay for goods to be delivered to another, then he and not the person to whom the goods are to be delivered is liable, though the goods were actually received by the other, and the promise to pay is not a promise to answer for another's debt.

5. Frauds, statute of \S 23(3)—Promise is collateral, and must be in writing, when another is liable for the debt.

Where one promises to pay for goods to be furnished to another, if the one to whom the goods are to be furnished is liable for the debt, then the promise is a promise to answer for the debt of another, and must be in writing, under Or. L. § 808.

6. Frauds, statute of \S 159—When language ambiguous, it is question for jury whether promise original or collateral.

If the language used by the parties was ambiguous, it becomes a question of fact, for the jury to determine under appropriate instructions, whether a promise to pay for goods to be furnished to another was original or collateral, and the jury should be informed what would constitute an original promise and what a collateral promise.

7. Frauds, statute of \S 26(2)—Promise is collateral, if any credit given to third party.

A promise to pay for goods to be furnished to a third party is collateral, and must be in writing, if any credit be given to the third party, though the seller principally depends for payment on the promisor.

8. Frauds, statute of \S 23(3)—Whether promise original or collateral is question of intention.

In determining whether a promise to pay for goods to be furnished to a third party is original or collateral, the intention of the parties must govern; but the intention should be ascertained from the words used in making the promise, the situation of the parties, and all the circumstances concerning the transaction.

B. Frauds, statute of §158(4)—Evidence held to show credit given to third party, and hence that promise was collateral.

In an action on defendant's alleged promise to pay for automobiles and accessories to be furnished his son-in-law, evidence held to show that credit was in part given to the son-in-law, and hence that defendant's promise was collateral, and not original.

In Banc.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by C. W. Masters and another, partners doing business as Masters & Perkins, against M. L. Bidler and W. J. Townley. From a judgment for plaintiffs, defendant Townley appeals. Reversed and remanded, with directions.

The plaintiffs, C. W. Masters and T. B. Perkins, are partners, and since August 1, 1916, they have been doing business under the firm name of Masters & Perkins. The partners conducted a garage in the city of Baker, and, in addition to making repairs on cars, they sold automobiles and automobile accessories. M. L. Bidler was a plumber, and conducted a plumbing shop in the city of Union. W. J. Townley, who is Bidler's father-in-law, also resided in Union. On and between October 2, 1916, and September 27, 1917, the plaintiffs delivered to Bidler automobile accessories. The plaintiffs brought this action against Bidler and Townley, alleging that, "at the special instance and request of said defendants, plaintiffs sold and delivered to said defendants automobile supplies" of the reasonable value of \$687.25, of which no part has been paid, except \$394.93, leaving the sum of \$292.32 due and owing. The defendants filed separate answers. Bidler "assumed liability for anything not paid for, but alleged that the bill was fully paid." Townley denied liability. There was a verdict and a judgment against both Bidler and Townley for the amount demanded by the plaintiffs. Townley alone appealed.

T. H. Crawford, of La Grande (Crawford & Eakin, of La Grande, on the brief), for appellant.

O. B. Mount, of Baker City, for respondents.

HARRIS, J. (after stating the facts as above). It is conceded that none of the supplies involved in this action were delivered to Townley, but that all of them were delivered to Bidler. The plaintiffs claim that Townley agreed, before the supplies were delivered, to pay for whatever articles the plaintiffs might let Bidler have. Townley asserts that he agreed to be responsible for one automobile, and that his agreement included nothing more. Whatever promise was made

by Townley was made in the course of a conversation which occurred in the plaintiffs' garage in Baker in September, 1916. We must therefore examine the evidence relating to that conversation.

Townley happened to be in Baker with his automobile in September, 1916, and while there he drove to the plaintiffs' garage, where he met Perkins, with whom he was acquainted, although they had not met for some time. On this occasion Townley and Perkins engaged in conversation, and it is conceded that no third person was present or heard what was said by the parties. In the course of the conversation Townley learned that the plaintiffs sold Studebaker and Dodge cars. Although Bidler was engaged in the plumbing business, he had devoted some of his time to selling automobiles as a "side issue." It seems that Bidler had a prospective purchaser, and Townley was aware of that fact. Townley claims that he asked Perkins if the plaintiffs would let Bidler take an automobile and sell it on commission; and Townley also says that he told Perkins that, if the plaintiffs would permit Bidler to take a car under such an arrangement, he would be responsible to the plaintiffs for the return of the car or its value. It is conceded that Perkins was not at that time acquainted with Bidler, although Bidler says he was in Baker when Townley talked with Perkins. There is no evidence that Bidler met Perkins, or that either one saw the other on that day.

A few days after the conversation between Townley and Perkins the plaintiffs delivered an automobile to Bidler, who sold it and promptly accounted to the plaintiffs for the price, less a commission of 12½ per cent., which he retained. Subsequently Bidler received four other cars from the plaintiffs, and he likewise accounted for the price of each of these four cars, retaining the commission as in the case of the first car. When getting one or more of these cars, Bidler also received some automobile "parts"; but it is conceded that Bidler paid for these "parts." If the promise made by Townley was limited to the automobiles, or only to one automobile, then the plaintiffs cannot recover in this action. While there is no controversy about the automobiles sold by Bidler, nevertheless the evidence concerning them is properly to be considered, because it tends to explain the conversation about the alleged liability of Townley for the accessories.

According to the testimony of Bidler:

"The next spring, early in the spring, I changed the plumbing shop over slightly, so I would have some room to do some repair work on cars, and at that time I went to Baker City, needing some extras and some tires," and made arrangements with the plaintiffs for "tires and so on."

When using the words "next spring," Bidler meant the spring next after the conversation between Perkins and Townley. Perkins testified that—

"In the fall or the next spring (meaning the fall or spring next after the conversation between Townley and Perkins) Mr. Bidler came up and wanted to put in a stock of tires and tubes and such stuff as that, and we told him, 'All right.'"

It is thus far made to appear that Townley and Perkins had a conversation in September, 1916, and this is the only conversation attributed to Townley before the sale of the accessories which are now in dispute.

Bidler did not take part in the conversation between Townley and Perkins; nor did he hear what was said. Presumably Townley told Bidler that the latter could get a car from the plaintiffs; for shortly after the conversation mentioned Bidler went to Baker and got a car. However, the evidence fails to disclose whether any conversation occurred between either of the plaintiffs and Bidler when the latter received the cars mentioned. The only conversation attributed to Bidler before the sale of the accessories, and with reference to them, is the conversation to which Perkins referred when he testified that Bidler "came up and wanted to put in a stock" of accessories. These facts must not be forgotten when we come to consider the question as to whether or not the promise made by Townley is within or without the statute of frauds.

We now direct attention to the evidence upon which the plaintiffs base their claim that Townley's promise was broad enough to include liability for both automobiles and accessories. Referring to the conversation which occurred in September, 1916, Perkins testified as follows:

"He [Townley] said he had a son-in-law that was quite a mechanic, and he was running a plumbing establishment in Union, and he wanted to know if we could let him take some cars and sell them there for us, * * * and so I told him he could sell in our territory; we would let him have cars, and he could sell them in our territory. And so, in a short time after that, Mr. Bidler came up and got a car, and sold it, and I think he sold either four or five, and we allowed him his commission of 10 per cent., and in a short time, let's see, I think it was in, it was in the fall or the next spring, why he came up and wanted to—Mr. Bidler came up and wanted to—put in a stock of tires and tubes and such stuff, as that, and we told him, 'All right.' Mr. Townley told me, when he was there, that anything we done with Mr. Bidler would be all right; to let him have what he wanted, and so we did.

"Q. And what did he say about setting his son-in-law up in business? A. Why he said he was inclined to be mechanical, and he would like to set him up in business, and have him doing business; that he could run the automobile business with his plumbing establishment

that he had there; that there wasn't quite enough, wasn't much to do in the plumbing, and he could handle both together.

"Q. On whose credit did you extend—did you deliver these goods? A. Well, on Mr. Townley's, principally, because we didn't know Mr. Bidler; only just what Mr. Townley had told us is all.

"Q. How long after you had this conversation with Mr. Townley was it that Mr. Bidler came up and started to take merchandise away from your place of business? A. Well, it wasn't a great while."

The record shows that Perkins also testified as follows:

"Q. Mr. Townley at that time told you that, if you would let Mr. Bidler have the car for sale—on a commission basis, was it? A. Yes.

"Q. That he would be responsible for either the return of the car, if it was not sold, in proper condition, or the payment of the price of the car, if it was sold? A. Well, he just said this way—anything we would let him have would be all right; he would make it all right.

"Q. Now, his talk at that time was about the car, wasn't it? A. Yes.

"Q. He wanted you to let him have a car? A. Yes.

"Q. And if you would let him have a car, he would be responsible for it? A. I suppose so; that is the way we understood it.

"Q. That is what he said? A. Yes. * * *

"Q. But you were talking about Mr. Bidler getting a car, weren't you; that is what you were talking about? A. Why, no; we wasn't exactly. Of course he was figuring on starting Mr. Bidler up, as I understand, in the business there in connection with his plumbing, and of course he would have to have parts.

"Q. Well, I am not talking about that; he didn't say he would have to have parts? A. No; he didn't come right out and say 'parts.'"

[1] We have given all the evidence offered in behalf of plaintiffs from which it could be argued that the promise made by Townley embraced automobile accessories, as well as one or more automobiles. The defendants introduced evidence which contradicted the version given by Perkins. Townley claimed that the conversation related to whether or not the plaintiffs would be willing to let Bidler have one automobile to sell on commission, and that nothing else was mentioned. If Townley correctly remembered the conversation, then the promise made by him did not include automobile accessories, and he could not be held liable in this action. In this situation it became the province of the jury to decide whether Townley used the language which he said he used, or whether he employed the language attributed to him by Perkins. We shall therefore assume, for the purposes of this discussion, that the jury found that Townley used all the language which Perkins attributed to him.

Whenever the plaintiffs received an order from Bidler for accessories, they entered the items of the order on a pad containing sheets for carbon copies of penciled entries, and

from this pad the plaintiffs took the original penciled sheet, and sent it with the accessories to Bidler, and retained the carbon copy. Although these carbon memorandums were offered in evidence, we do not find them with the files. However, we understand from the record that they were entered under the name of Bidler. Perkins testified that from these carbon memorandums entries were posted in a loose-leaf ledger, and that ordinarily this was done within a day after filling the orders. There is in the files a purported copy of a part of a loose-leaf ledger, and from this copy we learn that the entries were posted in the ledger under the heading of "J. W. Townley, by M. L. Bidler." Perkins testified that each month the plaintiffs sent a statement of the account to Bidler. In addition to sending statements to Bidler, Perkins said: "Every time I would meet him, I would talk it over" with Bidler, and he never denied the bill. Perkins also testified:

"We just sent statements to Mr. Bidler for quite a while, and we didn't get any returns from it, * * * and finally we sent Mr. Townley a statement direct."

We understand from the record that the statement sent to Townley was first mailed in the fall of 1917, and probably after the delivery of all the accessories involved in this litigation

[2-5] The next inquiry is: Was the promise made by Townley original or collateral? There was no writing; hence, if the promise was collateral, it cannot be enforced. If the promise made by Townley was merely to answer for the debt of Bidler, then his promise was collateral. If the sales were made upon Townley's credit exclusively, and not upon Bidler's credit, then Townley's promise was original, and not collateral. If A. by an original and not by a collateral promise agrees to pay B. for goods to be delivered to C., then A. alone and not C. is liable; and the fact that the goods were actually received by one who is not liable makes no difference, for in contemplation of the law the sale is made to A. and not to C.; and in that event the promise made by A. is not a promise to answer for another. But if C. is liable for the debt, then the promise of A. is a promise to answer for another, and in that event the promise of A. must be in writing. If C. is liable to B. for the goods, then the promise of A. is in aid of and collateral to the promise, express or implied, of C., and hence is "void" under section 808, Or. L.

[6, 7] If it can be said that the language used by parties was ambiguous, it then becomes a question of fact for the jury, to determine under appropriate instructions, whether the promise was original or collateral. Bryant v. Panter, 91 Or. 686, 690, 178 Pac. 989. But the jury should be informed as to what will constitute an original prom-

ise and as to what will constitute a collateral promise. Note in 9 Ann. Cas. 895. The determination of whether a promise is an original promise, as distinguished from a collateral one, depends upon whether credit is extended solely to the promisor, or whether the indebtedness is also primarily the indebtedness of the third person to whom the consideration moves. If credit is given solely to the promisor, it is an original promise and not within the statute of frauds; but if any credit be given to the third party the defendant's promise is collateral and must be in writing. Nor does it matter upon which of the two parties the plaintiff principally depends for payment, so long as the third party is at all liable to him to do the same thing which the defendant has engaged to do. Mackey v. Smith, 21 Or. 598, 603, 28 Pac. 974; Allen v. Leavens, 28 Or. 164, 168, 37 Pac. 488, 26 L. R. A. 620, 46 Am. St. Rep. 613; Slade v. Utah Construction Co., 57 Or. 525, 534, 112 Pac. 433; Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912B, 218; Johnson v. Bank, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893; Swaboda v. Throgmorton-Bruce Co., 88 Ark. 592, 115 S. W. 380; Welch v. Marvin, 36 Mich. 59; note in 126 Am. St. Rep. 492; note in 15 L. R. A. (N. S.) 215, 226; 20 Cyc. 180; 23 R. C. L. 1271; 25 R. C. L. 487, 489; 12 Ency. of Ev. 9; Browne on Statute of Frauds (5th Ed.) § 197.

[8] The intention of the parties must govern; but the intention should be ascertained from the words used in making the promise, the situation of the parties, and all the circumstances concerning the transaction. 25 R. C. L. 489; Mackey v. Smith, 21 Or. 598, 602, 28 Pac. 974.

[9] If we now apply the test established by the law, the conclusion must be that the promise of Townley was a collateral one. It will be recalled that, when asked, "On whose credit did you extend—did you deliver these goods?" Perkins answered, "Well, on Mr. Townley's principally, because we didn't know Mr. Bidler; only just what Mr. Townley had told us, is all." Thus it appears from the testimony of Perkins himself that credit was given to Townley "principally"; and this is only another way of saying that credit was in part given to Bidler. Moreover, the plaintiffs subsequently treated Bidler as a debtor, and finally they sued Bidler, together with Townley, on the theory that Bidler was also liable, and they prosecuted that theory to a judgment against Bidler. No witness testified that deliveries were made solely on the credit of Townley; but, on the contrary, it affirmatively appears from the testimony of Perkins himself that some credit was given to Bidler, although the supplies were furnished "principally" on the credit of Townley. This fact, shown by the evidence offered by plaintiffs, prevents them

from recovering from Townley. At the trial Townley requested, but was denied, an instruction directing the jury to return a verdict for him. Townley was entitled to a directed verdict. *Welch v. Marvin*, 36 Mich. 59; *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898, 82 L. R. A. (N. S.) 598, Ann. Cas. 1912B, 218.

If the defendants had jointly promised to pay for the supplies, Townley would be liable; but there is not a scintilla of evidence showing that they jointly promised to pay the plaintiffs. *Bryant v. Panter*, 91 Or. 686, 178 Pac. 989; *Welch v. Marvin*, 36 Mich. 59; 13 C. J. 573.

The judgment is reversed as to Townley, and the cause is remanded, with directions to enter a judgment in favor of him.

BENSON, J., not sitting.

(101 Or. 30)

SEAWEARD v. DE ARMOND et al.

(Supreme Court of Oregon. June 21, 1921.)

1. Judgment \Leftrightarrow 888—Evidence held insufficient to show agreement to release on part payment.

Evidence held insufficient to show that defendant, who had a judgment against a decedent and others, agreed to release the judgment on payment of his pro rata share of the assets of the estate, or to accept such payment in full satisfaction, or that his attorneys ever made such promise or agreement.

2. Compositions with creditors \Leftrightarrow 2—Defined.

A "composition with creditors" is an agreement between an insolvent or embarrassed debtor and his creditors, whereby the creditors, in consideration of an immediate payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole debt.

3. Compositions with creditors \Leftrightarrow 27—Burden of proof on party alleging.

Plaintiff, suing to enjoin a sale under execution on the ground that the judgment creditor was a party to a composition between another judgment debtor's administrator and creditors, had the burden of proving a composition agreement on the part of the judgment creditor.

4. Attorney and client \Leftrightarrow 101(2)—Attorney without authority to compromise judgment in his hands for collection.

An attorney, to whom a judgment was intrusted for collection, had no power, in the absence of express authority, to bind his client by a compromise of the amount due on the judgment, and if he agreed to accept less than was actually due in full satisfaction, the client was at liberty to ignore the compromise and collect the full amount.

5. Vendor and purchaser \Leftrightarrow 231(16)—Purchaser charged with notice of docketed judgment against vendor.

Under Or. L. § 205, providing that from the date of docketing a judgment it shall be a lien on all the real property of the defendant, one purchasing land from one of the defendants in a properly docketed judgment was charged with notice of the judgment.

En Banc.

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Suit by J. H. Seaweed against R. H. De Armond and another. From a decree dismissing the suit, plaintiff appeals. Affirmed.

This is a suit to enjoin the sale of real property, instituted by J. H. Seaweed, plaintiff and appellant, against R. H. De Armond, and H. Lee Noe, as Sheriff of Malheur county, Or., defendants and respondents. Seaweed had acquired fee-simple title to the land from one C. E. Belding. As plaintiff in an action at law, R. H. De Armond, defendant herein, on January 31, 1918, obtained a judgment for the sum of \$569.35, with interest thereon at the rate of 10 per cent. from January 1, 1912, and for \$78 costs and attorneys' fees, against S. F. Taylor, as administrator of the estate of A. A. Brown, deceased, C. E. Belding, and others. This judgment was, on January 31, 1918, duly docketed in the judgment lien docket in the circuit court of the state of Oregon for Malheur county, in the office of the county clerk, and thereby became a valid and subsisting lien on the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of sec. 8, Twp. 18 S., R. 47 E. W. M., the real property of C. E. Belding, which was thereafter by him conveyed to Seaweed, the plaintiff in this suit. On June 17, 1919, De Armond caused execution to issue, and placed it in the hands of H. Lee Noe, sheriff of said county, with instructions to levy upon the land belonging to plaintiff and described above. Thereafter, on the application of Seaweed, plaintiff in this suit, the court issued a temporary injunction, restraining the sale of the said premises. The complaint alleges, among other things:

"That on or about the 20th day of September, 1918, all of the creditors of the estate of A. A. Brown, deceased, including defendant R. H. De Armond, made and entered into an agreement whereby each of the said creditors agreed with S. F. Taylor, the administrator of the estate of A. A. Brown, deceased, to accept a pro rata share of the assets of the estate of the said deceased in full satisfaction of their demands, and of the demands of each of said creditors.

"That then and there W. H. Brooke, as attorney for the said R. H. De Armond, made, executed, and delivered a receipt in writing in words and figures as follows:

(198 P.)

"Received this day from S. F. Taylor, as administrator of the estate of A. A. Brown, deceased, the sum of \$1,173.00 for the following items in pro rata satisfaction thereof:

Judgments of R. H. De Armond.....	\$ 870 14
And of judgment of A. L. Sprowl.....	291 46
Also for revenue stamps.....	8 00
On John Woods deed and for recording quitclaim deeds to John Wood.....	4 00

Total \$1,173 00

"W. H. Brooke,
"Attorney for Judgment Creditors
Above and John Wood." "

The defendant admitted the receipt of a pro rata share of the assets of the estate, but denied that the same was accepted in full satisfaction of the judgment against Taylor, as administrator of the estate of A. A. Brown, deceased, Belding, et al. Defendant alleged, among other things:

"That plaintiff is now, and ever since January 31, 1918, has been, charged with notice of said judgment, and that same was a valid and subsisting lien upon the premises of C. E. Belding, and particularly the premises described in plaintiff's complaint, and that said plaintiff was charged with said notice, and had actual notice of said judgment prior to the time he purchased said property and paid for the same, and prior to the time of the execution of said deed, and that said plaintiff accepted the deed therefor, charged with notice that said judgment was a valid and subsisting lien upon said property."

Among the findings of fact made by the court we quote the following:

"That said estate of A. A. Brown, deceased, was unable to pay its creditors in full, and there were various meetings of the creditors of said estate at which was discussed the question of accepting pro rata the assets of said estate, and an agreement was signed by most of the creditors of said estate, agreeing to accept a pro rata division of the assets of said estate in satisfaction of the claims of the creditors signing such agreement. This agreement was not signed by defendant, R. H. De Armond, or any one in his behalf, and the court finds that R. H. De Armond did not agree to accept any division of the proceeds of said estate in full satisfaction of his claim against said estate. That, on the contrary, he accepted and applied in partial satisfaction of his said judgment mentioned in plaintiff's complaint the pro rata part of the proceeds distributed by said estate. * * * And that thereafter one of the attorneys for said R. H. De Armond partially satisfied said judgment mentioned in plaintiff's complaint of record, wherein, after reciting the premises, such satisfaction reads: 'Now, therefore, this is to acknowledge receipt thereof and to partially settle said judgment in said sum of \$467.44 as of September 20, 1918.'

"That there has been no release or satisfaction of said judgment mentioned in plaintiff's complaint, except that said judgment has been partially satisfied in the sum of \$467.44 as of September 20, 1918."

From the findings of fact, the court made the following conclusions of law:

"That said judgment is now, and ever since its rendition on January 31, 1918, has been, a valid and subsisting judgment and lien against the real property of the defendants therein, including the real property of C. E. Belding and including the real property described in plaintiff's complaint.

"That plaintiff * * * took conveyance of said real property subject to the lien of said judgment.

"* * * That said judgment has not been canceled or satisfied in any manner except by partial payment of \$467.44."

Based upon said findings of fact and conclusions of law, the court decreed that plaintiff's suit be dismissed, and that the temporary injunction be dissolved.

The plaintiff, in his appeal to this court, assigns error as follows:

"In finding that the judgment held by the defendant R. H. De Armond * * * was a lien on plaintiff's lands. * * *

"In finding that the defendant De Armond did not make a full and complete settlement of his judgment * * * when he accepted from Taylor as administrator of the estate of A. A. Brown, deceased, the sum of \$870.14. * * *

"In finding that De Armond did not agree with the other creditors of the estate of A. A. Brown, deceased, to accept a pro rata payment in full settlement of his judgment claim against the said estate.

"In finding that the receipt described in * * * the complaint was not given in full settlement of the judgment of De Armond, * * * and that plaintiff took a conveyance of his lands subject to any such judgment."

C. McGonagill, of Ontario (W. W. Wood, of Ontario, on the brief), for appellant.

P. J. Gallagher, of Ontario (W. H. Brooke, of Ontario, on the brief), for respondents.

BROWN, J. (after stating the facts as above). Plaintiff asserts that it was the general understanding of the creditors of the estate of A. A. Brown, deceased, that a pro rata payment from the funds derived from the sale of the real property belonging to that estate, amounting to \$19,800, was to be in full satisfaction of all claims against the estate. Plaintiff further charges that R. H. De Armond, defendant herein, accepted a pro rata of the funds with the understanding that it was in full settlement of his judgment against the estate of A. A. Brown, deceased, C. E. Belding, and others.

[1] There was evidence given by S. F. Taylor, the administrator of the said estate, and by W. E. Lees, his attorney in the matter of the estate, also by W. W. Wood, an attorney for certain creditors of the estate, to the effect that there was an understanding generally among the creditors that the proceeds of the sale of the real property belonging to the Brown estate were to be received in full satisfaction of all claims against the same. The administrator testified that:

"The creditors had a meeting, and agreed among themselves, as there was not sufficient funds to pay all these claims in full, to take their payment pro rata from the funds on hand which were derived from the sale of the property. * * * My understanding of the agreement was that everything was to be settled at that time as per this agreement pro rata, and that all judgments, satisfactions were to be entered of record for all judgments."

He further testified that he did not remember what the pro rata was; that Mr. Lees was the attorney for the estate and was looking after it.

Concerning the agreement among the creditors to satisfy their demands upon a pro rata payment, W. E. Lees, the attorney referred to, testified, among other things:

"These creditors that were mentioned in this stipulation here were there, and there were others. Some of them were represented by their attorneys and Mr. Brooke and Mr. Gallagher were there, or one of them—I am not certain which—were representing Mr. De Armond; and the fact is I don't know whether there were any of these other creditors there personally or not. I think they, most of them, were represented by attorneys."

Witness said, in substance, that according to his recollection the meeting resulted in the understanding that the creditors were to accept pro rata payments in full settlement of their respective claims. On cross-examination, he said:

"I don't remember very much about it only in a general way. I do remember about this meeting up there, and by reading this, refreshing my memory here as to what was determined on, but I don't remember any of the details. I know there was some talk, and I think there was some satisfaction that was executed there; that is, of the judgment lien."

Referring to the De Armond judgment, he testified:

"Well, I don't remember just how his claim was satisfied or what was done. I know, as I have testified, that there was a meeting of the creditors up there, and as I recollect it there was an agreement in substance as stated here, that they would share pro rata."

"Q. But you didn't understand either Mr. De Armond to say, or his attorneys to say, that they were taking that much in complete satisfaction against the other judgment debtors? A. No; I don't say that, because I don't remember it."

W. W. Wood testified that he attended a meeting of the creditors of the estate some time in the summer or fall of 1918 as the legal representative of certain clients who were creditors; that the general understanding among the creditors was that the claims were to be settled from the proceeds derived from the sale of the real property, divided pro rata among the creditors. He said:

"I understood that the assets were to apply in full satisfaction of the claims."

A careful search of the testimony of plaintiff's witnesses does not reveal that the defendant De Armond ever agreed to release his judgment upon a pro rata payment, or to accept such payment in full satisfaction thereof, nor does it appear that W. H. Brooke or P. H. Gallagher, his attorneys, ever promised or agreed upon the part of De Armond to satisfy the judgment in question upon the receipt of a pro rata payment from the available funds arising from the sale of the real property belonging to the estate of A. A. Brown, deceased; neither does the evidence show that they, or either of them, undertook to compromise the claims represented by them.

A stipulation, executed by certain creditors of the estate of Albert A. Brown, deceased, among other things, recites that:

"We will accept in full payment and satisfaction of our respective claims against said estate a pro rata of the net proceeds of the said estate, the same to be based upon the payment of a pro rata per cent. of our respective claims and determined by the face or principal of said claims without interest, and each and every of said claims to receive the same per cent., which said per cent. shall be determined by dividing the net proceeds of said estate by the total amount of the face or principal amount of said claims."

This stipulation was signed by several creditors, but not by, or for, De Armond.

The receipt referred to in the pleadings and offered in evidence, signed by "W. H. Brooke, Attorney for Judgment Creditors," does not profess to be a receipt for satisfaction in full of the judgment referred to herein. It reads, "pro rata satisfaction."

It is true, as argued by counsel for plaintiff, that the release of the judgment debt as claimed in the instant case, would operate as a release of the judgment lien upon the property of the plaintiff, a joint judgment debtor.

Plaintiff maintains that a composition agreement was entered into between the defendant De Armond with other creditors of the estate of A. A. Brown, deceased, and S. F. Taylor, the administrator thereof.

[2] A composition with creditors is defined as an agreement between an insolvent or embarrassed debtor and his creditors, whereby the creditors, in consideration of an immediate payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata, in discharge and satisfaction of the whole debt. *Continental National Bank v. McGeoch*, 92 Wis. 310, 68 N. W. 606; 5 R. C. L. p. 863.

[3] Plaintiff has failed to prove any composition agreement upon the part of defendant De Armond. The law puts the burden of proof upon him who alleges. The defendant never made such an agreement, and if the record disclosed—which it does not—that De

Armond's attorneys entered into a contract to accept a pro rata claim in full settlement of the judgment held by him, there is an utter absence of proof of any authority conferred upon them, or either of them, by their client, whereby they would be authorized to compromise his claim.

[4] It is a rule of law, supported by an abundance of authority, that an attorney has no power, in the absence of express warrant, to bind his client by a compromise of the amount due on a judgment intrusted to him for collection. If the attorneys for De Armond compromised his claim by agreeing to accept a sum less than actually due on the judgment in full satisfaction thereof without authority from him, he is at liberty to ignore such compromise and proceed with the collection of his judgment the same as if it had never been attempted.

The rule stated by Weeks on Attorneys at Law (2d Ed.) 471, is this:

"It is laid down in American cases that an attorney has no authority arising from his employment in that capacity, no implied power, to compromise his client's claim, or to settle a suit and conclude the client, without the latter's consent."

Thornton on Attorneys at Law, vol. 1, par. 220, announces the rule as follows:

"The general rule also prohibits the attorney from receiving, in the absence of authority from his client, a sum less than that actually due in consideration of his client's claim, especially where it has been previously reduced to the form of judgment or decree. The debtor is not injured by being compelled to pay the whole debt, and it has been held that one who undertakes to settle with an attorney for less than the actual debt must, at his peril, ascertain whether the attorney is authorized to make such compromise, the burden being upon him to establish that fact. * * * In the absence of authority or ratification, however, the client may recover the full amount of the debt, less the sum paid to his attorney. * * *"

In an article by the editor of *Corpus Juris*, it is said that:

"Except in a few jurisdictions, the general rule is now well settled that an attorney has no power, by mere virtue of his retainer and without express authority, to bind his client by a compromise of a pending suit or other matter intrusted to his care." 6 C. J. 659.

Mr. Justice Moore, in *Barr v. Rader*, 31 Or. 225, 49 Pac. 962, quotes with approval the following:

"The plaintiff's attorney," says Mr. Freeman in his work on Executions (2d Ed.) § 108, "has, by virtue of his general employment in the case, power to direct and control the execution, though he cannot satisfy the writ except

upon payment to him of the full amount thereof in money, unless the plaintiff has given him special authority to compromise the debt. * * * The burden of proving such special authority is upon the party claiming under it, for it will never be presumed."

In *Fleishman v. Meyer*, 46 Or. 267, 80 Pac. 209, this court held that:

"As a general rule an attorney without special power is not authorized to compromise his client's claim. There is, however, no objection to giving an attorney special authority to compromise, and in rare instances the nature of the business may be such that a power to compromise will be implied, in which cases the act of the attorney in agreeing to the compromise would bind the client." [4 Cyc. 945.] Authority to compromise a claim * * * will be implied only in the regular course of pending suits and actions, when an attorney has neither time nor opportunity to consult with his client, whose interests would be imperiled by delay. *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63; *In re Heath's Will*, 83 Iowa, 215, 48 N. W. 1037; *Brockley v. Brockley*, 122 Pa. 1, 15 Atl. 646. The weight of authority in this country supports the rule that an attorney, by virtue of a mere retainer, has no implied power to bind his client by a compromise of his claim: 3 Am. & Eng. Enc. Law (2d Ed.) 358; *Barr v. Rader*, 31 Or. 225, 49 Pac. 962; *Huston v. Mitchell*, 14 Serg. & R. 307, 16 Am. Dec. 503; *Fitch v. Scott*, 3 How. (Miss.) 314, 34 Am. Dec. 86; *Holker v. Parker*, 7 Cranch, 435 (3 L. Ed. 396); *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647."

The case at bar does not come within any exception to the general rule.

[5] We have already stated that the defendant De Armond, as plaintiff in an action at law, obtained a judgment on January 31, 1918, against Taylor as administrator of the estate of A. A. Brown, deceased, C. E. Belding and others; that immediately after the entry of judgment in that action the same was docketed according to the provisions of chapter 15, title 2, Or. L. It is provided by section 205, Or. L., that:

"From the date of docketing a judgment as in this chapter [XV, title II] provided, * * * such judgment shall be a lien upon all the real property of the defendant within the county * * * where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon. * * *"

When the plaintiff acquired title to the land involved herein, R. H. De Armond's judgment was a valid and subsisting lien thereon, and the plaintiff was charged with notice thereof.

This case is affirmed.

BENSON, J., not sitting.

(101 Or. 42)

**FIRST STATE & SAVINGS BANK v.
OLIVER et al.**

(Supreme Court of Oregon. June 21, 1921.)

1. Fixtures \Rightarrow 18(1), 21—Tests as between grantor and grantee or mortgagor and mortgagee stated.

In deciding whether an article used in connection with real property should be considered as a fixture and a part and parcel of the land, as between a grantor and a grantee or mortgagor and mortgagee, the usual tests are: (1) Real or constructive annexation of the article to the realty; (2) appropriation or adaptation to the use or purposes of the realty with which it is connected; (3) the intention to make the annexation permanent.

2. Fixtures \Rightarrow 4—Considerations in ascertaining whether it was the intention to make permanent annexation stated.

The intention of making the article permanently accessory to the real property is to be inferred from the nature of the article, the relation of the party making or maintaining the annexation, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made.

3. Fixtures \Rightarrow 27(1)—Rights of parties may be governed by special agreement.

The rights of parties as to personalty attached to the land may be controlled by special agreement between the parties.

4. Fixtures \Rightarrow 18(1)—Pumps and motor constituting part of pumping system held fixtures.

Five and six inch centrifugal pumps, annexed to land, and a ten horse power electric motor as a part of the pumping system, but which was sometimes detached from one pump and moved to and connected with another part of the system, but which was never disconnected or removed from the land, which pumps and motor were essential to the irrigation and drainage of the land, *held* fixtures.

5. Fixtures \Rightarrow 35(2)—Mortgaging of property not a consideration unless mortgage was executed by owner or one having interest in the property involved.

In order for the making of a mortgage upon articles constituting parts of a pumping system, or upon the real property upon which they are placed, to have any influence upon the question of whether they are personal property or a part of the land, the mortgage must be executed by the owner, or one having an interest in the property involved.

In Banc.

Appeal from Circuit Court, Klamath County; W. V. Kuykendall, Judge.

Suit by the First State & Savings Bank against C. T. Oliver and others. From decree giving it insufficient relief, plaintiff appeals. Affirmed.

This is a suit to foreclose a chattel mortgage. The trial court found and decreed that the mortgage be foreclosed as against

all of the property described therein except one ten horse power electric motor, one six-inch centrifugal pump, and one five-inch centrifugal pump, which the court found to be the property of defendants Margaret H. Barney and William M. Bray. Plaintiff appeals.

The claim of defendants Barney and Bray is that the motor and pumps are part of the real estate and were never owned by defendant Oliver. It is the contention of defendant Oliver and plaintiff that the motor and pumps are personal property owned by Oliver and mortgaged to the bank.

The controversy arises by virtue of the following facts:

On April 15, 1918, the plaintiff bank loaned to defendant C. T. Oliver \$680, and to secure the payment of the note given therefor Oliver executed to the bank a chattel mortgage upon the electric motor and two pumps in dispute and certain farm machinery, implements, and live stock. This mortgage was duly recorded. On and prior to March 22, 1917, E. R. Reames, the president of the First National Bank of Klamath Falls, Or., was the owner of a ranch in Klamath county, Or., near the city of Klamath Falls, known as the Race Track ranch, upon which he had considerable personal property, some of which was included in the chattel mortgage in suit. Mr. Reames, being desirous of selling this property, listed the same for sale or trade with defendant Oliver, who was engaged in the real estate business in the city of Klamath Falls. Oliver negotiated with one McKillop through Rucker & Co. of San Francisco, Cal., for the transfer of the property. A trade was finally consummated, whereby Mr. Reames took certain property which is not involved in this suit, and in consideration therefor conveyed the Race Track ranch, with a lot of the personal property thereon. Mr. Reames took a mortgage from McKillop on the Race Track ranch for \$4,000. In order to make the deal Oliver at the same time made a contract to repurchase the ranch and personal property from McKillop, including the ten horse electric motor and the two pumps. A deed of the farm was executed by McKillop and wife to Oliver, and also a bill of sale of the personal property connected with the ranch, and deposited in escrow with the First National Bank of Klamath Falls, to be delivered to Oliver upon the payment to McKillop of the sum of \$5,500, balance of the purchase price for which a promissory note was executed by Oliver to McKillop. It was stipulated in the escrow agreement that upon the payment by Oliver of \$1,500 on the principal of the note the bill of sale should be delivered to him. Upon the payment of the balance, the deed was to be delivered to him. Oliver, pursuant to the agreement, took possession

of the land and personal property. It was afterwards agreed between Mr. McKillop and Mr. Oliver that as Oliver desired to sell some of the personal property he might do so and pay the money into the First National Bank of Klamath Falls for Mr. McKillop. Upon such payment of \$1,300, McKillop was to release the personal property on the farm to Oliver. McKillop purchased some horses on the farm from Oliver, allowing him \$500 therefor on the deal. Pursuant to the arrangement Oliver sold some of the property at public auction and paid the \$1,300 to the account of McKillop. Rucker & Co. transacted the principal part of the business pertaining to the deal for McKillop. Mr. Reames testified that the First National Bank, as he remembered, was instructed by McKillop to release the personal property to Oliver by letter from McKillop. No written release was executed. About January 10, 1918, Oliver was in San Francisco, where another deal by which he desired to trade his interest in the farm and the remainder of the personal property was being negotiated through Rucker & Co., and he wired the First National Bank of Klamath Falls to send the escrow agreement to Rucker & Co. As the Rucker firm had been the agent of McKillop during the transaction, the bank, on January 11, 1918, delivered the escrow papers to McKillop instead of mailing them to Rucker & Co. McKillop has since retained these papers, and was not a witness in this case. Just what property was described in the bill of sale is a matter of speculation.

On July 17, 1919, McKillop and wife sold and conveyed the farm, subject to the mortgage in favor of Reames, to Margaret H. Barney, of Wisconsin; defendant Bray acting as her agent. McKillop sold his interest in the personal property remaining on the ranch to Mrs. Barney, and on September 15, 1919, for the expressed consideration of the sum of \$10, executed a bill of sale to Mrs. Barney to that effect. After the three-cornered deal between Reames, McKillop, and Oliver, Oliver executed a chattel mortgage in favor of the First National Bank to secure the payment of a note, in which mortgage the motor and pumps in question were included with other property. After the chattel mortgage to the First National Bank was satisfied, Oliver executed the mortgage in question to the plaintiff bank. Oliver never completed the purchase of the farm. Whatever right, if any, he obtained to the property in question, was obtained as personal property. Bray, the agent of Mrs. Barney, it appears, had knowledge of the execution of plaintiff's mortgage about the time of the purchase of the farm for Mrs. Barney and before the execution of the bill of sale from McKillop to Mrs. Barney.

E. L. Elliott, of Klamath Falls, for appellant.

W. H. A. Renner, of Klamath Falls, for respondents.

BEAN, J. (after stating the facts as above). Having given a general history of the different deals claimed to affect the status of the property in suit, we will endeavor to outline more minutely the situation, use, and purposes of the motor and two pumps in question; this with a view of determining whether or not the property involved was a part of the real estate. Defendant Oliver never obtained title to the real property. It appears that he secured ownership and possession of the personal property sold by Reames to McKillop, and in turn transferred by McKillop to Oliver, who executed to the plaintiff a chattel mortgage. Whatever right Oliver then had to the property in question passed by way of the mortgage to plaintiff.

We should start with Mr. Reames' ownership. He owned all of the farm and fixtures and personal property sold and transferred to McKillop. We shall pass without further mention many of the side issues, and also conclusions stated by the witnesses as to what part of the property was real and what personal, and try to observe the concrete facts which govern the main question. It appears the farm is situated on the bank of the Klamath river. There were two pumps houses on the land, with a centrifugal pump in each used for pumping water from the river to irrigate the land. One of the pumps rested on timbers and the other also on timber resting on concrete. Both were securely fastened to their foundations with screws. The ten horse power electric motor was fastened to a timber frame resting on the concrete foundation and connected with electric wiring, and remained on the place when the property was transferred to McKillop. Possession was taken by Oliver under the contract of purchase from McKillop. The motor was so arranged that the electric wire could be detached, and the motor and its frame placed upon a sled and moved to the other pumping plant, where it fitted the foundation and could be securely screwed down to the same. Sometimes the motor was so moved and used. It usually remained in one of the places. Mr. Reames, while on the stand as a witness for plaintiff, testified in regard to the motor in part thus:

"Q. In connecting the motors with the wires, wasn't that fixed in such a way it was easily disconnected so it could be moved easily? A. Well, we had to disconnect the wires from the switch and than take off the switch and move that down from the other place and then connect up there, the same as moving any motor.

"Q. The motor was not set in any permanent foundation, was it, like a cement foundation, anything like that? A. At one—at the stand where it was used principally, there was a concrete foundation with timbers on that and also the pump on the same timbers. The motor was on the other timbers that set on

that; we screwed down to it and made it stationary so as to remain true and firm."

One of the pumps was sometimes used for pumping water in order to drain the land. The motor and pump appear to have been a part of the irrigation system connected with and used upon the land. They were essential for the purposes of irrigation and drainage of the land. How long this system had been in use or when it was placed upon the land does not clearly appear.

[1] In deciding whether an article used in connection with real property should be considered as a fixture and a part and parcel of the land, as between a grantor and a grantee or mortgagor and mortgagee, the usual tests are: (1) Real or constructive annexation of the article to the realty; (2) appropriation or adaptation to the use or purposes of the realty with which it is connected; (3) the intention to make the annexation permanent.

[2] The intention of making the article permanently accessory to the real property is to be inferred from the nature of the article, the relation of the party making or maintaining the annexation, the policy of the law in relation thereto, the structure and mode of annexation, and the purpose and use for which it is made. 19 Cyc. 1039; Bay City Land Co. v. Craig, 72 Or. 44, 143 Pac. 911; Johnson v. Pacific Land Co., 84 Or. 356, 361, 164 Pac. 564; Roseburg National Bank v. Camp, 89 Or. 67, 74, 173 Pac. 313; Blake-McFall Co. v. Wilson, 193 Pac. 902. In the case of Roseburg National Bank v. Camp, supra, at page 75 of 89 Or., at page 315 of 173 Pac., Mr. Justice Harris, speaking for this court, said:

"Annexation, actual or constructive, is an essential element. Pure examples of constructive annexation are found in cases where, after having been actually annexed, an article is severed from the realty for some temporary purpose. * * * In the instant case the pipe and giants can be removed without impairing them or injuring the land and therefore the single element of annexation is not conclusive. As was said by this court in Doscher v. Blackiston, 7 Or. 144, 146, the courts in many of the states have abandoned the notion that to constitute an irremovable fixture the article must be attached to the land by bolts or nails or be imbedded in brick or stone. * * *

It is the trend of judicial opinion to regard all of those things as fixtures which have been attached, whether physically or constructively, to the realty, with a view to the purposes for which the real property is held or employed, however slight or temporary the connection between the articles and the land. The important element to be considered is the intention of the party making the annexation. Neither the intention existing at the time of procuring the article nor that which exists while the same is being

transported to the real property where it is designed to be placed, nor the secret plan in the mind of the person making the annexation, govern. The controlling intention is that which the law deduces from all of the circumstances of the installation of the article upon the land. Roseburg National Bank v. Camp, supra, and cases there cited.

[3] In the recognition of these formulated general tests which may be applied in passing upon the question, it is obvious that they do not establish definite criteria. Each case must be determined not only upon the circumstances and nature of the annexation and the use to which the property is employed, but also on the relations of the parties. These tests are subject to the qualification that the rights of the parties are liable to be controlled by special agreement. 11 R. C. L. p. 1059, § 3. We read in 11 R. C. L. p. 1061, § 5, thus:

"The second test, namely, the adaptation or application to the use or purpose of that part of the property with which it is connected, is generally considered as entitled to much weight, especially in connection with the criterion of intention; * * * the tendency being to regard everything as a fixture which has been attached to realty with a view to the purposes for which the realty is held or employed, however slight or temporary the connection between them. So generally it may be said that if property is placed on land to improve it and make it more valuable it is generally deemed a fixture, but that if it is attached for use which does not enhance the value of the land it remains a chattel."

[4] Applying these rules to all the facts and circumstances in the present case, we note that it is apparent that Mr. Reames, or whoever installed the irrigation system on the farm, did so with a view to enhancing the production of the farm, to increase the growth of vegetation thereon. Irrigation in a semiarid region, like parts of Klamath county, is the very life of the land. It is beyond comprehension that the system was installed for any temporary purpose. The motor and pumps served the purpose of ditches, canals, and headgates of a gravity system of irrigation, which are no doubt appurtenant to real property. The pumping system was doubtless placed upon the land to improve it and make it more productive and valuable and more agreeable for a habitation. The purposes for which the three articles were used indicate strongly that they were intended to be a part and parcel of the land. They were adapted to the purpose of the land to which they were attached. The annexation made was sufficient to stand the first test mentioned. While the motor was sometimes detached from one pump and moved to and connected with the other part of the system, it was never, as far as shown, disconnected or removed from the ranch. The pumps were permanently annexed to the

freehold, and the motor was a part of the system which comprised the pumps.

"In some jurisdictions, if the realty is equipped with a complicated plant, some of which is so attached to the realty as to be a part thereof, and some not physically annexed, then on a transfer of the realty the entire plant is transferred, including the unattached parts, on the principle whereby an indispensable part of a machine is transferred." 19 Cyc. 1045.

From the nature of the irrigation system constructed on the farm, the relation and situation of the owner who installed the apparatus, the whole surroundings and mode of the annexation, the evident purpose thereof, and all the facts disclosed by the testimony, we conclude that the owner making the connection and maintaining the system for a long time did so with the intention of making the system accessory to the real estate. Therefore the ownership of the motor and pumps did not pass to defendant Oliver with the personal property. He could not create a valid lien upon any greater interest than he owned by virtue of the mortgage executed to plaintiff. The title to the irrigation system passed by virtue of the deed from McKillop to Barney.

[5] Counsel for plaintiff, and also counsel for Oliver, earnestly urge that the fact that Oliver executed a mortgage in favor of the First National Bank and also one to plaintiff covering the motor and pumps in question shows that the parties treated the property as personal. In order for the making of a mortgage upon articles of this nature or upon the real property upon which they are placed to have any influence upon the question whether they are personal property or a part of the land, as we understand, such mortgage must be executed by the owner, or one having an interest in the property involved. Neither Reames, McKillop, nor any other owner of the real estate described, executed a chattel mortgage on the motor and pumps in suit. Oliver could not change or affect the title of McKillop, the record owner of the land, by executing a chattel mortgage upon any of the fixtures on the farm. The principle claimed does not apply in this suit.

As ruled in *Sowden & Co. v. Craig*, 20 Iowa, 156, at page 164, 96 Am. Dec. 125, at page 130:

"Where the owner of real estate executes a mortgage upon chattels, which may properly be made fixtures, and subsequently affixes them to the real estate, that no person having knowledge of such facts can, by purchase of the real estate or otherwise, acquire from the mortgagor any title to such chattels paramount to the mortgagee thereof."

We are not concerned in the case at bar with the more liberal rule applicable when an article is annexed to realty by a tenant.

Plaintiff claimed \$250 as attorney's fees for foreclosing the chattel mortgage for \$860, and interest. The trial court allowed \$150 as such fees. We think the circuit court was in a better position to decide what was a reasonable amount for such services than this court is. We approve this finding.

It follows that the decree of the trial court should be affirmed. It is so ordered.

(101 Or. 53)

HIGINBOTHAM v. WOLFORD.

(Supreme Court of Oregon, June 21, 1921.)

1. Landlord and tenant ⇨34(2)—Breach of lease held not ground for cancellation.

Where lessee of farm, under lease entitling lessor as rental to certain portions of the crop raised and to certain pastures, was in the actual possession of the land, giving it his personal attention, lessee's noncompliance with lease as to care of land, his failure to account to lessor for her half of the pasture, or the proceeds of about one ton of alfalfa, or the little hay that he fed to his hogs, and his violation of lease permitting another to use a small portion of the land, and the use of the barn for one team, not decreasing lessor's share of the rental, was not ground for cancellation of lease in equitable actions therefor, in the absence of allegation that lessee was insolvent, and in the absence of a showing that the loss to the estate itself, if any, by reason of breach, would be nominal; the lessor having a complete and adequate remedy at law.

2. Landlord and tenant ⇨111—Forfeiture of lease not decreed for mere nominal technical violation.

Equity will not decree the forfeiture of a lease for a mere nominal technical violation, but there must be something that goes to the substance or merits, or which would at least tend to show waste, destruction or injury to the estate itself.

3. Landlord and tenant ⇨136—Provisions of lease as to how land should be farmed substantial considerations for leasing.

Provisions of lease, merely specifying how the land should be farmed and what lessee should do toward upkeep of farm, were substantial considerations for the leasing.

4. Dismissal and nonsuit ⇨75—Dismissal of lessor's suit to cancel lease should be without prejudice to rights of either parties.

Dismissal of lessor's suit for cancellation of lease for lessee's noncompliance therewith, on the ground that the alleged breach did not injure the estate itself and that lessor had an adequate remedy at law, should be without prejudice to rights of either party.

En banc.

Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

Action by Maggie Higinbotham against D. B. Wolford. Decree of dismissal, and plaintiff appeals. Affirmed, as modified.

"November 11, 1918, and for a period of five years from that date, the plaintiff made a lease to the defendant of her certain farm near Echo, in Umatilla county, and certain machinery and utensils, for which she was to receive as rental one-half of the annual crop of hay in the stack and one-half of the grain raised for the year 1919, one-fourth of the grain for the years 1921 and 1923, delivered at the warehouse free of all expense to the plaintiff, and certain pastures. The defendant took possession under the terms of the lease which provides:

"If the party of the second part shall fail in any particular to carry out the terms of this lease, and particularly if he shall fail to properly care for, irrigate and harvest the portion of the alfalfa or the grain belonging to the party of the first part, then the party of the first part may at her option declare this lease terminated and may take possession of said premises, and shall not be taken as violating the rights of the party of the second part to compensation as herein provided for except on the new lands that he may have seeded to alfalfa."

For a number of alleged breaches the plaintiff commenced this suit on August 21, 1919, in which she prays for an accounting and decree for the amount found due and damages in the sum of \$2,100; for the loss of the wheat crop and the careless and negligent operation of the ranch, and the misuse of the irrigation waters, and the failure to seed the alfalfa as the lease provides, and damage to the premises; for the cancellation and termination of the lease; that the defendant be ousted, and the plaintiff be restored to her former estate.

For answer, the defendant admits the execution of the lease and his entry, and denies all other material allegations of the complaint, and as a further and separate defense alleges that he farmed the premises in a good and husbandlike manner, took proper care of the alfalfa sown and growing, and spring-toothed the land and irrigated it in accord with the course of good farming in the locality; that at the time suit was commenced the last crop of hay had not been stacked, "nor had the period of 30 days elapsed, mentioned in the said lease, when the said hay should be measured and divided between the said plaintiff and this defendant"; that the crop of grain for the year 1919 was of no value, and would not pay to harvest it, and that under the terms of the lease plaintiff is entitled to one-half of the crops for pasturage purposes; that any failure to repair and construct certain fences was because the plaintiff did not furnish the material and the fact that McCormach claimed to be the sole owner of the line fence; that the manure at the barn was properly used

and spread on the alfalfa lands or used in the dams and levees, and that none of it was sold or moved from the premises. In substance, the defendant denies that he violated any of the provisions of the lease, and claims that he substantially complied with all of its terms, and that by reason of the wrongful act of the plaintiff, in entering upon the premises in violation of the lease and injuring the growing hay, he was damaged in the sum of \$1,000, for which he prays for a decree against the plaintiff, and that she be enjoined from trespassing on the premises or interfering with his possession.

The reply is a general denial.

After the taking of testimony, the court made findings that the lease was duly executed, and that under it the defendant entered and took possession of the premises, "that defendant substantially performed all the terms and conditions of the said lease upon his part to be kept and performed," and rendered a decree against the plaintiff, dismissing her suit, and for costs to the defendant, from which the plaintiff appeals, claiming that the court erred in its findings and in decreeing that the suit should be dismissed, "and in failing to decree such dismissal without prejudice to another suit by appellant upon the same cause."

Frederick Stelwer, of Pendleton (Raley, Raley & Stelwer, of Pendleton, on the brief), for appellant.

James A. Fee, of Pendleton (Fee & Fee, of Pendleton, on the brief), for respondent.

JOHNS, J. (after stating the facts as above). It will be noted that the lease was executed on November 11, and that the complaint was filed on August 21, 1919. By its terms, defendant agrees that he will farm in a good and husbandlike manner during the period of the lease; that he will properly care for the alfalfa now sown and growing, and spring-tooth it and carefully irrigate it according to good husbandry in the locality; at the proper time he will cut and properly stack it at his own expense; that 30 days after stacking the last crop it shall be equally divided. Second, as to the wheat now growing, for the year 1919, one-half of it shall be delivered to the warehouse in bulk; if it does not have any value, each shall have one-half for pasturage. Third, he will plow, cultivate, harrow, and seed by the summer-fallow method, and see that a crop of grain is raised during the years 1921 and 1923 and deliver one-fourth of all the grain to the warehouse; to keep the fences in good repair, new material, if any is necessary, to be taken from the line fence on the ranch between the lands of McCormach and the plaintiff. He agrees that he will break up, level, and seed to alfalfa all of the lands known as "alfalfa lands," which can be irrigated, the same to be levied and made suitable for alfalfa; that

(193 P.)

he will plant to alfalfa and such nurse crops as he may think best; that he will put the lands in shape and seed them as fast as he can reasonably do so, so that on November 1, 1919, 5 acres will be seeded, and on November 1, 1920, 20 acres, and on November 1, 1921, 100 acres, November 1, 1922, 150 acres, and at the end of the lease all of the land north of the Western Land & Irrigation Company shall have growing a good crop of alfalfa. The defendant shall have all nurse crops, and the hay shall be divided equally. The reasonable value of putting the new land in alfalfa is \$50 an acre. The plaintiff shall look solely to the one-half interest in the crops which belong to him, and shall turn over to the defendant on October 1 of each year enough hay to pay for the value of the work done, etc. In leveling and seeding and ditching the land, it is to be handled on the check plan, and approximately one acre is to be placed in each check per square; all manure produced at the barn is to be distributed annually and properly spread upon the alfalfa lands, and no manure is to be sold or removed.

The defendant agrees that in spring-tooth-ing, he will reseed such portion of the lands as are thin, or in his judgment need reseeding; to keep up all ditches, and keep them free from weeds, and construct such new portion as may be necessary. Each year he will perform such work upon the Allen ditch as the plaintiff is obliged to perform to hold the ownership; the same being one-fifth. He will keep the water on the pasture to hold the water level; the main ditch shall be large enough to carry all of the waters of the Allen ditch; that pasture to be divided equally and any pasture sold divided equally; no stock shall be pastured upon the alfalfa in the fall of any year after it has been eaten down, and none shall be pastured after the 1st of March; to keep all outside fences in good repair, plaintiff to furnish necessary materials; plaintiff to have space in the barn for herself or feeder, and reserve the right to feed her portion of the hay upon the premises; defendant to have the use of farm machinery and hay machinery, and keep it in repair; property not to be subleased, or any sale or assignment, without written consent; plaintiff to have the right to enter at all reasonable times.

For a cause of suit, and as damages for a violation of the lease, the plaintiff alleges that defendant "has failed to farm and care for the said premises in a good and husbandman-like manner, and has failed to irrigate carefully the alfalfa growing thereon"; that he has used excessive waters in irrigation, and has caused seepage to raise and bring the alkali to the surface; that the injured land amounts to about 15 acres, and that all of it is damaged by excessive water; that defendant did not cut the alfalfa in a careful and proper manner, but cut it poorly and un-

evenly, and left much of it attached to the roots; that he has stacked the hay improperly, in small, insecure stacks, and except in one or two places has stacked it upon good alfalfa land; that he failed to place any beams or timbers under it; that he neglected to separate the good hay from the weeds, which materially injured the quality of the hay; that the improper mixing of the weeds with the hay and the improper stacking resulted in plaintiff's damage, the amount of which plaintiff is not able to state at this time; that at various times the defendant did pasture his hogs upon the growing alfalfa, in which the plaintiff had a half interest; that the hogs were pastured on the alfalfa long after the stock should have been removed, and were there about May 24; that by reason thereof not less than 40 head of hogs and pigs ran in and upon and destroyed the growing grain, so that at least one-half of it was ruined by the hogs and was unfit to cut; that the other 80 acres was not entirely injured, and that some of it could have been harvested, and that one-half of it belonged to the plaintiff; that it did not yield more than 6 or 7 bushels per acre, and on account of the short crops the defendant refused to harvest it; that by reason thereof plaintiff lost her half-interest in the wheat crops, of at least 8 bushels per acre upon 80 acres, to her damage in the sum of \$500; that on account of the injury to the crop by the hogs she suffered a loss of 7 bushels per acre upon the remaining 80 that was totally destroyed, and for that portion thereof which was partially destroyed she was damaged to the amount of \$1,600; that the defendant violated the lease by failing to distribute the manure, and in using it for the construction of temporary dams "for the diversion and holding of water in the irrigation of the premises referred to in said lease"; that plaintiff cannot state the amount of her damage by reason of such failure, but that it was "a substantial damage to plaintiff."

In paragraph 16 of the complaint it is alleged that the defendant violated the lease by failing to keep the ditches free and clear of weeds; that all of the land, except the wheat land, is irrigated, and adapted to the raising of alfalfa; that it is valuable with the water, and is of no value without the water; that the plaintiff's water rights have been adjudicated; that to perfect such inchoate right as to 200 acres described in the complaint as pasture land it is necessary that such lands should be irrigated, reclaimed, and planted to agricultural crops; that the lease provides that the defendant should irrigate the meadows, and it was intended that the pasture should be irrigated until it was seeded to alfalfa, and thus protect plaintiff's water rights; that the defendant has failed to irrigate the pasture land, and has plowed up about 100 acres of it, and has made no effort to seed it to alfalfa, and that the sea-

son is now too late for that purpose; "that on account thereof the said salt grass meadows have been injured in a considerable sum of money, and plaintiff is damaged thereby, and particularly on account of said default and violation, the plaintiff's inchoate water right is placed in jeopardy, and will be lost to plaintiff, unless plaintiff can enter upon the said premises and rectify the injury." In paragraph 17 it is alleged that the defendant failed to construct the irrigating ditches, and instead of building the one described in the lease he enlarged a lateral, and that such enlargement was a distinct injury to the land of the plaintiff, for the reason of which he is damaged in a considerable sum. In paragraph 19 it is alleged that defendant has caused other injury, to plaintiff's damage, by negligently and carelessly operating the farm, through the willful disregard of plaintiff's rights, and, if his possession is continued, he will destroy "to a very large extent the value thereof, all to plaintiff's irreparable injury"; that he plowed up a raspberry patch, and has failed and neglected to care for and spray the orchards; "that the pasture land which was plowed up by the defendant as aforesaid can be saved to plaintiff by the expenditure of a considerable amount of money, probably \$25 or \$50 per acre"; that upon the termination of the lease the plaintiff will "re-enter said premises at her own expense, and so far as possible repair the injury which has been done to said land by the defendant." In substance, the above are the grounds for which plaintiff claims damages on account of the alleged violations of the lease.

For want of proof, the appellant frankly says in her brief that "the claim for damages was substantially abandoned by appellant upon the trial, and is not involved in the appeal." By reason of such admissions, and the failure of proof to sustain the complaint made, the question of damages as to all of the above-specified alleged violations of the lease are eliminated from the consideration of this case. By analysis, the following questions are left: That the defendant violated the lease by selling about one ton of alfalfa hay, for which he has not accounted to the plaintiff, and that he cut and fed a small portion of alfalfa to his hogs; that he has failed to keep the fences on the wheat land in repair; that he failed to distribute the manure on the lands, and used it for the construction of temporary dams to hold the water for irrigation purposes; that it was intended by the plaintiff that the pasture should be irrigated until such time as the defendant would plant and seed it to alfalfa; that after plowing the pasture he has made no effort to seed it, and that it is now too late in the season to secure a good stand, because there will not be sufficient water for its irrigation until October or November; that at one time the defendant

had at least 75 head of stock upon the pasture, for which he received \$2 per month per head, and that he has refused to account to the plaintiff for her share of the pasturage; that he leased about 20 acres of the land, including room in the barn for a team of horses, and the use of plaintiff's wagon, "without the written or other consent of the plaintiff first obtained," for which he received about \$75; and that he has failed to account for that money.

The primary purpose of this suit is to obtain a decree for the forfeiture of defendant's lease, for a violation of its provisions, and that plaintiff be restored to her former state. Appellant cites *Matthews v. Digges* (Cal. App.) 188 Pac. 283, in which the lease contained an agreement that the lessees would "use reasonable efforts to poison squirrels upon said leased property, the party of the first part, at his own cost and expense, to furnish the necessary poison." For a failure to comply with this provision the lease was forfeited. That was an action at law, in which the trial court found that "the covenant had been broken, so as to entitle the plaintiff to declare a forfeiture of the lease and to recover possession of the premises in this action." The opinion says:

"The evidence, it is true, is conflicting as to both of these matters; but the trial court resolved these conflicts in the plaintiff's favor, as it was entitled to do, and with its findings and conclusions in so doing we are not at liberty to interfere."

In *Anderson v. Hammon*, 19 Or. 446, 24 Pac. 228, 20 Am. St. Rep. 832, this court held:

"Where the neglect and omissions of the defendants to perform their obligations under a lease resulted in waste, which, if permitted to continue, must eventually result in the ruin and destruction of its subject-matter to the irreparable damage of the plaintiff, held, that equity would interfere and cancel the lease to prevent such waste and destruction."

That grew out of a lease of a bearing orchard, which required skill, constant care, and attention, and it appeared from the evidence that the defendant went to California, and the court held that through defendant's neglect waste was committed, which tended to impair and destroy the value of the orchard itself, and that it became infected with insect pests, "which seriously injured the healthful condition of the trees, killing some and causing others to go into decay."

[1, 2] In the instant case the proof shows that the defendant is in the actual possession of the premises giving them his personal attention, and that the loss, if any, to the estate itself would be nominal. There is no allegation that defendant is insolvent, and, assuming that he did fail to account to the plaintiff for her half of the pasture, or the proceeds for about one ton of alfalfa hay which it is claimed he sold, or the little

hay which it is alleged that he fed to his hogs, for that plaintiff would have a complete and adequate remedy at law. It is also claimed that he violated the lease in the renting of about 20 acres of the land, and in the giving of permission for the use of the barn for a team. That was more in the nature of a license, and was not an assignment of the lease or a subletting, and was for only a small portion of the pasture land and of the barn, and could not in the least impair or go to the destruction of the estate, and would not in any manner decrease plaintiff's share of the rental. The rule is fundamental that equity will not decree the forfeiture of a lease for a mere nominal technical violation. There must be something which goes to the substance or the merits, or which would at least tend to show waste, destruction, or an injury to the estate itself. As stated, the lease was executed on November 11, 1918, for a period of five years and the suit was commenced on August 21, 1919, before the last crop of alfalfa was cut and in the stack, and for want of evidence plaintiff frankly admits that there is no proof of the alleged damages for violation of the lease. At the time the suit was brought, the violations of the lease on the part of the defendant, if any, were only nominal. We agree with the trial court "that defendant substantially performed all of the terms and conditions of said lease upon his part to be kept and performed."

[3, 4] The land is valuable, and the lease was carefully drawn, and clearly specifies how it should be farmed, and what the defendant should do. Those provisions are important to the plaintiffs, and were substantial considerations for the leasing, and it is the duty of the defendant in good faith to carry out the lease. The lower court decreed that the suit should be dismissed. All things considered, and in the interest of justice, the suit should have been dismissed without prejudice to the rights of either party, and that will be the order of this court; otherwise, the decree is affirmed, with costs to the respondent.

(109 Kan. 232)

STATE v. PFEIFER et al. (No. 22821.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

Habeas corpus §102—Evidence held sufficient to sustain judgment refusing discharge.

In a habeas corpus proceeding, the district court decided that the evidence given before a justice of the peace, in a preliminary examination of petitioners, who were charged with a public offense and committed for trial, was sufficient to show that the offense had been committed, and that there was probable cause

to believe that the petitioners had committed the offense. On appeal, the decision is affirmed.

Appeal from District Court, Ellis County.

Alex A. Pfeifer, Anton A. Pfeifer, and Adam A. Pfeifer apply for a writ of habeas corpus, after being bound over to the district court on a charge of poisoning cattle. From a judgment refusing discharge and remanding defendants, they appeal. Affirmed.

J. P. Shutts and H. L. Pestana, both of Hays, and A. E. Crane, of Topeka, for appellants.

Richard J. Hopkins, Atty. Gen., and J. M. Wiesner and E. A. Rea, both of Hays, for the State.

JOHNSTON, C. J. The defendants were arrested upon a charge of unlawfully and maliciously placing poison in a pasture where the cattle of Alex Rupp were grazing, with the intention of poisoning the cattle, and it is alleged that 9 of them died from eating the poison so placed. At a preliminary examination of the defendants before a justice of the peace, it was found that the offense charged had been committed, and that there was probable cause to believe that they were guilty of the offense. Contending that the evidence was insufficient to warrant binding them over for trial, they applied to the district court for a discharge, upon a writ of habeas corpus. That court examined the evidence, and decided that it was sufficient to warrant the commitment of the defendants for trial. From the decision refusing a discharge, and remanding the defendants to the custody of the sheriff, they appeal to this court.

It appears that Rupp had rented a farm from the mother of defendants, and the controversy had arisen among them as to the termination of the lease, which resulted in litigation. There was hostility between the defendants and Rupp, due in part to the dispute as to the lease and occupancy of the farm, and in part as to the impounding of defendant's cattle by Rupp for trespass. On the rented farm was a pasture in which Rupp had a herd of cattle, and these began to sicken and die. An examination indicated that they had died from poison. On further investigation it was found that quite a number of piles of poison had been placed here and there in the pasture. There was testimony to the effect that, on several days, shortly before the death of the cattle, the defendants had been seen near to and in the pasture. On one occasion, when there was a quarrel between Rupp and Alexander Pfeifer about the impounding of defendant's cattle by Rupp, some strong language was used by the defendant, and among other things he said, "I will get your cattle;" and when Rupp re-

marked he would not, as he, Rupp, did not allow his cattle to get out, Pfeifer said, "I will get them anyhow, and you will pay pretty damned dear. * * *" There appears to be ample evidence that the cattle died from poison, and enough to show that the poison had been purposely placed in the pasture by some person. The testimony connecting the defendants with the offense is slight, but, in view of that showing, their hostility to Rupp, their being in the pasture about the time the cattle were poisoned, and the threat mentioned, it is deemed to be sufficient to hold the defendants for trial. There is a difference between the quantum of proof essential to a binding over for trial and that required to convict at the trial. The guilt or innocence of a defendant is not adjudged at a preliminary examination, and it is not necessary that evidence upon which a defendant is held for trial should be sufficient to support a conviction. It is enough if it shows that an offense has been committed, and that there is probable cause to believe the defendants are guilty. In re Danton, 108 Kan. 451, 195 Pac. 981.

Judgment affirmed.

All the Justices concurring.

(109 Kan. 281)

KEY V. THOMAS LYONS CO. (No. 23168.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Principal and agent §21, 22(1) — Agency not evidenced by writing held provable by agent's testimony as to appointment and authority, but not by declarations or conduct.

On October 5, Lowry was agent of the defendant, to buy broom corn, pay for it with checks from a check book supplied by the defendant, and accept delivery. On that date the plaintiff, knowing Lowry was the defendant's agent, sold to him, as such agent, three carloads of broom corn. On November 2, the plaintiff delivered the broom corn to Lowry, and received from him one of the defendant's checks, in payment of the price. The defendant dishonored the check because, as it said, it had revoked Lowry's agency on October 15. No notice of revocation was given. *Held*, Lowry's agency, not being evidenced by writing, was provable by his testimony regarding the facts of his appointment and authority, but not by his declarations or conduct.

2. Principal and agent §22(2) — Plaintiff's knowledge of agency held provable by statements of agent that he was such, made during continuation of agency.

Agency being established, the plaintiff's knowledge of the agency was provable by statements of Lowry that he was agent, made to the plaintiff during continuation of the agency.

3. Principal and agent §49 — Burden of showing termination of agent's authority held to rest upon principal.

Under the circumstances stated, the presumption was that the agency existed on October 5 continued, and the burden of proof to show termination of authority to complete the initiated sale rested on the defendant.

4. Principal and agent §38 — Check given by agent collectible in absence of notice of revocation of authority.

In the absence of notice of revocation of Lowry's authority, the plaintiff was privileged to accept and collect the check, although he had not, before October 5, dealt with Lowry as the defendant's agent or received from him any of the defendant's checks.

Appeal from District Court, Seward County.

Action by J. W. Key against the Thomas Lyons Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. L. Light, of Liberal, and S. B. Amidon, S. A. Buckland, and H. W. Hart, all of Wichita, for appellant.

V. H. Grinstead, of Liberal, John W. Davis, of Greensburg, and M. F. Cosgrove, of Topeka, for appellee.

BURCH, J. The action was one to recover on a bank check. The plaintiff prevailed, and the defendant appeals.

The check was dated November 2, 1918, and was signed The "Thomas Lyons Co., by R. F. Lowry." The petition alleged Lowry was agent of the defendant, duly authorized to sign and deliver the check. The answer denied agency of Lowry and his authority to sign and deliver the check. Lowry was a broom-corn buyer, residing at Liberal, Kan., who did business on his own account as R. F. Lowry & Co. and as the Liberal Broom Corn Company. The defendant employed Lowry to purchase broom corn for it, and armed him with a Thomas Lyons Company book of numbered blank checks with which to pay for what he bought. About October 5, Lowry agreed to buy three carloads of broom corn from the plaintiff. The broom corn was delivered on November 2, and the check was issued to pay for it. There was much evidence that Lowry's authority to act for the defendant was revoked about October 15, that he was ordered to send in his check book, and that on November 2 he was without any authority to issue the check sued on. There was much evidence to the contrary, and a finding either way would be well supported.

When making his case in chief the plaintiff was asked this question:

"Q. You may answer this question by yes or no: Did you know who Mr. Lowry represented in buying this broom corn of you?"

Over objection, the plaintiff answered, "Yes, sir."

When called as a witness in rebuttal, the plaintiff testified over objection as follows:

"Q. At the time you contracted with Mr. Lowry, did you know that he was buying broom corn in that territory for the Thomas Lyons Company of Arcola, Ill? A. I did."

Extended cross-examination developed the fact that the actual source of the plaintiff's information respecting Lowry's agency was Lowry himself, who told the plaintiff he was buying for the Thomas Lyons Company. It is said the testimony was improperly received, because agency may not be proved by declarations of the person to whom agency is attributed. The testimony was not offered to prove agency. Lowry's agency was proved directly by other testimony, and his agency at the time he first negotiated with the plaintiff was admitted by the general agent of the defendant who appointed him. The testimony objected to was offered to prove the plaintiff's knowledge that Lowry was the defendant's agent, and if, while Lowry was agent for the defendant, he communicated the fact to the plaintiff, the plaintiff then had knowledge of it.

Standing alone, some of the plaintiff's answers to questions propounded to him on cross-examination would indicate he was dealing with Lowry personally; but his testimony as a whole made it sufficiently clear he was selling to Lowry as the defendant's broom-corn buyer in that territory. Some evidence that, when the plaintiff contracted to sell the broom corn, he knew Lowry was generally reputed to be the defendant's broom-corn buyer, was improperly received, but was of no consequence, because Lowry was the defendant's agent at that time.

[1, 2] Lowry's agency to buy broom corn, and authority to pay for it with the defendant's check, were proved for the plaintiff by Lowry, not by his acts and declarations, but by his testimony relating to his appointment and authority. His appointment and authority were not evidenced by writing, and it is elementary law that he was qualified to testify to the facts which constituted him agent of the defendant to do the things which he did.

The court instructed the jury as follows:

"No. 6. The agency of the said R. F. Lowry to write checks upon the defendant being conceded by the parties, it is presumed to have continued, unless the contrary is shown by a preponderance of the evidence, and the burden of proof is upon the defendant to show by a preponderance of the evidence that the agency and authority of the said Lowry to write checks on the defendant was terminated prior to the time the check sued on was issued and delivered by the said Lowry, if you find that it was so issued and delivered to the plaintiff."

[3] It is said authority to issue checks after October 15 was not conceded, and the burden rested on the plaintiff to prove authority possessed by Lowry on November 2 to issue the check of that date. The conceded authority referred to in the instruction related to time previous to the claimed termination of agency on October 15. The agency on which the plaintiff relied was agency to buy, pay for, and accept delivery of broom corn on behalf of the defendant. Agency of that character not only existed before October 15, but it had been exercised in purchasing and paying for much broom corn. Between September 20 and October 15, Lowry used 16 checks from the book from which the check sued on was taken, and a purchase of broom corn from the plaintiff had been initiated. In such cases the presumption is that agency continues until notice of revocation (2 C. J. 920, §§ 650, 651), and in this instance the burden of overcoming the presumption and of establishing termination of authority to complete the initiated sale necessarily rested on the defendant. The plaintiff testified he had no notice of any interruption of Lowry's agency, and the defendant offered no evidence of any kind of notice of revocation.

[4] The plaintiff was a broom-corn broker. There was some evidence that when Lowry was sent out to buy broom corn for the defendant, he was told to buy of farmers and to keep away from the towns. An instruction was given to cover the subject of secret limitations on apparent general authority, which was proper for that purpose. The instruction referred to notice of revocation of Lowry's authority, and it is said the plaintiff was not entitled to such notice, because he had not, before the transaction under consideration, dealt with Lowry as the defendant's agent or received from Lowry any Thomas Lyons Company check. On October 5, Lowry was the defendant's agent, and the plaintiff, knowing him to be the defendant's agent, had dealt with him as such. This subject was covered by an instruction which reads as follows:

"No. 8. You are further instructed that the law makes a principal liable on contracts made after the revocation of the authority of an agent, between the agent and third persons who have theretofore dealt with the agent as such, or who had knowledge of such agency prior to its revocation, unless notice of such revocation of agency was given to such third person, but this rule does not apply to persons who are not shown by the evidence to have had knowledge of the agency or previous dealings with the agent as such, and no notice of revocation of the agency is necessary to be given to such persons."

No complaint is made of this instruction, which conforms to the statement of principle found in 2 C. J. 539, § 165.

It is said the evidence disclosed that the

plaintiff is not the real party in interest. This subject was submitted to the jury by an instruction not complained of, and the finding against the defendant embraced in the general verdict accords with what appears to be the weight of the evidence. Other criticisms of the proceedings are not deemed of sufficient importance to require special mention.

The judgment of the district court is affirmed.

All the Justices concurring.

(19 Kan. 351)

KLOPFENSTEIN v. UNION TRACTION CO.
(No. 23260.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Municipal corporations — §21 (20) — Driver of automobile held not negligent as matter of law in failing to see unguarded obstruction when passing another vehicle.

One driving an automobile along a city street is not as a matter of law negligent in not seeing an obstruction negligently left unguarded, although looking in its direction while approaching it, he being obliged to turn out and pass a horse-drawn vehicle, thereby coming upon such obstruction.

2. Municipal corporations — §23 — Findings in action for damages held consistent.

The findings returned by the jury were consistent with the verdict and with themselves.

3. New trial — §110 — Granting new trial not error, although findings erroneously considered inconsistent.

The trial court, feeling dissatisfied with the trial, that it had been hurried, and that the jury had not understood the instructions, and that the case had not been properly presented to them, although erroneously deeming the verdict inconsistent with the findings, did not err in ordering a new trial of its own motion.

Appeal from District Court, Montgomery County.

Action by O. A. Klopfenstein against the Union Traction Company. Judgment for plaintiff and from a denial of motion for judgment on the findings, and from an order of the court's own motion granting a new trial, defendant appeals, and plaintiff also appeals. Affirmed.

John J. Jones, of Wichita, and Chester Stevens, of Independence, for appellant.

James A. Brady and Lester G. Seacat, both of Cherryvale, for appellee.

WEST, J. The defendant appeals from an order denying its motion for judgment on the findings of the jury and from an order granting a new trial. The plaintiff also appeals from the latter order.

The petition alleged that the defendant in removing the bricks, blocks, stone, rock, cinder, and sand filler supporting its track left a hole between the rails and piled up the removed material so as to form a dangerous obstruction in the street which was left unguarded and without signal or warning; that the plaintiff while driving his automobile along the north side of the street was forced to pass a horse-drawn vehicle, and drove his car on the space between the rails and over the space just outside and along the right rail into the hole thus left, whereby he received certain injuries.

The court instructed the jury:

That the plaintiff had a right to drive along any part of the street; "that in so doing he was not required to exercise a high degree of care for the purpose of observing his surroundings, but he is under the duty and obligation to exercise ordinary care to observe the general conditions of the street and the traffic that might be thereon, and if you find and believe from all of the evidence in the case that the plaintiff was not in the exercise of ordinary care while driving towards and approaching the place where he alleges he was injured, and that had he been exercising ordinary care, as herein defined to you, he could or should have seen said obstruction in time to have avoided it, he is guilty of such contributory negligence as will bar a recovery in this action, and your verdict in such event will be for the defendant and against the plaintiff."

The jury returned a verdict for the plaintiff and found that he was not driving without headlights or exceeding a speed of 12 miles an hour, and that the dirt was piled a foot and a half or two feet high on each side of the track.

"Q. 7. Was plaintiff, at the time and just before he alleges he was injured, looking in the direction in which he was traveling? A. 7. Yes.

"Q. 8. If you answer the last question 'Yes,' what prevented him from seeing the obstruction? A. 8. Nothing.

"Q. 9. If you find for the plaintiff, in what respect do you find the defendant, its agents, servants, and employees, negligent? A. 9. No danger signals."

The defendant filed a motion for a new trial and a motion for judgment on the findings, and upon the argument the court overruled the latter, whereupon the defendant withdrew the former, and the court of its own motion granted a new trial, giving this as its reason:

"The court is not satisfied with the trial of the case; did it very hurriedly. And I don't believe that they grasped the meaning of the court's instructions, and that the case was properly presented so that the jury might understand what the law and the facts were, by reason of the haste. I don't think they could make the findings one way and the verdict the

other if they had no misconstruction of them. I don't think they properly considered the instructions."

[1] The defendant insists that the findings exonerated it for the reason that they showed the plaintiff to be looking in the direction he was driving, but not seeing the obstruction; also that, being entitled to a judgment on the findings, it was error to grant a new trial. It is argued that the creation of the obstruction was not the proximate cause of the injury, but merely the condition thereof. But the petition alleged and the facts showed that the obstruction was left without lights or guards. The fact that the plaintiff, coming up behind a horse-drawn vehicle and being compelled to go around it, was looking in the direction of the obstruction, does not preclude his recovery, for he had a right to assume that the street was reasonably safe for travel, and the fact that he drove into and was injured by the obstruction is indicative that he did not in any realizing sense see the obstruction as he approached it. In *Water Co. v. Whiting*, 58 Kan. 639, 50 Pac. 877, the plaintiff's horse was frightened by a spurting water hydrant in the street which was not noticed by her until within 100 feet of it, when the horse took flight. The claim of contributory negligence was there as here, but the court said it was not favorably impressed with this contention.

"It is true that the open hydrant was within range of their vision, if their attention had been called to it, and it was discernible before it was discovered by them. They were not, however, required to keep their eyes upon the pavement continuously, looking for obstructions and pitfalls. It was a street which was in constant use, and over which they had passed almost daily without encountering such danger. While they must still act with reasonable care, they had a right to presume, and to act on the presumption, that the street was reasonably safe for ordinary travel." 58 Kan. 644, 50 Pac. 878.

Twenty-one years later this court in *Weaver v. City of Cherryvale*, 102 Kan. 476, 170 Pac. 997, in an action against the city for injuries sustained by a pedestrian striking her foot against the end of a plank extending from the pavement to the curb at the edge of the sidewalk, said:

"The general verdict amounts to a finding that the plaintiff did use due care for her own protection, except so far as the special findings affirmatively show the contrary. We think that, although she was familiar with the conditions existing, knew of the use being made of the plank, and could have seen it if she had looked

for it, she could not on that account be held guilty of contributory negligence as a matter of law. The question whether she failed to exercise due diligence under all the circumstances shown by the findings and evidence, as well as the question whether the city had been negligent, was one of fact to be determined by the jury." 102 Kan. 477, 170 Pac. 998.

[2] It is a mere truism to say that those passing along the streets of a city are not required to have their attention fixed on the purpose of discerning obstructions and pitfalls; and the fact that their gaze happens to be in the direction they are going when they run into one does not absolve the wrongdoer from liability. We see nothing inconsistent or contradictory in the findings.

But by a wilderness of decisions covering half a century the rule is settled in this state that ordinarily the trial court dissatisfied with a verdict is in duty bound to set it aside. *Williams v. Townsend*, 15 Kan. 563; *K. P. Ry. Co. v. Kunkel*, 17 Kan. 145; *City of Sedan v. Church*, 29 Kan. 190; *Rowell v. Gas Co.*, 81 Kan. 392, 105 Pac. 691; *White v. Railway Co.*, 91 Kan. 526, 138 Pac. 589; *Ingalls v. Smith*, 93 Kan. 814, 145 Pac. 846; *Butler v. Milner*, 101 Kan. 264, 166 Pac. 478, and cases cited; *Halverson v. Blosser*, 101 Kan. 683, 168 Pac. 863, L. R. A. 1918B, 498; *Goehenour v. Construction Co.*, 104 Kan. 808, 180 Pac. 776; *Atkinson v. Darling*, 107 Kan. 229, 191 Pac. 496; *Briggs v. Bank*, 107 Kan. 339, 191 Pac. 487; *Borden v. Guber*, 108 Kan. 587, 196 Pac. 232. See, also, *Ratliff v. Railroad Co.*, 86 Kan. 938, 122 Pac. 1023, ordering a new trial without motion.

When the record shows that the new trial was granted on a pure question of law on which the trial court was wrong, such ruling cannot stand. *Lindh v. Crowley*, 29 Kan. 756; *A., T. & S. F. R. Co. v. Brown*, 51 Kan. 6, 32 Pac. 630; *Sovereign Camp v. Thiebaud*, 65 Kan. 332, 69 Pac. 348; *Railroad Co. v. Werner*, 70 Kan. 190, 78 Pac. 410; *Sutter v. Harvester Co.*, 81 Kan. 452, 106 Pac. 29; *Thompson v. Seek*, 84 Kan. 674, 115 Pac. 397; *Ahlstrom v. Kansas Milling Co.*, 85 Kan. 548, 118 Pac. 57.

[3] But here, the court expressly stated its dissatisfaction with the trial, its feeling that it had been hurried, and that the jury had not grasped the meaning of the instructions. Under those circumstances it is held that it was not error to grant a new trial on the court's own motion.

The rulings complained of are therefore affirmed.

All the Justices concurring.

(109 Kan. 272)

SCHROTH v. BARDRICK. (No. 23066.)

(Supreme Court of Kansas. June 11, 1921.)

*(Syllabus by the Court.)***1. Brokers — 75 — Evidence held to justify finding for plaintiff in action to recover commissions paid.**

The record examined, and the evidence held sufficient to sustain the judgment for plaintiff on the single issue of fact for the determination of which this cause was remanded to the district court in *Schroth v. Bardrick*, 106 Kan. 154, 186 Pac. 749.

*(Additional Syllabus by Editorial Staff.)***2. Brokers — 75 — Blank commission notes prepared for signature held admissible in action to recover commissions paid.**

In an action to recover \$250, which defendant had exacted from plaintiff as a commission for procuring a real estate loan, admission in evidence of blank commission notes, partially prepared for plaintiff's signature, but which were not used because the commission was added to the note for the loan, or because it was not to be charged for at all, held not error.

Appeal from District Court, Mitchell County.

Action by W. J. Schroth against George Bardrick. Judgment for plaintiff, and defendant appeals. Affirmed.

R. L. Hamilton, of Beloit, for appellant.

R. M. Anderson, of Beloit, for appellee.

DAWSON, J. This was an action to recover \$250, which the defendant exacted from the plaintiff as a commission in a transaction pertaining to a real estate loan. The case was here before, and was reversed because of the admission of incompetent evidence (*Schroth v. Bardrick*, 106 Kan. 154, 186 Pac. 749), and remanded for a new trial on "the single issue relating to payment of a commission for procuring the loan."

The plaintiff owned a farm, which was incumbered with a mortgage for \$4,500. He applied to the defendant for a larger loan to pay off the original mortgage and to procure funds to improve his farm residence. This was the subject of some negotiations with defendant, and eventually defendant arranged for the plaintiff a loan of \$5,000 on the farm and an independent loan for \$500 or \$750 on plaintiff's promissory note. The note was for \$750, and the question at issue was, whether it should have been for that amount or only for \$500. Plaintiff had poor eyesight, and could not read the papers the defendant required him to sign. He signed the papers, as he contends, in reliance upon the representations of defendant that he was getting the mortgage loan of \$5,000 at 5½ per cent. and the balance on his note for \$500

at 7 per cent. The defendant contends that the note was properly drawn for \$750 to include his commission on the \$5,000 loan. The defendant discounted the \$750 note at a local bank. The defendant handled the funds procured by these loans. He paid off the old mortgage, and paid certain bills for the improvement of plaintiff's house, etc. When the \$750 note came due, plaintiff was notified by the bank and went to inquire about it. The bank showed him the note and he acknowledged his signature. He then called upon defendant for an explanation.

"Q. And what was the conversation then, Mr. Schroth? A. Well, Mr. Bardrick told me that he knew we would need a little more money and that is why he done it, he made it \$750. I said that would be all right if I got the money, and I went down and paid my interest."

The matter dragged along for some time, awaiting an accounting of defendant's expenditures in plaintiff's behalf with the moneys procured by these loans. Then it developed that defendant had exacted a commission of \$250, and this lawsuit followed. Judgment was given for plaintiff, and defendant appeals.

[2] Error is assigned in the admission in evidence of ten blank commission notes, which had been partially prepared by the loan company for plaintiff's signature, but which were not used because the commission was added to the \$500 note, or because it was not to be charged at all. This evidence was of slight relevancy, but it was admissible for whatever it was worth.

It is next urged that plaintiff was erroneously permitted to testify that he had never received any money from defendant, when in his petition he had admitted that defendant had paid out \$4,881.57 for his benefit. The objection is not good. Plaintiff seems to have been an unlearned farmer, who was telling his story as best he could. The jury did not misunderstand him; he merely meant that no cash had come into his hands from these loans.

[1] The next error is based on the overruling of defendant's demurrer to plaintiff's evidence. The plaintiff's evidence, if true, clearly disclosed that no commission of \$250, or any other sum, was to be exacted for this loan. The evidence showed that plaintiff signed an application for a loan, which included a commission of \$275. There was some delay about getting this loan, and plaintiff called upon another loan agent, and when a loan for the latter was about to be procured defendant met plaintiff on the street, and they had the following conversation. The record reads:

"When he asked me where I was going I told him down to Mr. Tice's. 'Why,' he says, 'what are you going to do there?' 'Why,' I

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says, 'I have got my loan down there.' He says, 'My papers are over there now.' I said, 'I can't help that now. I have got the loan through Mr. Tice.' 'Why,' he says, 'what do you have to pay?' 'Why,' I says, 'I have got to pay 6½.' 'Why,' he says, 'Why will you pay 6½ when I have offered it to you at 5½, and my papers are here?' and so he says, 'Why not come back up?' 'Well,' I says, 'I don't know;' and 'Well,' he says, 'you see your wife about it.' And I went and seen my wife, so me and her we went up there. * * *

"Witness went to Tice's office, came back to Bardrick's office, and he and his wife signed the notes and mortgages."

The allegations of fraud were sufficient to admit the evidence touching the details of the transaction, and regardless of some possible discrepancies and inconsistencies in plaintiff's evidence, and however persuasive the evidence and argument for the defendant may have been before the trial court and jury, that cannot avail here, and the demurrer was properly overruled.

The other assignments of error have been carefully noted, but they do not require discussion. The verdict was not contrary to the evidence, which the jury in the exercise of their duty and discretion saw fit to believe; the motion for a new trial disclosed nothing indicating that justice had miscarried or that another trial would be likely to bring about a different result; nor did the court err in rendering judgment for plaintiff. The single issue of fact for the determination of which this cause was remanded to the district court is now settled, and it is without any error such as invalidated the former judgment; consequently this judgment must now be affirmed.

Judgment affirmed.

All the Justices concurring.

(109 Kan. 344)

SHRIVER v. BELL. (No. 23252.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

Brokers \S 63(2)—Negotiations held not to constitute contract because of reservation of right to refuse to sell.

The owner of a tract of land wrote to a real estate broker (who had submitted an offer for it which was not accepted) asking him to see if he could get a certain amount on stated terms, and adding, "If you can, I will advise you at once and may accept your offer as you have made it." The broker wired in answer that he accepted the offer. *Held*, that no contract resulted, and the broker was not entitled to recover a commission for having procured a customer ready to take the land on the terms named, for the reason the language quoted amounted to a reservation on the part of the owner of the right to refuse to sell on the terms referred to.

Appeal from District Court, Wallace County.

Action by Irvin Shriver against W. J. Bell. From an order sustaining a demurrer, plaintiff appeals. Affirmed.

C. F. King, of Sharon Springs, and Monroe, Hursh, Sloan & Monroe, of Topeka, for appellant.

W. E. Ward, of Sharon Springs, and Rea & Flood, of Hays, for appellee.

MASON, J. Irvin Shriver sued W. J. Bell for a real estate broker's commission, and appeals from an order sustaining a demurrer to his petition.

The plaintiff was a resident of Wallace county, where the land is situated. The defendant lived in Oswego, N. Y. The entire transaction was conducted by correspondence, and the controversy can be determined upon the face of the written communications between the parties. The plaintiff wrote to the defendant April 22, 1918, asking as to the terms on which he would be willing to sell the land—a section containing 645 acres. The defendant replied, saying that he still held it at \$11 net to him, adding:

"I am not very anxious to dispose of it, for I think it will increase rapidly in value, but will hold that offer good for the present."

On May 6, 1918, and March 10, 1919, the defendant wrote in response to further inquiry, his letters reading:

"I would not sell for \$10 per acre, my price is \$11 per acre net to me, nor would I sell for only a payment of \$1,000.00 and I would expect 6 per cent. per annum interest."

"I have held my land for \$11.00 per acre net to me and would sell for that price should you get a reasonable offer submit it to me for I want to sell if I can get my money out, providing, there was a good fair payment, I would give reasonable time on the balance."

The following communications were then interchanged, the first being a telegram sent by the plaintiff May 14, 1919, and the second a letter written by the defendant three days later:

"Have offer of seven thousand for section seven fourteen forty-two Wallace county, Kansas, two thousand cash will give mortgage back on land for five thousand for ten years at six per cent. with privilege of paying part or all at any interest payment answer at once."

"Now about the sale of my land there is nearly 645 acres and I do not like to wait so long for my money on so small a payment at time of purchase. I have not sold the land and have had equally as good an offer, but thought the payment too small. See if you can't get \$11 per acre and \$2,000.00 down with an annual payment of \$200.00 and the interest. If you can I will advise you at once and may accept your offer as you have made it."

On receipt of the last letter the plaintiff telegraphed the defendant:

"Accept offer of May seventeenth answer by wire at once."

The petition alleged that the plaintiff had procured a purchaser ready, able, and willing to pay \$13.50 an acre for the land, or \$8,707.50, upon the terms stated in the letter of May 17th, but that the defendant refused to make the sale. Judgment was asked for \$1,612.50.

We think the demurrer was properly sustained on the ground that the defendant did not unconditionally put the land on the market on the terms mentioned in his letter. His exact language was:

"See if you can't get \$11 per acre and \$2,000.00 down with an annual payment of \$200.00 and the interest. If you can I will advise you at once and may accept your offer as you have made it."

We regard this as unambiguous, the clear meaning being that in case the plaintiff should submit an offer on the terms stated the defendant would at once let him know whether he would accept it, and that if such an offer were not obtained, the defendant might later conclude to let the property go for what had previously been offered. The defendant merely agreed to give further consideration to the offer already made and to consider the new one if it should be submitted. He retained the right to reject both. The plaintiff's telegram undertaking to accept the offer of May 17th could not affect the matter, for the defendant's letter of that date made no out-right offer. In that situation, the plaintiff's right to compensation being contingent on his producing a buyer on terms at which the defendant had agreed to sell, no recovery could be had. Cases denying the right of a broker to a commission in somewhat similar circumstances are referred to in note 9, 4 R. C. L. 304. See, also, *Hale v. Kumler*, 85 Fed. 161, 29 C. C. A. 67.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 278)

LONG v. MYERS. (No. 23122.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Boundaries ⇐40(3) — Where evidence showed that boundary line had been marked by fence for more than 15 years, though not by agreement, a demurrer to evidence was properly sustained.

In an action for possession of a strip of land, the plaintiff's testimony tended to show that the line between the contesting landowners had for more than 15 years been marked

by a fence up to which each had farmed, but so marked only tentatively, and not by agreement that it should constitute the real boundary. *Held*, error to sustain a demurrer to the plaintiff's evidence.

2. Boundaries ⇐37(5) — Evidence held insufficient to sustain decree quieting title in defendant.

The decree quieting title in the defendant, being based on this evidence, was erroneously granted.

Appeal from District Court, Neosho County.

Suit by John R. Long against E. S. Myers, with cross-petition by defendant for decree to quiet title. A demurrer to plaintiff's evidence was sustained, title quieted in defendant, and plaintiff appeals. Reversed and remanded, with directions.

Smith & Brobst, of Chanute, and John R. Long, of Erie, for appellant.

W. R. Cline and J. Q. Stratton, both of Erie, for appellee.

WEST, J. The plaintiff sued to recover possession of a strip of land in dispute between himself as the owner of a 40-acre tract and the owner of the adjoining 40 on the north. The defendant denied this claim and cross-petitioned for a decree quieting his title. Jurors were impaneled and testimony taken, after which the court sustained a demurrer to the evidence of the plaintiff and quieted title to the disputed strip in the defendant. The plaintiff appeals.

George Cosner was the patentee of the quarter section. In 1882 he sold this 40 to Massey. In 1898 Massey sold to Myers, who in 1918 sold to the plaintiff, the deeds describing the land as the southeast quarter of the southeast quarter. After the plaintiff bought of Myers he took a measuring tape and testified he found his land several rods short north and south and asked Myers what he thought of having a surveyor locate the line; that the latter objected to doing anything about it. The plaintiff then had the tract surveyed, proper notice having been given, and it was found that the old fence running east and west was 99½ feet south of the true line at the east end and 13½ feet at the west end, thus marking the strip for which possession was sued for in this case.

The patentee, Mr. Cosner, testified that when he sold to Massey the two measured the 40 off with a rope and established the line through there.

"Q. Did you know at the time you established this whether you were getting it on the correct line or just guessing at it? A. Well, we just measured it off 80 rods square—aimed to; we didn't know whether we got it or not; we measured it with a rope."

He and other witnesses testified that he farmed up to the fence which he says he put 2 feet over on the line thus established and which was treated as the line, and that his adjoining neighbor farmed down to the same fence, and no controversy arose about the line. The plaintiff lived on adjoining land more than 20 years before he purchased the 40 and knew of this fence.

It seems that the trial court from all the testimony thought it showed that Cosner and Massey had agreed on this fence as the boundary line. The trouble about this is that Mr. Cosner further testified:

"Q. You established that as a line fence?
A. Well, we calculated to get it surveyed when the surveyor came up.

"Q. You knew where the line was at that time? A. No; I didn't know."

[1] If this does not affirmatively show that these two adjoining landowners simply by rope measurement put the fence between them temporarily until the true line could be established, it certainly tended to show such an arrangement, and there was testimony from which the jury might well have found it to exist.

It is well settled that the use of a dividing fence without specific agreement that it shall be deemed a boundary between adjoining landowners is neither an establishment of a true line nor a thing which will start the statute of limitation running by way of adverse possession. In *Edwards v. Fleming*, 83 Kan. 653, 112 Pac. 836, 33 L. R. A. (N. S.) 923, it was held that, when a fence is believed to be the true boundary, and the claim of ownership is up to the fence as located, if the intent to claim title exists only on the condition that the fence is on the true line, the intention is not absolute, but conditional, and the possession is not adverse. See, also, *Peterson v. Hollis*, 90 Kan. 655, 136 Pac. 259, Ann. Cas. 1915B, 725; *Shanks v. Williams*, 93 Kan. 573, 144 Pac. 1007; and *Winters v. Bloom*, 96 Kan. 443, 151 Pac. 1109. In the latter case it was said:

"The court also found that it did not appear whether the wall was built over on the eight-foot parcel by mistake or not. If it was done by mistake and possession was held under a misapprehension as to the true boundary, it would not be adverse, although it continued beyond the 15-year period." 96 Kan. 445, 151 Pac. 1110, citing numerous authorities.

To a similar effect is *Peyton v. Waters*, 104 Kan. 81, 177 Pac. 525.

[2] As the defendant's right to have his title quieted is dependent on the same question as the plaintiff's right to possession, it was not only error to sustain the demurrer to the plaintiff's testimony, but also error to decree the title quieted in the defendant.

The rulings are therefore reversed, and

the cause remanded, with directions to proceed in accordance herewith.

All the Justices concurring.

(109 Kan. 306)

CLARK v. TOPEKA FLOUR MILLS CO.
(No. 22933.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Sales §52(5) — Evidence insufficient to show contract for purchase and sale of flour.

The appellant, claiming that he bought from the appellee 5,000 barrels of flour delivered in Chicago, and that only 4,000 barrels were shipped, bought 1,000 barrels at an advanced price, and sued to recover the difference. *Held*, that the evidence is sufficient to sustain findings to the effect that he had no contract with the appellee, because the minds of the parties never met on the terms of a contract, by reason of appellant's failure to agree to the terms of a written confirmation sent him.

2. Sales §22(3) — Confirmation of sale of flour held to state terms of contract, if any were entered into.

A milling company at Topeka sold 5,000 barrels of flour at a certain price to a broker at Kansas City, and under his directions shipped the flour to the appellant at Chicago at an advanced price by which the broker was to receive 12 cents per barrel commission. Appellee sent a written confirmation to the appellant offering to enter into a contract direct with him for the sale of the flour, which he retained, but he never informed appellee whether he agreed to it or not. *Held*, that if he had any contract with the appellee, it was upon the terms stated in the written confirmation.

3. Sales §181(11) — Under the evidence diversion of flour purchased held equivalent to delivery.

Even accepting the view that the parties had a contract for 5,000 barrels of flour, the evidence was sufficient to sustain a finding that the appellant authorized the shipment of a thousand barrels to a third person, and that the diversion of the flour amounted to a delivery under the contract.

Appeal from District Court, Shawnee County.

Action by Frank G. Clark against the Topeka Flour Mills Company. Judgment for defendant for costs, and plaintiff appeals. Affirmed.

Dennis C. Payne and D. R. Hite, of Topeka, for appellant.

Edwin A. Austin, of Topeka, for appellee.

PORTER, J. The appellant, claiming that he bought from the appellee 5,000 barrels of flour delivered in Chicago, and that only 4,000 barrels were shipped, bought in 1,000 bar-

rels at an advanced price, and sued to recover the difference. There was a judgment against him for costs, from which he appeals.

The trial court made findings of fact in substance as follows:

Clark, the appellant, is a flour merchant in Chicago, Ill. E. E. Pierson, a commission merchant and broker in flour at Kansas City, had had many transactions with the Topeka Flour Mills Company, in most of which he had acted as broker, receiving a commission for his services in selling flour. In some instances he had bought outright, and had been allowed a certain percentage on a commission basis. August 8, 1916, the appellee sold Pierson 5,000 barrels of Gold Bell flour at \$5.80, bulk, f. o. b. Kansas City. On August 14 Pierson wrote Clark confirming a sale made by telegram to him of the same flour to be shipped by the Topeka Flour Mills Company at \$6 per barrel, bulk, delivered at Chicago. By letter to Pierson, Clark confirmed the sale. Pierson wrote the appellee:

"In filling the contract I have with you for 5,000 bbls. of Gold Bell. * * * Please load this flour into twenty cars, 250 bbls. to each car, and invoice the flour to Mr. Frank G. Clark, * * * Chicago, Illinois. Make your arrival draft against the shipments for \$5.98 per bbl., delivered to Chicago, stopping the cars at Kansas City for inspection, attaching * * * certificate to your draft with bill of lading."

On August 23 the appellee sent to Clark original and duplicate confirmation sheets of the purchase, saying:

"We beg to confirm sale per E. E. Pierson of 8-8-16 upon terms and conditions named below."

Under the term "basis" the confirmation contained this statement:

"Cars to be stopped at Kansas City for inspection, buyer to pay inspection charges."

On the bottom of the sheet marked "original" there was this statement:

"Sign attached duplicate and return promptly."

The duplicate was marked:

"Sign here * * * and return promptly."

Clark did not sign or return or acknowledge in any way the original or duplicate confirmations; nor did he reply to a letter of August 25 written by the appellee which stated:

"Regarding the booking for 5,000 barrels Gold Bell flour with you, made through Mr. E. E. Pierson of Kansas City, we beg to advise that we have made application for the empty cars."

On September 18 the appellee wrote him:

"On August 23d we sent you a confirmation, our No. 275. Please sign the duplicate attached and return in order to complete our files."

To which Clark replied on September 21 by letter:

"I have been unable to locate the confirmation which you say you sent August 23d. Will you kindly forward another and will sign and return to you."

No other confirmation was sent to him, and he had no direct communication with the appellee from that time until October 26, when he wired:

"Hurry shipment last thousand Gold Bell."

The appellee began to ship the flour to Clark August 25, and continued until 4,000 barrels had been forwarded, the last car on September 22. The flour was billed direct to Clark, the billing giving as the date the flour was sold—

"8-8-16, directions received 8-23-16, sold by E. E. P. to Frank G. Clark, \$5.98 per barrel, basis Chicago, freight to be deducted, stop at Kansas City for inspection."

The appellant paid the drafts which accompanied the invoices and accepted the flour, but made claims against Pierson for one-half the inspection charges at Chicago and also for short weights. The bills for these claims Pierson sent to the appellee. On September 21, the appellee wrote Clark:

"We have been handed a bill from you by Mr. E. E. Pierson for half inspection on 5 cars and a memo. of short weights on the same cars."

"This flour was sold to Mr. Pierson, f. o. b. Kansas City; Kansas City weights and inspection. Therefore we cannot allow your bill for inspection. * * * We will allow 1 lb. [per sack] short weight on these shipments."

Clark, without answering these letters, sent them to Pierson, and again offered to credit Pierson with whatever the appellee sent him, but stated that he expected Pierson to stand the difference, for the reason that the flour was bought f. o. b. Chicago and subject to Chicago inspection and weights.

The finding with reference to the thousand barrels that were never shipped direct to the appellant is that on September 7, 1916, Pierson had sold a Boston firm a thousand barrels of Gold Bell flour and on the same day wrote Clark as follows:

"May I borrow 1000 bbls. of the Gold Bell to apply on another contract and then ship you the thousand barrels in October?"

To which Clark on the following day replied:

"I have your favor of the 7th and note same. It will be all right with me for you to transfer 1,000 barrels of my Topeka Gold Bell contract to October shipment."

Pierson requested appellee to hold back a thousand barrels on Clark's order. The ap-

(198 P.)

pellee wrote him, stating that they would like to comply with his request, but would be obliged to get out the Clark order at that time, but would hold it back "all we can, but cannot promise very much." Accordingly the appellee shipped the thousand barrels on the order of Pierson to Boston.

On October 24 Clark wired Pierson:

"Why don't Topeka ship thousand Gold Bell transferred to October?"

Pierson replied:

"I have shipped out all the flour they owe me and cannot get any more from them until next month on account of being oversold.

"I will try and get another thousand bbls., from one of my other mills to take the place of this."

To this, Clark replied by letter:

"If you will remember some time ago you wrote you had 1,000 barrels Gold Bell for October shipment, and would I take this October shipment contract and let you have 1,000 barrels of my Gold Bell for prompt shipment. This I agreed to do at that time, and am sorry you did not ship. I saw buyer, and he will take 1,000 barrels of Gold Bell for November shipment, but must have it in November, as he has the flour sold. If you cannot get Gold Bell be sure to get a 95 per cent. patent of equal quality, so there will be no trouble later on. Don't delay shipment after November."

About the same date Clark wired appellee direct:

"Hurry shipment last thousand barrels Gold Bell."

The appellee wrote that they had taken the matter up by telephone with Mr. Pierson—

"to whom we originally sold the flour. We beg to refer you to him for an adjustment of this matter, as we have filled our contract under instructions."

To this appellant replied:

"I was very much surprised to receive your letter of the 26th, in which you state you have filled all your contracts with Mr. Pierson. I still have 1,000 barrels of Gold Bell which you confirmed to me. In my correspondence with Mr. Pierson I consented only to an extension of time on delivery of thirty days, which in no sense cancels any part of this contract."

On November 11 Clark again wired the appellee:

"Hurry shipment last thousand barrels Gold Bell, Pierson contract."

Again he was referred to Mr. Pierson, and at once wired the latter:

"Must have shipment thousand Gold Bell, your contract. Rush. Cannot wait any longer."

On December 6 he wired the appellee:

"Unable to do anything with Pierson, must look to you fulfillment of contract."

On the same day the appellee replied saying:

"We have written you several different times that our contract with you is completed, so we have nothing more to ship."

On November 22 the appellant purchased flour of similar quality to protect himself against loss on the thousand barrels for which he paid the then market price of \$8.45 a barrel.

Notwithstanding the somewhat complicated facts, the case is quite simple. Appellant's principal theory is that the appellee, with full knowledge of the facts, sent a confirmation to him on August 23, and two days later began shipping the flour marked "sold to Frank G. Clark"; that this indicated an intention to abide by the transaction as negotiated by Pierson, and that the appellee is bound by the terms of the contract Pierson made with appellant and by all that Pierson subsequently did. In support of this theory stress is laid upon expressions in a letter from the appellee to the appellant where reference is made to "our contract with you"; the statement in the invoices "sold to Frank G. Clark"; the expression in letters to Pierson referring to the flour as "sold to Clark"; and "confirming a sale through Pierson"; reference in other letters to Pierson, referring to the transaction as "the Frank G. Clark order," and statements in letters to Pierson in which the appellee asked him to supply it with a release signed by Clark in order "that we may be relieved of all liability."

An exhibit, not referred to in the findings, is a letter from Clark to Pierson in August, admitting receipt of a confirmation from the appellee, and directing Pierson's attention to a previous letter in reference to Chicago inspection, and stating that Chicago buyers would not accept Kansas City inspection, and that it was only a needless expense. And yet as late as September 21, in response to appellee's request that he sign and return the duplicate confirmation sent him in August, he writes that he is unable to locate the confirmation. Late in November when he was having trouble with Pierson over the last thousand barrels he apparently had succeeded in locating it—for he writes appellee that there was still a thousand barrels of flour due him on a sale "which you confirmed to me."

[1, 2] The fact is he was invited by the appellee to enter into a contract directly with it on certain terms stated in the confirmation sent him, among which terms were "cars to be stopped at Kansas City for inspection, buyer to pay inspection charges." The fact that he not only refused to reply to this and other letters, but had no communication with the appellee whatever until after the trouble arose between him and Pierson (save the one letter of September 21, stating that

he was unable to locate the confirmation) indicates a studious attempt to avoid entering into a contract with the appellee which would bind himself. Doubtless the trial court was not impressed with the claims of a business man who refused to answer a business letter as important as the one with reference to the confirmation. Of course, the appellee was in a position where it could elect if it saw fit to regard a contract with appellant as in force on the terms stated in the unanswered confirmation. The legal effect of the acceptance and retention of a written confirmation in contracts of this character, when originally made by oral communication, by telephone, or by telegrams, has been passed upon by this court in a number of recent cases. *Strong v. Ringle*, 96 Kan. 573, 152 Pac. 631; *Wallingford v. Grain Co.*, 100 Kan. 207, 213, 164 Pac. 275; *Cardwell v. Uhl*, 105 Kan. 249, 182 Pac. 415; see, also, 13 C. J. 279, 280, 281. The same principle applies to the present case because the appellant had no contract whatever with the appellee, unless one arose by the sending of the written confirmation of August 23; and unless the appellant, upon receipt of it, communicated to the appellee any objections he might have to its terms, the contract was embodied in the letter of confirmation itself.

The trial court reached the conclusion that the transaction between Pierson and the appellee was a valid contract of sale of the 5,000 barrels of flour to Pierson upon the terms stated in their correspondence, and that neither party had any intention of making a sale of the same flour to Clark, but afterwards, and before any of the flour was shipped, Pierson sold the flour to Clark upon somewhat different terms, including delivery at Chicago, which required payment by the seller of inspection weights there and an advance in price of 12 cents per barrel, terms which were not known or agreed to by the appellee, and that the shipment of the flour direct to Clark, billed as sold to him, upon drafts paid by him, were all in the execution of the contract between Pierson and Clark; that the appellee on Pierson's order offered to confirm the sale direct to Clark, but that Clark never accepted the proposed terms offered, and never agreed to Kansas City inspection nor to pay for Chicago inspection, and, further, that he never advised the appellee of his contract with Pierson.

If we accept appellant's theory that Pierson was a broker and never had any interest in the flour then he was a mere go-between, a middleman. Both appellant and appellee were aware of the fact that Pierson was to receive 12 cents per barrel from appellant, and

the latter knew that if he entered into a contract with appellee, the contract was one made "per Pierson" or "through Pierson," and the presumption is that he also knew that Pierson was not acting without expecting to receive some sort of a commission or profit from the appellee. Therefore the general rule as to representing adverse interests has no application because the broker's employment was such that his duties were not discretionary in character and he was employed merely as a middleman "for the sole purpose of bringing certain persons together." 4 R. C. L. 275, and see note; *McLure v. Luke*, 154 Fed. 647, 84 C. C. A. 1, 24 L. R. A. (N. S.) 661. In that view of the case the appellant simply loaned his fellow broker a thousand barrels of the flour, and authorized him to notify the appellee to divert it to another shipment for Pierson's accommodation. If, in the meantime, flour had gone down in price \$2 or \$3 per barrel, appellant would doubtless have objected strenuously to any attempt by appellee to compel him to accept, and pay for another thousand barrels at the original price. The contention that Pierson was appellee's agent, with authority to bind the latter, is not sustained by the findings nor, in our opinion, by a fair construction of the writings.

The trial court was right in considering the question of little importance whether there was a contract between the appellant and the appellee by which the latter agreed to deliver the full 5,000 barrels of flour, for the reason that appellant saw fit to loan to Pierson the last thousand barrels under a personal arrangement between them, and appellant had no right to assume that Pierson had authority from the appellee to extend the time of delivery of the balance of the flour, and, as the court held:

"In fact Pierson had no such authority, especially in view of the fact that the market price of flour appears to have been going up, and that the [defendant] expressly stated to Pierson, September 9, that it would have to get out the Clark order at that time."

[3] To the appellant's insistence that the appellee is estopped to deny that a contract existed between them for the sale and purchase of the full amount of the flour, the answer is that the appellant is the one who is estopped, first, by his refusal to deal with the appellee until he found himself unable to come to a satisfactory adjustment of his differences with Pierson; second, by authorizing the thousand barrels to be delivered on Pierson's order.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 427)

STATE ex rel. HOPKINS, Atty. Gen., v.
COGLEY et al. (No. 23553.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

Corporations \Rightarrow 36—Educational corporation held to continue beyond period fixed by statute; statute providing that corporation should continue for 50 years held prospective in operation, and not to limit grant already made.

The life of an educational corporation organized under a general statute providing that every corporation shall have succession "for the period limited in its charter, and when no period is limited, for twenty years," where its articles of association provide that it shall exist forever, is not limited to the period mentioned; and without extension or renewal its corporate capacity continues until a limit is placed upon it by subsequent legislation. A later enactment changing the word "twenty" to "fifty" in the clause quoted, and providing that the existence of a private corporation shall begin on the day the charter is filed and continue for 50 years, is prospective in its operation, and is not intended to diminish a grant already made.

Original proceeding by quo warranto by the State of Kansas, on the relation of Richard J. Hopkins, as Attorney General, against Rev. William E. Cogley and others, acting as board of trustees for Saint Mary's College. Judgment for defendants.

Richard J. Hopkins, Atty. Gen., for plaintiff.

Richard J. Higgins, of Kansas City, for defendants.

MASON, J. In December, 1869, the St. Mary's College, in Pottawatomie county, Kan., was organized as an educational corporation under the general statute then in force. Its charter has never been extended or renewed, and a question has arisen as to its continued corporate existence. This action in quo warranto is brought against the persons now acting as members of its board of trustees to determine whether without a further grant they can lawfully exercise the functions of such office. The facts are agreed to, and the case is submitted for final determination as to the effect of the statutes upon the existence of the corporation.

The corporation was organized under the general statute containing this provision:

"Every corporation, as such, has power: First, to have succession by its corporate name, for the period limited in its charter, and when no period is limited, for twenty years." Gen. Stat. 1868, c. 23, § 11.

This language was included in the articles of association or charter:

"The St. Mary's College hereby incorporated shall exist and have succession forever."

Clearly the purpose of the statutory provision quoted was not to restrict to 20 years the period of existence of all corporations created under it. In the absence of any express limitation or statutory regulation the life of a corporation is indefinite—it continues until legally dissolved. 14 C. J. 178. The statute quoted may be regarded as dealing with the duration of a corporation only where the charter is silent on the subject. It does not prevent a corporation being chartered for 50 years, 100 years, or 1,000 years. But, if there is nothing in the articles of incorporation to indicate the period for which a corporation is to exist, the statute supplies the omission and fixes it at 20 years. The word "limited" may fairly be interpreted as though it read "defined," and a corporation whose charter declares that it shall last forever is not silent or indefinite on the subject of the period of its continuance. No prejudice to the rights of the public can result from such an interpretation of a law of this state, for a corporation created thereunder cannot in any event exist longer than the people through their representatives in the Legislature may determine, inasmuch as the Constitution expressly reserves the right to amend or repeal all laws conferring corporate powers. Article 12, § 1. The construction indicated has been placed upon the language of the statute by the court of last resort of the state from which it was borrowed, by a decision, however, which has not controlling force because rendered after its adoption here. State ex rel. v. Lesuer, 141 Mo. 29, 41 S. W. 904. In the case just cited the court declined to pass upon the question whether corporations organized for educational purposes under the general act containing the language above quoted would in any circumstances be subject to the 20-year limit there imposed; but it has since held that educational corporations chartered under special statutes were not to be regarded as within the scope of such limitations because of their character saying:

"Educational institutions of this kind are not established with a view of being continued for a brief period only or indeed for any limited time; in their very nature they are designed to be perpetual. It would be preposterous to assume that men would enter into the work of founding a college, erecting buildings, and gathering the necessary appliances for the conduct of such an institution to be dissolved at the end of twenty years." State ex rel. v. Board of Trustees, 175 Mo. 52, 59, 74 S. W. 990, 991.

The same court has also held that the limitation referred to is not to be construed as applying even to life insurance companies chartered under special acts, because the Legislature cannot be thought to have intended that the duration of corporations whose con-

tracts would necessarily extend over much longer periods should be limited to twenty years. *State v. German Mutual Life Ins. Co.*, 224 Mo. 84, 123 S. W. 19, 19 Ann. Cas. 1210.

In 1886 it was provided in an amendment to the law referred to that the duration of a corporation might be extended for successive periods of 20 years, "or for such length of time as may be stated in its certificate therefor." Laws 1886, c. 62, p. 85, § 2. This seems to contemplate an extension without any limitation as to time, and that effect has been attributed to it. *State v. Lawrence Bridge Co.*, 22 Kan. 438. Under this construction the new provision may be regarded as a legislative interpretation of the original act as authorizing the organization of corporations without a limit as to their duration, inasmuch as the Legislature would hardly intend to allow an extension for an unlimited time while putting a limit on the original period for which a corporation could be organized.

It remains to consider the effect of subsequent enactments. In 1907 the corporation statute was revised. The provision already quoted was re-enacted with the substitution of "fifty years" for "twenty years." Gen. Stat. 1915, § 2144. A new section was at the same time added containing this provision:

"The existence of a private corporation shall begin on the day the charter is filed in the office of the secretary of state, and shall continue for a period of fifty years." Gen. Stat. 1915, § 2110.

We need not determine the construction of these provisions further than to decide that both of them are prospective. There is no doubt, of course, of the authority of the Legislature, under its reserved power already referred to, to shorten the period of existence of a corporation already created. But it is obvious that the mere change from 20 years to 50 years in the statute fixing the duration in the absence of any other designation would not affect corporations already created. And the mere declaration that a corporation shall exist for 50 years from the filing of its charter cannot be regarded as intended to diminish the effect of a grant already made—to shorten the life of a corporation in existence when the act was passed.

We are concerned now only with a corporation of the character here involved—one for the maintenance of an educational institution. Without determining what might be the interpretation of the statute as applied to a corporation for financial profit, we hold that the corporate existence of the college of which the defendants are acting as the trustees continues without extension or renewal until such time as the Legislature by future action shall place a limit upon it.

Judgment is therefore rendered for the defendants.

All the Justices concurring.

(109 Kan. 25)

CURE v. MIDLAND LIFE INS. CO.
(No. 23030.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Insurance \S 392(11)—Facts insufficient to show waiver of provision for delivery of policy and payment of premiums while insured was alive.

In an insurance contract it was stipulated that the policy should not be in force until it was delivered and the first premium paid while the applicant was alive and in good health. After payment of part of the annual premium, and before the delivery of the policy, the applicant died. After knowledge of his death his former employer, under an arrangement for the payment of premiums due to the insurance company from the wages of insured employees, sent a check to the company which covered installments due from insured employees, and included a payment on the contract of the deceased applicant. As soon as the agent discovered that the check covered that payment the money was returned to the employer. Upon a claim that the conduct of the defendant was a waiver of the conditions precedent to a consummated contract, it is held that the evidence did not establish a waiver.

2. Estoppel \S 52—To constitute a "waiver," there must be a decisive act showing an intention to relinquish the right or acts amounting to an estoppel.

To constitute a waiver of a contract right, there must be a clear, unequivocal, and decisive act of the party showing an intention to relinquish the right or acts amounting to an estoppel on his part.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

Appeal from District Court, Cowley County.

Action by Nora Cure against the Midland Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Frank P. Seebree, of Kansas City, Mo., and Hackney & Moore, of Winfield, for appellant. S. A. Smith and S. C. Bloss, both of Winfield, and W. C. Mullendore, of Winfield, for appellee.

JOHNSTON, O. J. This was an action brought by Nora Cure to recover from the Midland Life Insurance Company \$1,000 upon an insurance contract made with her minor son, Hubert L. Cure. Judgment was in her favor, and defendant appeals.

The contract for insurance was arranged between Cure and G. T. Brewer, the agent of the insurance company, on July 29, 1918, and in the application it was stipulated:

"No policy issued in consequence of this application shall go into effect until it shall actu-

ally be delivered to me, and the first premium thereon shall be actually paid to the company, all during my life and good health."

After the application had been approved and registered with the insurance department, but before it was delivered, Cure was accidentally killed. There is no discord between the parties as to the clause of the contract providing that the contract was not binding until the delivery of the policy, nor as to the fact that no delivery had been made. It is conceded that under the contract delivery of the policy was a prerequisite to the consummation of the contract, but it is contended that this provision was waived by the action of the agents and officers of the company. When the application was made Cure gave his note for \$29.84 as a payment towards the first annual premium, and it was arranged with his employer, the Empire Gas and Fuel Company, that \$10 of the amount should be taken out of his wages on August 10th, \$10 more on August 25th, and the balance of \$9.84 on September 10th. The first payment was taken from his earnings on August 10th and paid to Brewer, the agent of the insurance company. The day following the accident Brewer notified the insurance company of the death of Cure, and because the policy had not been delivered, and was not in force, he transmitted the \$10 which had been paid to him to the company, as he said, "to return to his folks."

The vice president of the company replied that there was no liability on the application, for the reason that the policy had not been delivered, and stated that delivery had been prevented by the failure of the mother of Cure to give her consent to the taking out of insurance by her minor son, and that the requests for her consent had been ignored by her. On August 25th, the next pay day, which was 10 days after Cure's death, the Empire company delivered a check to Brewer covering installments on a number of notes given by Cure and other insured employees, which included \$19.84, the balance due on the Cure note. The fact that the check included a payment on the Cure note was not observed by Brewer when it was delivered, but when it was discovered he paid it back to the Empire company, and also returned the \$10 installment formerly received. The check covering this amount was held by the Empire company for a few days, and it was then returned to Brewer, with the statement that the parents of Cure refused to accept it. The amount so received is still in the hands of the defendant, but when it was tendered to the parents they refused to accept it, and have insisted that the defendant was liable for the full amount named in the application. When a demand was made for the insurance, the company sent a check for \$29.84, the amount of the premium paid, but it was returned with the statement that \$1,000 of

insurance must be paid, and if not paid suit to collect the same would be begun.

[2] The claim of waiver is based upon the fact that payments were accepted and retained after Cure's death, and after the defendant had notice of his death. It is manifest that the defendant did not intentionally take or hold the premium money after learning of the death of Cure. It is essential to a waiver of a contract right that there be not only knowledge of it, but an intention to relinquish it. It has been said that:

"To make out a case of waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part." 27 R. C. L. 909.

[1] The evidence shows that there was no intention on the part of the defendant or its agent to waive the condition or relinquish the right. When notice of the death was received there was prompt declaration of no liability, and steps were taken towards the return of that part of the premium which had been collected. It is true that the balance of the premium, \$19.84, was taken out of the wages of Cure after his death, and after the notice of his death by the defendant and its agent, and that this was included in a check covering installments of other employees which was turned over to the agent of the defendant. As soon as he learned that this amount was included in the check, prompt and decisive action was taken by the return of the money to the employer who had paid it. It was not knowingly taken, nor was there any intention to retain or appropriate it. Instead of an intentional and unequivocal relinquishment of the contract right, there was a consistent insistence that there was no liability on the contract, and an attempt in good faith to return the premium that had been indirectly paid through the agent of Cure's employer.

Nor is there anything in the case in the nature of an estoppel, as the plaintiff was not misled by the fact that the premium was in defendant's hands for a short time. From the beginning the return of the premium was steadily refused. A waiver of a like condition was before the court in *Green v. Ins. Co.*, 106 Kan. 90, 186 Pac. 970. There an application for insurance was made, and part of the first premium was paid, but it was stipulated that the contract should not take effect until the delivery of the policy. The policy was executed, placed in the hands of the local agent of the company for delivery, but before it was accomplished the death of the applicant occurred. Because of the serious illness of the applicant and inability to consummate the contract, the delivery of the policy was delayed, but the agent informed the wife of the applicant that the policy was valid and in force. The agent was without authority to deliver the policy unless the

premium was paid, and the applicant was then in good health. Upon learning of the death of the applicant the insurance company promptly disclaimed liability, and it was held that, while the court had been liberal in applying the doctrine of waiver in insurance cases, there could be no waiver without an intention to waive the stipulated conditions, and it was therefore held that waiver was not established.

If the premium had been paid by Cure when the application was made, and had been kept by the company until after knowledge of his death, it would not have affected the provision that the contract was to be without force until the delivery of the policy and full payment of the first premium while he was in life and good health. Of course, if the company had knowingly accepted premiums and intentionally recognized the validity of the contract and waived these conditions it would be bound. The evidence does not show such an intention, and nothing occurring after his death tends to show an intentional relinquishment of the right nor anything approaching an estoppel to deny liability.

The judgment will therefore be reversed, and the cause remanded, with instructions to enter judgment for defendant.

All the Justices concurring.

(109 Kan. 234)

BACON v. KANSAS CITY TERMINAL RY. CO. (No. 22862.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

Explosives §12—Negligent blasting shown.

The evidence examined, and held, injury to a dwelling house, occasioned by concussion and vibration produced by blasting, was the result of negligence.

Appeal from District Court, Wyandotte County.

Action by Martha E. Bacon against the Kansas City Terminal Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. W. Moore, of New York City, O. L. Miller, of Kansas City, Kan., and John H. Lathrop, of Kansas City, Mo., for appellant.

J. H. Brady, of Kansas City, Kan., for appellee.

BURCH, J. The action was one to recover damages for injury to a dwelling house occasioned by blasting done by the defendant. The verdict and judgment were for the plaintiff, and the defendant appeals.

The blasting was done to procure material for fills for the defendant's railroad. The bank of earth which was reduced by blasting was located in a populated portion of the

city of Kansas City, was composed of sand and clay, with a top stratum of clay, and was 50 or 60 feet high. It was not practicable to use a steam shovel exclusively. The shovel could reach upward but 20 or 25 feet, and its continued use would cause the bank to cave, with danger to men and machinery. Blasts at the top of the bank would produce a bench lower down, in which other charges would be exploded, and the operation would be repeated until the earth loosened to the bottom of the bank. The defendant commenced blasting about January 10, 1917. At first, from two to four cans of blasting powder were placed in each hole, generally two cans. Each can weighed twenty-five pounds. Being unable to obtain sufficient earth to make satisfactory headway, the engineer in charge of the work made application to the city engineer for permission to use heavier charges. After experiments, the city engineer authorized use of not to exceed four cans, or 100 pounds of powder to a hole. The city engineer would supervise the placing of a charge, and then go to a residence in the vicinity and note the effect of the explosion. Complaints of the blasting had already reached his office, and he went into three or four houses in the neighborhood of the bank, and remained there while shots were fired, in order to satisfy himself in regard to what would be a reasonable amount of powder to use. As an engineering proposition, he thought that under the conditions the defendant should use 100 pound charges. He did not think continued vibration from uninterrupted use of such charges would affect the structure of a house, but he would not say injury to some extent would not result. He testified the work could have been done with two-can charges, by taking more time and putting in more blasts.

There was abundant evidence the blasting did serious injury to nearby houses, including that of the plaintiff. One witness said it seemed as if a blast lifted his house and then rocked it from north to south. Foundations were cracked and broken. Copping was cracked and thrown out of line. Walls were cracked. Stucco and plastering were cracked. Casings, jambs and joints were loosened. Pillars and windows were pulled away from walls. Mantels and floors were drawn away so that cracks were opened. Windows were broken. Wall paper was ruined. Picture frames were shaken from walls, and things were shaken from mantels. A laundry sink was jarred loose, and cisterns were cracked. The plaintiff's house was injured to the extent of \$850. The defendant endeavored to show that it was not responsible for the condition of the house, but merely succeeded in preventing recovery of the full amount claimed. None of the consequences referred to were occasioned by casting debris on the premises sustaining injury. There was evi-

dence that some explosions produced greater shock than others, and there was no dispute that top-bench blasts were more violent in effect than blasts in lower benches. There was no evidence that the defendant owned the land on which the blasting was done, and, so far as the record discloses, the defendant might easily have procured material for its fills from some place far enough from human habitations not to endanger them. However, for purposes of the decision it will be assumed the defendant was making the best possible use of its own land in order to procure material to put its roadbed in condition to perform its functions as a public service corporation.

The defendant asserts the evidence discloses it used due care in conducting its operations, and unless guilty of negligence, the consequence to plaintiff's property was *damnum absque injuria*.

The New York Court of Appeals presents one side of the ultimate problem in this way: By blasting, a man established his house or other building on a portion of a stony tract of land. Other portions of the tract are desirable for residence or business purposes, but owners are not able to build there without doing injurious blasting. The first occupant ought not to be allowed to monopolize the entire tract. *Booth v. R. W. & O. T. R. R. Co.*, 140 N. Y. 267, 278, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552. The other side of the problem may be suggested in this way: The blasting which each subsequent builder must do will wreck all the improvements of his immediate predecessor. While the proposed case is an extreme one, it tests the principle involved. Decisions on the subject are collated in *Bessemer v. Doak*, 152 Ala. 166, 44 South. 627, 12 L. R. A. (N. S.) 339; *Hickey v. McCabe*, 30 R. I. 346, 75 Atl. 404, 27 L. R. A. (N. S.) 425, 19 Ann. Cas. 783; *Langhorne v. Turman*, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211; *Louden v. City of Cincinnati*, 90 Ohio St. 144, 106 N. E. 970, L. R. A. 1915E, 356, Ann. Cas. 1916C, 1171; L. R. A. 1917A, 1016.

The defendant's argument is that it is lawful to enjoy property, and that the law favors beneficial use of property. The results of beneficial use, being lawful, cannot be injurious in a legal sense. Concussion and vibration resulting from blasting carefully done cannot be confined, and so long as no physical invasion of the plaintiff's property occurred by casting debris upon it, the limits of lawful beneficial enjoyment were not transgressed. The golden rule of the law, "*Sic utere tuo ut alienum non lædas*," finds no place in the defendant's brief.

The writer is of the opinion the distinction between injury by shock and injury by casting debris affords no ground for distinction in liability. One constitutes actual, forcible, physical invasion just as much as the other. The same blast may break a window of a

house with a fragment of rock, and ruin the foundation and walls by concussion and vibration, or may break a window of one house with a fragment, and demolish another by shock. It is not material that one form of invasion may be ticketed "trespass" in the categories of the law, while the other may not, and in the absence of technical negligence there still remains the question of reasonable use, viewed broadly enough to include all interests and circumstances. The city engineer fairly indicated the elements of the problem, efficient prosecution of the work of getting out needed material, and security, not absolute, but reasonable security for property in the neighborhood. The city engineer was called in April. From January to April the general practice was to use two cans of powder to a hole. The defendant's engineer in charge said "two to four cans; * * * mostly used two cans." Doubtless four-can charges placed in the top bench caused the complaints which reached the city authorities. The work could have been continued with two-can charges. That method required more time and more blasts. Heavier charges were desired, not to obtain beneficial use of property, but to obtain more material faster. Use of four-can charges demonstrated they were destructive of occupied houses in the vicinity. Assuming that none of the charges were misplaced or otherwise improperly handled, and assuming that the defendant acted on the advice of capable and prudent men who tried to balance conflicting interests carefully, and so was not negligent, the writer would say a jury would be justified in finding the limits of reasonable privileges were overstepped. However, in two blasting cases this court accepted the rule that negligence must be the ground of liability when injury occurs without trespass in the technical sense (*Cherryvale v. Studyvin*, 76 Kan. 285, 91 Pac. 60, 11 L. R. A. (N. S.) 385; *Rost v. Railroad Co.*, 95 Kan. 713, 149 Pac. 679. Following those decisions, the case under consideration was submitted to the jury on the negligence theory, which, as indicated, is acceptable to counsel for the defendant, and the theory will again be made the basis of decision.

White was the defendant's employee in charge of blasting when the city engineer made his tests. White testified as follows:

"Mr. Bates, the engineer, and Mr. Barclay [city engineer] came there to make tests of charges. They stood over me while I put in the charge, and then went away to some house. After the tests I was instructed not to use more than four cans. * * * I have had experience blasting earth. Put my holes 9 to 12 feet deep. * * * More vibration the deeper the hole. I shot my holes back about 6 feet. * * * You would get more with deeper hole and further back."

Neither the city engineer nor the defendant's engineer testified regarding the dis-

tance from the face of the bank the test holes were drilled. The city engineer testified that charges placed 15 feet from the face of the bank would cause greater vibration than they would if only 8 feet back—holes farther back would cause more vibration. He was corroborated by other expert witnesses. Herrin owned a house badly injured by the blasting. He testified as follows:

"Was present when tests were made by Mr. Barclay, city engineer. No blasts occurred that were damaging at that time. They were down there and they came to my house and were in my house when blasts were touched off, and, while there was quite a tremor, nothing to compare with some they had."

The result is, 100-pound charges, placed in holes 6 feet from the face, were found not to be dangerous, and consequently were authorized by the city engineer.

Hall, who preceded White, testified that the farther back the holes were placed the greater the vibration, and that he put holes from 8 to 10 feet back. For the plaintiff, Milan said holes were placed 10 feet back, and sometimes farther. Herrin said they were placed from 15 to 20 feet back. Miller said they were placed from 5 to 12 feet back. Greer said they were sometimes placed 8 or 9 feet back, and sometimes 18 to 20 feet. The necessary inference is, the defendant abused its permission, and used 100-pound charges to throw down two or three times the quantity of earth displaced by the test shots, notwithstanding the fact that shock increased with distance of the hole from face of the bank. Before April, the defendant evidently employed the same tactics, occasionally, to speed its work.

There is nothing else of importance in the case. Evidence of contemporaneous injury to other buildings in the same locality, from the same cause, was properly received. Since at the close of the testimony there was evidence of negligence, the ruling on the demurrer to the plaintiff's evidence is not now material. Criticisms of the instructions given are without substantial merit, and the proper rule of damages was stated to the jury.

The judgment of the district court is affirmed.

All the Justices concurring.

(109 Kan. 253)

LAMB v. BOARD OF COM'RS OF BUTLER COUNTY. (No. 23004.)

(Supreme Court of Kansas. June 11, 1921.)

Appeal from District Court, Butler County.

On motion for rehearing or modification. Rehearing denied. Cause remanded.

For former opinion, see 108 Kan. 739, 196 Pac. 1059.

WEST, J. In its motion to rehear or modify the judgment affirmed in our former opinion, the defendant sets forth that under the statute the plaintiff was not entitled in any quarter to more than \$600 salary and \$300 clerk hire under the schedule, but that attached to her petition was an itemized account showing that she had actually received \$1,299.92 in excess of the sum of these quarterly amounts. The petition alleged that the plaintiff received and paid over "fees greatly in excess of the amount paid to this plaintiff * * * as salary and clerk hire, an itemized account" of which was attached.

The answer contained the statement that the itemized account showed the amount of salary paid to the register of deeds "and the amount of clerk hire allowed and paid to the clerks for clerk hire in the office of said register of deeds."

Of course, it makes a difference whether this money was paid to the plaintiff or to the clerks employed in her office, and, if the claim now insisted on is correct, a deduction from the amount of the judgment should be made. The cause is therefore remanded, for the purpose of considering and deciding this one question, and for such judgment as such further consideration may warrant.

All the Justices concurring.

(109 Kan. 338)

DYER v. JOHNSON. (No. 23246.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Appeal and error ⇐339(2)—Ruling on petition not subject to review when not appealed from within six months.

A trial court's ruling on a demurrer to a petition is not subject to review when not appealed from within six months.

2. Appeal and error ⇐728(2)—Specification as to admission of improper evidence without showing evidence presents no question for review.

A specification of error that the trial court admitted improper evidence without some showing as to what the improper evidence consisted of presents no question for review.

3. Mortgages ⇐37(2) — Parol evidence to prove absolute warranty deed equitable mortgage.

The rule followed that parol evidence is admissible to prove that a warranty deed absolute in form was an equitable mortgage to secure the repayment of purchase money.

4. Mortgages ⇐38(1)—Evidence supporting finding that absolute warranty deed was equitable mortgage.

The evidence was sufficient to support the trial court's findings of fact.

5. Conclusions of law.

The trial court's conclusions of law were necessitated by the findings of fact.

6. Denial of new trial.

The judgment was correct, and the motion for a new trial was properly overruled.

7. Mortgages \Leftrightarrow 28—Absolute deed held equitable mortgage under evidence.

The plaintiff solicited the defendant for money to purchase a farm in behalf of a friend, and to take a mortgage on the farm for the full amount of the purchase price, as she had done on a similar occasion for the plaintiff many years before. She declined, giving reasons for not following her former action, but offered to furnish the money and take the title in herself, and to put plaintiff's friend in possession of the farm under a lease with an option to purchase, if plaintiff would look after the matter for her, and upon his promise to protect her investment and take the land himself if his friend failed to do so. This agreement was made; defendant purchased the farm, and plaintiff's friend went into possession. The latter defaulted in his payments; these were made good by plaintiff, and he took over the farm and the lease option by assignment, and continued to pay the interest and taxes. These, and other pertinent facts narrated in the opinion, were clearly established by the evidence. *Held* that the plaintiff was the owner of the farm, and the defendant was the equitable mortgagee.

Appeal from District Court, Linn County.

Action by W. J. Dyer against Melissa J. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

John A. Hall, of Pleasanton, for appellant.
Chas. F. Trinkle, of La Cygne, for appellee.

DAWSON, J. This was an action for the purpose of having a deed decreed to be a mortgage, and for the determination of financial matters pertaining thereto.

The defendant, Melissa J. Johnson, held the title to 80 acres of land in Linn county by a deed of general warranty from the prior owner, one Edgar Goss, of Arizona. The defendant, who is the aunt of plaintiff's wife, is a woman of some financial means. About 25 years ago she loaned the plaintiff, W. J. Dyer, the entire purchase price of a farm, permitting him to take the title thereto, and she took a mortgage on the property as her security. At various times thereafter she furnished the plaintiff with financial backing. On the strength of this long and amicable relationship, some time in the fall of 1913 plaintiff began negotiations for the purchase of the 80 acres involved in this lawsuit. He ascertained from the father of Goss, the owner, that the land in dispute could be bought for \$2,500. About that time the plaintiff told a neighbor, W. E. Robbins, of his prospective purchase, and that he intended to ask his wife's aunt, Mrs. Johnson, for

the money to buy the property. Robbins expressed a desire to buy the land, and Dyer told Robbins that, as the latter had no land of his own, he would let him have it; and Dyer made a journey to the residence of the defendant at Ft. Scott to see if she would advance the entire sum to purchase the land so that Robbins might get it under the same sort of arrangement which she had sanctioned when Dyer got his first farm through her financial assistance many years before.

Dyer explained to Mrs. Johnson that he wanted to assist Robbins to get the land, that the land was worth the price, and that, if she would advance the money to pay for it, he would stand good for it and take the land if Robbins did not. Mrs. Johnson declined to do as she had done for Dyer himself, pointing out that Robbins was a stranger to her, and if a foreclosure were necessary that would take considerable time, and there was the possibility of double taxation; but she offered to furnish the \$2,500 and take the title in her own name if Dyer would stand good for her investment and interest thereon at 6 per cent., and that Robbins could go on the land as a tenant under a lease, with an option to purchase it at cost, and that Robbins should pay $6\frac{1}{2}$ per cent. interest, and that she would allow Dyer $\frac{1}{2}$ per cent. for his services in looking after the matter for her.

This arrangement proposed by defendant was agreed to, and consummated in February, 1914; and in March, Dyer, Robbins, and Mrs. Johnson met James Goss, father of the Arizona owner, and Mrs. Johnson paid him the \$2,500, and the deed was delivered to her. She also executed a five-year lease on the farm to Robbins, at \$200 per annum, which lease included an option that he might purchase the property for \$2,500. The option also provided that any excess in the annual payment of \$200 which might arise after the interest at $6\frac{1}{2}$ per cent. on \$2,500 was deducted therefrom, together with the annual taxes, should be considered as a payment on the purchase price, and that, when \$500 had been paid on the purchase price, she would give Robbins a deed to the property and take back a mortgage for the balance.

Pursuant to this arrangement, Robbins took possession of the farm and occupied it for nearly three years. He paid the \$200 due at the end of the first year, but defaulted on the remainder. The plaintiff caused Robbins to give defendant promissory notes for the defaulted payments, and indorsed them as surety. To indemnify himself, plaintiff first took an assignment of Robbins' lease option, but afterwards Robbins vacated the premises, and the plaintiff himself went into possession. The defendant never concerned herself about the property, never saw it until about the time Robbins vacated it in 1916,

and she continued to look to Dyer for the payment of the interest on her investment, and to pay the taxes. In March, 1918, he had a settlement with the defendant, paying her the interest on the Robbins notes and also the interest on the \$2,500 for the year between March, 1917, and March, 1918. During these years Dyer also paid the taxes, but in 1919 defendant paid them herself, as plaintiff discovered when he went to discharge that duty at the usual time.

Meantime, since the plaintiff and defendant first concerned themselves with this land, it had doubled in value. In 1919 Dyer had some negotiations under way with one J. A. Willis looking to its sale at \$65 per acre, including the crop, and Dyer and Willis went to see Mrs. Johnson and inquired of her whether she would carry a loan of \$3,000 on the property. In this conversation Mrs. Johnson for the first time learned the surprising figure at which the land was being negotiated for sale; and shortly thereafter she offered to sell the land herself to a third party, which speedily brought about this lawsuit.

Evidence of the matters above narrated and other less significant details were developed at the trial. The court made extended findings of fact, found that Dyer owned the property, and that Mrs. Johnson's deed was an equitable mortgage, ascertained and determined Dyer's debt to Mrs. Johnson, and decreed the same to be a first lien on the land, and ordered judgment in her favor for the amount due her, with interest, and for the taxes she had paid in 1919, aggregating \$3,208.42, and ordered foreclosure unless plaintiff paid the same within 10 days.

The defendant, Mrs. Johnson, appeals, specifying errors:

- "(1) In overruling the demurrer to the petition. (2) In admitting the improper evidence. (3) In making findings of fact which are not supported by the evidence. (4) In making conclusions of law not warranted by the facts. (5) In rendering decree in favor of plaintiff. (6) In overruling motion for new trial."

[1] Noting these in order, we find no discussion in appellant's brief touching the court's ruling on the demurrer. The demurrer to the petition was overruled on February 2, 1920, and this appeal was not taken until October 2, 1920, more than six months after the ruling on the demurrer, and we assume that this point has been abandoned. Furthermore, we have now no jurisdiction to consider it. *Slimmer v. Rice*, 99 Kan. 99, 160 Pac. 984.

[2, 3] Touching the admission of improper evidence, no particular matters are pointed out for our scrutiny and determination. If this has reference to the admission of parol testimony to show that the warranty deed from Goss to Johnson was only an equitable mortgage to secure to her the purchase money for the 80 acres which was to belong to

Robbins if and when he repaid her, or to Dyer if Robbins failed, and Dyer stood back of him and paid in his stead, then we come to a question of law which is thoroughly settled in this jurisdiction. Such evidence is competent, and the rule is the same whether the matter involved concerns either realty or chattel property. *McNamara v. Culver*, 22 Kan. 661, syl. 2; *Butts v. Privett, Sheriff*, 36 Kan. 711, 14 Pac. 247; *Pope v. Nichols*, 61 Kan. 230, 59 Pac. 257; *Martin v. Allen*, 67 Kan. 758, 761, 74 Pac. 249; *Hubbard v. Cheney*, 76 Kan. 222, 226, 91 Pac. 793, 123 Am. St. Rep. 129; *Winsor v. Winsor*, 78 Kan. 885, 95 Pac. 1136; *Saylor v. Crooker*, 89 Kan. 51, 130 Pac. 689, syl. 1; *Boam v. Cohen*, 94 Kan. 42, 145 Pac. 559; *Root v. Wear*, 98 Kan. 234, 237, 157 Pac. 1181. See, also, an extended treatise on this subject in *L. R. A.* 1916B, pp. 18-610.

[4] Passing then to the third assignment of error (and this is the text of most of defendant's argument), we cannot discern any want of substantial evidence to support the findings of the trial court. Their findings are 16 in number, and are too long for reproduction here, but defendant does not specify any single finding as being unsupported by the evidence. Indeed, we do not find much sharp dispute between the testimony given in plaintiff's behalf and that given for defendant in the most significant and controlling aspects of this controversy. The defendant herself advanced no convincing theory of any different interpretation which might be placed on her business relations with plaintiff than that of equitable mortgage, especially after Robbins vacated the premises and Dyer took possession, or which would explain why she continued to look to him for the interest on her investment of \$2,500, and to settle with him on that basis in 1917, and to accept his check, as she did on March 29, 1918, for the interest on the \$2,500, as well as for the interest on the notes for \$300 given by Robbins and indorsed by Dyer. Answering an inquiry by the court, defendant testified:

"Q. At the time Mr. Willis was at your house and talking about the land, did you make the statement that Mr. Dyer would have to take the mortgage? A. In words like this, 'If there was a \$3,000 mortgage, he would have to take the mortgage.'"

"Q. At that time, would you have been willing to take your investment and 6 per cent. interest and sell the land; was that your idea? A. Why, he would have had to have bought the land and paid me out on the land, and then he could have dealt with Mr. Willis."

"Q. He was to pay you \$2,500 and \$300 [Robbins' notes] and 6 per cent. interest? A. He never said he would."

"Q. Is that what you understood? A. Yea, sir."

The inconsistencies which defendant urges against the testimony for plaintiff are more plausible than real. Of course when plain-

tiff talked with strangers he spoke of the defendant as the owner of the property; and of course when he desired to lease the land for gas and oil he sent the lease to her for signature. He would hardly be expected to explain to third parties the informal and trusted relationship which existed between them. All these circumstances were in evidence for what they were worth. At the trial defendant's counsel was at liberty to make the most of them in his argument; but they serve little purpose here. It would not avail, even if he succeeded in raising doubt in our minds touching the correctness of the trial court's findings of fact. The making of those findings was the function of the trial court, not ours; nor can we discern that the parol testimony, together with all the evidential circumstances, lacked any element of clarity or sufficiency to justify the finding that Mrs. Johnson's deed, absolute on its face though it was, was in fact an equitable mortgage, and this we are bound to hold, although we fully recognize the potent rule of evidence laid down in *Winston v. Burnell*, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289, and the other cases cited by defendant. The evidence had the requisite sufficiency to satisfy that rule.

[5] The trial court's conclusions of law necessarily followed its findings of fact. Once the fact that defendant's deed was from its inception an equitable mortgage was established, its status as such was crystallized, and could be changed only by a new contract, or terminated by foreclosure (*Le Comte v. Pennock*, 61 Kan. 330, 59 Pac. 641; *Stratton v. Rotrock*, 84 Kan. 198, 114 Pac. 234); and this was never done until the judgment was entered in this lawsuit.

[6, 7] The judgment of the trial court was correct, and the motion for a new trial advanced nothing which tended to show that another trial would or should bring about a different result, and it was properly overruled.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 290)

TRINKLE v. GARDEN CITY LAND & IMMIGRATION CO. (No. 23212.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

Execution \S 338—Amendments of sheriff's return held proper after expiration of time therefor.

In mandamus to compel a corporation to transfer a share of its capital stock purchased at a sale under an execution against a shareholder, the defense was that the sale was void because of the failure of the sheriff to leave with the secretary of the corporation an at-

tested copy of the execution and return within 14 days from the date of the sale in accordance with the provisions of section 7350, General Statutes of 1915 (Code Civ. Proc. \S 446). It was shown that the sheriff delivered to the secretary a copy of the execution and return which was not attested and which failed to show the name of the purchaser; but in the action in which the execution issued the sheriff, by leave of court, amended his return by setting forth the name of the purchaser, and thereupon delivered to the secretary of the corporation a duly attested copy of the execution and return as amended. Held, as between the corporation and the purchaser, the court from which the execution issued had authority to permit the amendments to be made after 14 days from the date of the sale, and after the 60 days for the return of the execution had expired. Gen. St. 1915, \S 7032 (Code Civ. Proc. \S 140).

Appeal from District Court, Finney County.

Application by H. O. Trinkle for a writ of mandamus against the Garden City Land & Immigration Company. From an order granting a temporary writ, respondent appeals. Affirmed.

F. Dumont Smith, of Hutchinson, for appellant.

H. O. Trinkle, of Cimarron, in pro. per.

PORTER, J. The appeal is from an order granting a peremptory writ of mandamus directing appellant to transfer on its stock books and deliver to the appellee one share of its capital stock purchased by the appellee at a sale under an execution against B. M. McCue.

The contention is that the statutory provisions for the sale under execution of a stockholder's interest in a corporation were not complied with, and that the court from which the execution issued exceeded its authority in permitting an amendment to the sheriff's return on the execution. The manner in which a shareholder's interest in a corporation may be levied upon and sold under execution is prescribed by section 7350, General Statutes of 1915, part of which reads:

"An attested copy of the execution and of the return thereon shall within fourteen days from the day of sale be left with the officer of the corporation whose duty it is to record transfers of shares, and the purchaser shall thereupon be entitled to a certificate for the shares brought by him and to a transfer thereof to such purchaser on the books of the company." Code Civ. Proc. \S 446.

The execution involved in the present action was issued on June 11, 1920, in the case of A. L. Sedbrook v. B. M. McCue. On the same day a duly attested copy of the execution was delivered by the sheriff to the secretary of the appellant company, who gave the sheriff a statement that McCue owned

one share of the capital stock of the company. On the 5th day of August, 1920, the sheriff delivered to the secretary of the company a purported copy of the execution with a return which was not an attested copy and which failed to show the name of the purchaser. On August 25, 1920, in the action of Sedbrook v. McCue, the sheriff, by leave of court, amended his return by setting forth the name of the purchaser with the statement that the appellee was the highest bidder at the sale, and thereupon he delivered to appellant's secretary a duly attested copy of the execution and return as amended.

The appellant argues that the sale of the intangible interest of a stockholder in a corporation, being unknown to the common law and being purely a creature of the statute, can only be accomplished by a strict compliance with the statutory provisions, and that the failure of the sheriff to leave with the secretary of the company an attested copy of the execution and return within 14 days from the date of the sale renders the proceedings void.

There is no force in the contention that the statute under consideration must be more strictly construed than other provisions of the Code merely because, under the common law, the intangible interest of a stockholder in a corporation was not subject to sale under execution. The first commandment of the Code of Civil Procedure reads:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object, and assist the parties in obtaining justice." Section 2; Gen. Stat. 1915, § 6892.

And section 140 of the Code (Gen. Stat. 1915, § 7032) authorizes the court or judge before or after judgment in furtherance of justice and on such terms as may be proper to amend any pleadings, process, or proceeding so as to conform to the facts, with the further provision that—

"When any proceeding fails to conform in any respect to the provisions of this Code, the court or judge may permit the same to be made conformable thereto by amendment."

While it is true that the sheriff was not only permitted to amend his return to show the name of the purchaser and that such purchaser was the highest bidder at the sale, but was also permitted to complete the proceedings by delivering to the secretary of the company an attested copy of the return as amended, and that the amendment and service of the copy on the appellant company took place more than 60 days after the execution was issued, the court undoubtedly had authority to permit these amendments, not only after the time for returning the ex-

ecution had expired, but also notwithstanding the 14 days fixed by the statute for completing the return had also expired. This is true, at least, as between the purchaser at the sale and the appellant company.

So far as appears from the abstract, no third party's rights are in any respect affected by the judgment. There is a statement in appellant's brief that, after the 14 days had expired from the date of the sale, the share of stock in question was transferred by the appellant to a bank of Garden City, and that the bank now holds it. The appellee has filed no brief.

As between the appellant company and the purchaser at the sheriff's sale, it was the duty of the court, in the furtherance of justice, to permit the proceedings to be amended. The bank is not a party to the action, and the appellant cannot avail itself of any rights the bank might have.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 296)

LANE v. NATIONAL INDUSTRIAL INS. CO.
(No. 23217.)

(Supreme Court of Kansas. June 11, 1921.
Rehearing Denied July 7, 1921.)

(Syllabus by the Court.)

Insurance — 175—Insurer held not liable under schedule of payments, where insured died before expiration of first year after issuance of policy.

A life insurance company issued a policy which provided that, in the event of the death of the insured, the company would pay to the beneficiary a certain sum under a schedule, made a part of the policy, which designated the sum to be paid at the end of any year after the date of the policy for 20 years. The schedule provided for the payment of \$250 at the end of the first year. The insured died 4½ months after the policy was issued. *Held*, that the company was not liable.

Marshall, J., and Johnston, C. J., dissenting.

Appeal from District Court, Montgomery County.

Action by Rella Lane against the National Industrial Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed, and judgment directed for defendant.

Chas. D. Welch, of Coffeyville, for appellant.

Harold McGugin and Walter S. Keith, both of Coffeyville, for appellee.

MARSHALL, J. The plaintiff recovered judgment on a policy of life insurance, and the defendant appeals. On March 17, 1919, the defendant, a life insurance company, is-

sued its life insurance policy to J. A. G. Lane, in which his wife, the plaintiff, Rella Lane, was named as beneficiary. The insured died on July 31, 1919. The defendant refused payment on the policy, and this action was commenced.

1. One of the defendant's contentions fatal to the plaintiff's right to recover is that—

"The policy sued on does not provide for any death benefit where the death occurs prior to the end of the first year."

This contention is based on the following language contained in the policy:

"The said company does hereby agree, in the event of the death of the insured, subject to all of the terms, conditions, exceptions, agreements and limitations contained herein, and in the application hereof, to pay to Rella Lane, wife, * * * the sum hereinafter stated, designated and set forth as payable at the end of the various years from the date of this policy for a period of twenty years, as death benefit under Schedule B herein, if this policy shall have been kept in full force and effect."

The policy also provided that—

"At the expiration of any year after the first year, for a period of twenty years from the date of this policy, * * * this company will * * * on the proper, legal and satisfactory assignment as collateral security for a loan, and delivery by the insured of this policy to the said company, loan the insured, on the last day of any one year after the first year, the sum hereinafter designated as the amount that will be loaned on this policy under the terms and conditions hereof at the end of the various years from the date of this policy, the sum set forth and stated in and under Schedule A herein."

On the back of the policy appeared Schedules A and B, which for the first four and the twentieth years were as follows:

At the End of	Schedule A. Cash Loan.	Schedule B. Death Benefit.
1 year	None.	\$ 250.00
2 years	\$ 126.25	250.00
3 years	193.87	250.00
4 years	264.50	290.00
20 years	1,802.50	1,828.00

It has been said that—

"Contracts of insurance are to be construed, where construction is permissible, most strongly against the insurer and in favor of the insured." Insurance Co. v. Milling Co., 69 Kan. 114, 76 Pac. 423; Fire Association v. Taylor, 76 Kan. 892, 91 Pac. 1070; Bank v. Insurance Co., 91 Kan. 18, 187 Pac. 78, 49 L. R. A. (N. S.) 972; Graff v. Insurance Co., 107 Kan. 648, 193 Pac. 356; 25 Cyc. 739.

But if the policy is not ambiguous there is no room for the application of this principle of interpretation. The courts cannot change insurance contracts any more than they can change other contracts. There is no ambiguity in this policy; it specifically and de-

initely provides that the \$250 shall be paid at the end of the first year. There is no language in the policy providing for the payment of any sum during that year. There is no liability if death should occur within the first year after the policy was issued. This conclusion is supported by the fact that under the policy there was no cash loan value for the first year, and is further supported by the fact that the investment feature of the policy is very prominent—at the end of the second year and of each year thereafter more money could be borrowed under the policy than would have been paid in as premiums.

The judgment is reversed, and the trial court is directed to enter judgment for the defendant.

BURCH, MASON, PORTER, WEST, and DAWSON, JJ., concurring.

MARSHALL, J. (dissenting). The meaning of the policy, as far as the first year of its operation is concerned, is not clear; but a fair construction would be that as it is a life insurance policy, it insures the life of the insured from the time it is issued, and that the \$250 to be paid at the end of the first year is a limitation on the time of payment if death occurs during the first year and not an exclusion of payment if the insured should die during that time. If the interpretation contended for by the defendant is correct, the policy would not take effect until the end of the first year so far as life insurance is concerned. That is not a reasonable construction of the language used. If we follow the rule of interpretation that has been adopted in other insurance cases, the conclusion must be reached that \$250 should be paid at the end of the first year if the death of the insured should occur during that year.

JOHNSTON, C. J., joins in this dissent.

(109 Kan. 227)

CENTRAL KANSAS MOTOR CO. v. KLINE.
(No. 22800.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Sales \S 462—To constitute lien, title note for purchase of personalty must be executed by purchaser.

A title note given for the purchase of personal property, to constitute a valid lien thereon as against subsequent innocent third parties, must be executed by the purchaser, not by a third party who is not a purchaser.

2. Sales \S 472(1)—Purchaser of property on which there is a lien not personally liable on note, in absence of agreement to pay.

A purchaser, or one who obtains possession, of personal property on which there is a lien evidenced by a duly recorded title note, is not personally liable on the note, where his name

does not appear thereon, and he has not in any way agreed to pay it.

3. Subrogation — 17—Junior lienholder in possession held not entitled to subrogation to repairman's lien rights.

A junior lienholder who, without the knowledge of prior lienholders, takes possession of a wrecked automobile and causes it to be repaired and pays for the repairs, is not entitled to be subrogated to the repairman's lien rights.

Appeal from District Court, Trego County; I. T. Purcell, Judge.

Action by the Central Kansas Motor Company against H. F. Kline. Judgment for defendant, and plaintiff appeals. Reversed, and new trial directed.

John R. Parsons, of Wa Keeney, and Burch, Litowich & Royce, of Salina, for appellant.

Herman Long, of Wa Keeney, for appellee.

MARSHALL, J. The plaintiff appeals from a judgment in favor of the defendant in an action to replevin an automobile under a recorded title note.

E. C. Powell owned an automobile which he desired to exchange with the plaintiff for a new one, and went with the defendant to Salina on April 13, 1917, for the purpose of making the exchange. Powell's personal attempt to make the trade appears to have been unsuccessful. In Salina he met G. M. Jones, the agent of the plaintiff at Wa Keeney, Powell's home, and asked Jones to see what kind of a deal he could make with the plaintiff in exchanging the automobiles. Jones negotiated with the plaintiff for that purpose and succeeded in making an agreement that the automobiles should be exchanged and that Jones should execute to the plaintiff a title note for the difference in value between them. Jones executed such a note for \$450. The note was filed for record in Trego county a few days thereafter. The car appears to have been taken away by Powell and Jones and to have been taken to Wa Keeney by them. The defendant, prior to the exchange of automobiles, had signed a note with Powell as security for him, and a verbal agreement had been made by which Kline should have a lien on an automobile then owned by Powell—probably the one traded to the plaintiff. On June 27, 1917, Powell gave to Kline a bill of sale for the new automobile, and soon thereafter, with the consent of Kline, drove it to Cheyenne, Wyo. Powell there wrecked the car. He then notified the defendant to come and get it. The defendant did so, paid \$137.35 for repairs on it, returned with the car to Wa Keeney about August 27, 1917, and recorded the bill of sale. The plaintiff afterward demanded of Kline the possession of the car. That possession was refused, and

this action was commenced. From the instructions it may be gathered that the defendant gave a redelivery bond and retained possession of the automobile.

The jury answered special questions as follows:

"(1) Was G. M. Jones the owner of the automobile sued for at the time he executed and delivered the mortgage note attached to the plaintiff's petition? Ans. No.

"(2) Did the Central Kansas Motor Company trade and deliver to E. C. Powell the automobile sued for in this action? Ans. Yes.

"(3) Did G. M. Jones trade and deliver to E. C. Powell the automobile sued for in this action? Ans. No.

"(4) Did E. C. Powell agree to take the automobile sued for subject to a lien thereon? Ans. No.

"(5) Did E. C. Powell authorize G. M. Jones to execute and deliver to the Central Kansas Motor Company a title note of the car sued for in this action? Ans. No.

"(6) When G. M. Jones executed and delivered to plaintiff the title note attached to plaintiff's petition, was he acting for himself and in his own right, or was he acting as the agent of E. C. Powell? Ans. No evidence.

"(7) At the time he acquired the car from E. C. Powell, did the defendant have any actual knowledge that the plaintiff had a lien thereon? Ans. No.

"(8) Did the defendant intend to acquire said auto from E. C. Powell free and clear from any and all incumbrances? Ans. Yes.

"(9) Did the defendant, in reliance upon the clear title he believed he was acquiring, expend money in having said auto repaired and get the same into his possession? Ans. Yes."

[1] 1. The judgment deprived the plaintiff of the lien which was attempted to be retained at the time the automobile was sold. If the automobile was sold to Jones, the title note when recorded was a valid and subsisting lien on the automobile in the hands of all who thereafter acquired any interest in it. On the other hand, if it was sold to Powell, and Jones was acting as an agent for Powell in the purchase of it, Powell or his agent for him should have executed the title note in order to have given the plaintiff a lien on the automobile. The plaintiff could not retain the lien by selling the automobile to Powell and taking a title note from Jones. It is true that the findings of the jury were, in effect, that the sale was made to Powell and not to Jones; the answers to the first three questions indicate that Jones was acting as the agent of Powell, but the answer to the seventh question says that there was no evidence from which to determine that fact, although the negotiations with Jones, his giving the note, and the recital in the note that "this note is given for the purchase of one Studebaker Six, serial 204749, engine 5415," tended strongly to show that the au-

tomobile was sold to Jones and that some subsequent arrangement between Jones and Powell enabled Powell to become the owner of it. The answers are contradictory to each other and cannot stand together.

[2] 2. On the trial the jury returned into court, after having retired to consider its verdict, and asked the court concerning the effect of a judgment in favor of the plaintiff on the liability of the defendant to pay the balance of the note after deducting the amount that would be realized from the sale of the automobile. In response to that inquiry the court instructed the jury as follows:

"As has already been stated in the previous instructions given you in this case, the question which you are called upon to decide is whether, under the terms of the note attached to plaintiff's petition, the Central Kansas Motor Company was entitled to possession of the automobile in question at the time this suit was commenced.

"For your information, however, you are instructed that, if a recovery is awarded to the plaintiff in this case, it will be entitled to possession of the automobile, and must sell the same for the purpose of paying the amount, if any, due to it upon the note attached to plaintiff's petition; and should the car fail to bring enough at such sale to fully satisfy the amount due plaintiff on said note, together with costs of such sale, then the plaintiff would have the right to collect from the defendant the deficiency, or the difference between the proceeds of the sale and the amount of the principal and interest due on said note, with costs of sale. On the other hand, should the proceeds of such sale exceed the amount due on said note and costs of sale, the defendant, Kline, would be entitled to whatever such excess might be."

There was no evidence to show that the defendant was liable on the note; his name did not appear on it, and there was no evidence to show that he had agreed to pay it. The instruction was erroneous and should not have been given; the defendant cannot be compelled to pay the note or any part of it. The inquiry of the jury indicated that it thought the question material, and a correct instruction should have been given.

[3] 3. The defendant contends that, even if his possession of the automobile is wrongful, he should be subrogated to the rights of those who made repairs on it at Cheyenne. If on a new trial it should be found that the plaintiff was entitled to the possession of the automobile at the time this action was commenced, the defendant's contention will be material. The argument of the defendant is that the parties who made the repairs had

a lien on the automobile until their claim was paid, and that because he paid that claim he is entitled to be subrogated to their lien rights. The difficulty with the argument is that the defendant contracted for the repairs; that he was primarily liable for them; and that he paid for making them. The debt was his, not that of another. To entitle him to subrogation the debt must have been the debt of another. As between the defendant and Powell, the debt might have been Powell's; but as between the defendant and the plaintiff it cannot be said that the debt was the plaintiff's. Our statute (section 6082 of the General Statutes of 1915) gives a lien to one who makes the repairs, not to the person who procures the repairs to be made. The defendant could not have the repairs made and thereby create a lien on the automobile and then take an assignment of the claim for repairs by paying it or be subrogated to the repairman's rights. If the plaintiff had a lien on the automobile at the time it was wrecked, the plaintiff was entitled to the possession of it at that time, and the defendant could not then take the car and by causing repairs to be made on it create a lien in his favor superior to the rights of the plaintiff.

At present the automobile is probably of little value, and its return will not compensate the plaintiff. If the plaintiff had a lien on the automobile, he was entitled to its possession, and should have judgment for its return, or for its value at the time the defendant took possession of it, with interest from that time until judgment is rendered, unless the amount of the two would exceed the amount of the note and interest. In replevin actions damages are recoverable for depreciation in the value of property wrongfully detained. *Russell v. Smith*, 14 Kan. 366; *Fair v. Bank*, 69 Kan. 353, 76 Pac. 847, 106 Am. St. Rep. 168, 2 Ann. Cas. 960; 34 Cyc. 1564; note, 69 L. R. A. 286; note, 30 L. R. A. (N. S.) 371.

If the automobile is returned, and it has depreciated in value since it was wrecked, judgment should be rendered against the defendant for the amount of its value immediately after it was wrecked and interest thereon, less its value at the time it is returned. In no event should the judgment in favor of the plaintiff exceed the amount of the note and interest.

The judgment is reversed, and a new trial is directed.

All the Justices concurring, except BURCH and DAWSON, JJ., who did not sit.

(109 Kan. 298)

LIVINGSTON v. LEWIS et al. (No. 23218.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Pleading \S 422 — While unverified answer does not raise issue as to existence of partnership, timely objection must be made.

Under section 110 of the Civil Code (Gen. St. 1915, \S 7002), which provides that allegations of the existence of a partnership shall be taken as true unless the denial thereof is verified by affidavit, when a petition alleges the existence of a partnership and an accounting is demanded between the alleged partners, an unverified answer of the defendant does not raise an issue as to the existence of the partnership, and its existence stands admitted; but a plaintiff can only take advantage of this rule of the Code by a timely objection, specifically pointing out to the court the want of verification to defendant's answer; and if plaintiff replies to the unverified answer and goes to trial on the issue of fact, and adduces his evidence thereon, and makes no showing that he was taken by surprise by the ruling of the court, and that he was unprepared to produce evidence on the issue which should have been held to be conceded by the unverified answer, he cannot base reversal error on the ground that the trial court tried out and determined the question of the existence of the alleged partnership on the evidence presented for its determination.

2. Appeal and error \S 230, 231(2) — Objection must be timely, and enable court to determine its significance.

An objection to the sufficiency of a pleading should be timely made, and it should be so clear and precise that the trial court can readily discern its significance; and, if the objection lacks in precision, and the court is misled thereby, no prejudicial error can be based thereon, following *Emery v. Bennett*, 97 Kan. 490, 492, 155 Pac. 1075, Ann. Cas. 1918D, 437.

3. Joint adventures \S 5(2) — Evidence held to show that parties were joint adventurers, and to warrant accounting.

The evidence and findings of the trial court examined and held to establish as a matter of law that the plaintiff and defendants were engaged in a joint adventure to take over a newspaper and printing plant, and that an accounting and settlement should be had between them.

Appeal from District Court, Gove County.

Action by A. R. Livingston against N. C. Lewis and W. J. Knaus. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. L. Travers, of Osborne, and Edgar C. Bennett, of Washington, Kan., for appellant. Clark & Beckner, of Hoxie, and J. H. Jensen, of Gove, for appellees.

DAWSON, J. This was an action for an accounting between plaintiff and defendants

in an alleged partnership of a newspaper and printing plant at Quinter. The plaintiff's petition alleged that on June 30, 1910, the plaintiff, Livingston, and the defendants, Lewis and Knaus, entered into a partnership agreement by the terms of which they were jointly to purchase a newspaper, the Gove County Advocate, and operate the newspaper plant as partners; that on that day they purchased the newspaper and plant by a bill of sale from the owner, William Field. The consideration was \$3,841.97, and a copy of the bill of sale was attached to plaintiff's petition. Plaintiff alleged that he contributed \$2,390.40 to the enterprise, and that defendant Knaus contributed about \$1,000; that the defendant Lewis was to manage and conduct the newspaper plant for himself and his partners; that there had never been an accounting between the partners; and that Lewis had uniformly applied to his own use the moneys received in operating the property.

Defendant Knaus filed a separate answer setting up various matters, and he, too, prayed for an accounting. Defendant Lewis answered with a general denial; he also pleaded sundry matters, and alleged that he had been the holder of a second mortgage on the newspaper property given by William Field, and that he had foreclosed that mortgage, and had bought the property at the sale under the second mortgage foreclosure. Neither of the answers was verified. But the plaintiff did not demur to the unverified answer of defendant Lewis. He filed a reply thereto, reiterating charges of the conversion of the partnership property by Lewis to cheat and defraud the plaintiff, and repeated the prayer of his petition. When the case came on for trial, the court ruled that "the issues pertaining to the matter of partnership should first be determined." Plaintiff objected, "for the reason that there was no issue touching the partnership, such issue being admitted on the face of the pleadings."

The trial court then proceeded to hear the evidence. At its conclusion an informal finding was made:

"By the Court: This is rather a peculiar case. These three men got some money invested in a printing office, and from the record I think none of them wanted it. They combined. I would hardly call it a partnership. They associated to keep the plant alive until it could be sold. I don't feel that there was a partnership that could bind the others for a dollar. They associated themselves, it is true, in trying to protect the debt, yet I don't figure that there was a partnership."

Judgment was accordingly entered—

"That no partnership exists or ever has existed, and for the defendants and against the plaintiff. Wherefore it is by the court considered, ordered, and adjudged that the defendants recover their costs."

[1, 2] The plaintiff appeals, insisting on the application and enforcement of the Code provision:

"In all actions, allegations * * * of the existence of a * * * partnership * * * shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney. * * * Civ. Code, § 110 (Gen. St. 1915, § 7002).

The particular point would have been perfectly good if the plaintiff had stood upon it. Reed v. Arnold, 10 Kan. 104; Walker v. Fleming, 37 Kan. 171, 177, 14 Pac. 470; Hayes v. Insurance Co., 98 Kan. 584, 158 Pac. 1107; Hill v. Republic County, 99 Kan. 49, 160 Pac. 987; 31 Cyc. 529. But plaintiff did not stand on this point. He filed his reply, and presented his evidence in support of his allegations touching the existence of the partnership. His objection at the trial "that there was no issue touching the partnership, such issue being admitted on the face of the pleadings," was not very illuminating to a trial judge who, perhaps, had no time to guess for himself just what was the trouble with Lewis' answer.

In Emery v. Bennett, 97 Kan. 490, 155 Pac. 1075, Ann. Cas. 1918D, 437, it was said:

"The principal error assigned is in the admission of evidence, because the defendant's answer was not verified as required by the new Code. Civ. Code, § 110; Rose v. Boyer, 92 Kan. 892, 141 Pac. 1006; Read v. Dodsworth, 95 Kan. 117, 147 Pac. 799. This assignment would be good, but appellant filed a reply which joined issue on the pleaded defense. Evidence pro and con was received concerning it, and the appellant asked, and to some extent obtained, instructions covering the defense pleaded. Counsel for the appellant never did point out to the trial court frankly and specifically the defect in defendant's answer, which was the want of verification. * * *

"We do not think that counsel are warranted in permitting even 'an unfriendly court' to commit error by overruling an objection which they fail to make sufficiently precise for the trial judge to understand and rule on intelligently. Can there be any doubt, if the objection had been timely and clearly made, that the court and opposing counsel would have seen it, and that leave would have been asked and granted to permit the answer to be verified?" 97 Kan. 491, 492, 155 Pac. 1075, Ann. Cas. 1918D, 437.

See, also, Blair v. McQuary, 100 Kan. 203, 206, 162 Pac. 1173, 164 Pac. 262.

[3] However, the question of the existence of a partnership was not the only nor the most important matter involved in this lawsuit. What the plaintiff wanted was not the mere gratification of a judicial assent to his abstract contention that he and the defendants were partners in a business enterprise. He wanted an accounting and settlement of the business. If it was not an ordinary partnership, it was some sort of a joint adventure which entitled the plaintiff to an accounting. According to the trial court's findings, which we accept as correct, these litigants

invested some money in a printing office. They combined. They associated to keep the plant alive until it could be sold. They associated themselves for certain purposes. These findings of the court were deduced from the evidence touching the business relationship of the litigants. That business relationship, not arising to the dignity of a true partnership, impliedly did consist of a joint adventure. Saunders v. McDonough et al., 191 Ala. 119, syl. 3, 67 South. 591.

In Goss v. Lanin, 170 Iowa, 57, 61, 152 N. W. 43, 45, it is said:

"Although courts in modern times do not treat a joint venture as identical with a partnership, it is so similar in its nature and in the contractual relationships created by such adventure that the rights as between themselves are governed practically by the same rules that govern partnerships. As some of the courts hold, while a partnership is ordinarily formed for the transaction of general business of a particular kind, a joint adventure, as a rule, relates to the single transaction, although it may comprehend a business to be continued for a period of years."

See Lumber Co. v. Marshall (No. 23192) 197 Pac. 861, decided May 7, 1921.

Plaintiff put a considerable sum of money into the adventure. He and defendants also paid off a first mortgage on the property. Presumably the property has produced some income. Doubtless, too, there are expenses properly chargeable to the business. There must have been some agreement, some understanding, express or implied, between these coadventurers touching their business relationship, how the adventure should be conducted, how terminated, how settlement should be made, etc. These, and like pertinent matters, must be considered in an accounting. The fact, if true, that one of the defendants held a second mortgage on the property, and that he foreclosed that mortgage, will not preclude his coadventurers from their right to an accounting. They were joint owners, substantially tenants in common, of the property; they were also subrogated to the rights of the holder of the first chattel mortgage, and probably their rights under the first mortgage which they paid take precedence of the rights of their coadventurer who also claimed under a second mortgage. We are discussing these matters on the assumption that the pleadings and evidence touching these matters are true, only to illustrate the necessity and justice of an accounting, but with no purpose to foreclose further inquiry into all the facts. So far as this record discloses, an accounting should be had between the litigants. See discussion of the general subject of joint adventures in 15 R. C. L. 500, and 23 Cyc. 453.

It therefore appears that the judgment for defendants must be set aside, and the cause remanded for further proceedings.

Reversed and remanded.

All the Justices concurring.

(109 Kan. 372)

PERKINS et ux. v. SAUNDERS et al.
(No. 23426.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Mines and minerals \S 73½—Lease held to expire by own terms on stated date unless extended by production of mineral.

An oil and gas lease examined, and held it expired by its own terms on a stated date, unless extended by production of mineral.

2. Mines and minerals \S 78(7)—Lessors of oil and gas lease held not estopped to insist on expiration of lease according to terms.

A general finding that the lessors were not estopped to insist on expiration of the lease according to its terms was sustained by the evidence.

Appeal from District Court, Elk County.

Action by Foster Perkins and wife against E. B. Saunders and others to cancel an oil and gas lease and to recover possession of the leased premises. Judgment for plaintiffs, and defendants appeal. Affirmed.

John Madden, J. T. Butler, and J. T. Rogers, all of Wichita, and W. M. Barrett, of Pratt, for appellants.

J. W. Blood, of Wichita, and A. F. Sims, of Howard, for appellees.

BURCH, J. The action was one to cancel an oil and gas lease and to recover possession of the leased premises. The plaintiffs recovered, and the defendants appeal.

Two questions are presented, which the defendants state as follows:

"First. Did the lease by its own terms expire on the 20th day of October, 1920, unless oil or gas in paying quantities had been found upon said land?"

"Second. If the lease did expire, were appellees estopped to secure a declaration of its termination and to evict appellants?"

[1] The first question is answered by the lease itself, which was executed on October 20, 1917:

"It is agreed that this lease shall remain in force for a term of three years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by lessee."

The instrument further provided that, if no well were commenced on or before October 20, 1918, the lease terminated unless a stipulated sum of money were paid. Commencement of a well might be deferred for additional periods by making similar payments. If the first drilling resulted in a dry hole, the lease terminated, unless within 12 months from the last rental period payments were resumed. To secure development within a year, the lessors offered a bonus. No

provision of the lease extended the term beyond 3 years, in the absence of production by the lessees within that period, and the first drilling was done on the last day of the term.

[2] The second question is answered by evidence favorable to the plaintiffs, in two ways: First, the lessors said and did nothing to estop them from insisting on the terms of the lease; second, the defendants commenced their belated development work, relying, not on any inducement of the plaintiffs, but on successful maintenance of their contention that it would be sufficient to have the drill in the ground on October 20, 1920. The evidence was conflicting, and was open to some interpretation as to meaning. The conclusion of the trial court was well sustained.

The judgment of the district court is affirmed.

All the Justices concurring.

(109 Kan. 223)

BOARD OF COM'RS OF TREGO COUNTY
v. TOPEKA BRIDGE & IRON CO. et al.
(No. 22799.)(Supreme Court of Kansas. June 11, 1921.
Rehearing Denied July 7, 1921.)*(Syllabus by the Court.)*

1. Bridges \S 20(6)—County may sue builder of defective bridge for entire contract price though adjoining county reimburses one-half thereof.

Where a county contracts with a builder for the construction of a bridge on the county line and pays to the builder the full contract price, although the adjoining county reimburses the contracting county for one-half of the contract price, the latter county may maintain an action against the builder for damages for the entire contract price where the bridge, on account of noncompliance with plans and specifications, is destroyed by high water.

2. Evidence \S 194—Samples held admissible to show that bridge constructed for county was defective.

To prove that the workmanship and material in the concrete abutment of a bridge was defective, samples taken from the abutment after it had been blasted open with dynamite may be introduced in evidence.

3. Bridges \S 20(4)—Repair of cracks in a concrete bridge held not to remedy defective workmanship and material.

Repairing cracks in a concrete bridge will not remedy defective workmanship and material used in its construction.

4. Bridges \S 20(4)—Abutments should support bridge though contract does not require approaches to support abutments.

Where a contract for the construction of a bridge does not provide that the approaches shall

be so built as to support the abutments, the abutments should be so constructed that they, without the approaches, will support the bridge.

Appeal from District Court, Trego County.

Action by the Board of County Commissioners of Trego County against the Topeka Bridge & Iron Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Herman Long, of Wakeeney, and D. R. Hite, of Topeka, for appellants.

W. L. Sayers, J. Q. Sayers, and J. S. Parker, all of Hill City, and John R. Parsons, of Wakeeney, for appellee.

MARSHALL, J. The plaintiff recovered a judgment against the defendants for damages sustained by reason of defective work and materials in a bridge built by the Topeka Bridge & Iron Company for the plaintiff, and the defendants appeal.

The bridge company entered into a contract with the plaintiff to build a cement bridge, according to certain plans and specifications, on the county line between Trego and Graham counties for \$2,145, and gave a bond in that sum, signed by the bridge company and by the Lion Bonding & Surety Company, for the construction of the bridge in strict accordance with the plans and specifications, and for the indemnification of the plaintiff against any loss or injury which it might sustain by reason of any defect in workmanship, design, quality, or quantity of materials used in the bridge during the term of four years from and after its completion. The bridge was washed out and destroyed by high water within four years after it was completed.

The jury returned a verdict in favor of the plaintiff for \$2,347.31, the amount paid to the bridge company for the construction of the bridge, together with interest thereon. The answers of the jury to special questions showed that the bridge company did not construct the bridge in accordance with the plans and specifications; that the workmanship on the bridge was poor; that materials used in its construction were defective, and of a grade inferior to that called for in the plans and specifications; that the poor workmanship and defective materials caused the bridge to give way under the pressure of high water; and that it would have been impossible to have repaired the bridge at any time after its completion.

[1] 1. The defendants complain of the following instruction:

"If you find by a preponderance of the evidence that the bridge in question was defective, either by reason of a defect in workmanship, design, quantity, or quality of material used in its construction, and that such defect resulted from failure on the part of said bridge company to construct said structure in accordance with the plans and specifications set out in the

contract, and if you further find that the plaintiff suffered any loss by reason of such defect or defects, then you will find for the plaintiff, for whatever loss the evidence establishes that the plaintiff has suffered, not exceeding, however, the sum of \$2,145, with interest from May 30, 1918; unless you should further find that the collapse of said bridge was the result of the negligence of the plaintiff in improperly loading said bridge and constructing the approaches thereto, in which case your verdict should be for the defendant."

Two objections are urged to this instruction; one is that it permitted the jury to find breaches of the contract other than those alleged in the petition; and the other is that there was no evidence to show the amount of damage sustained by the plaintiff. The answers to the special questions showed a number of breaches of the contract, but an examination of those answers and of the petition reveals that all the breaches shown by the answers were within the allegations of the petition. It is thought not necessary to set out the allegations of the petition or the answers to the questions for the purpose of showing the correctness of this conclusion. The petition alleged that \$2,145 was paid by the plaintiff to the bridge company for the building of the bridge, and the answers to the special questions showed that the bridge was worthless and useless; the damage then must have been the contract price, with the interest thereon. But the defendants urge that the plaintiff paid only one-half of the contract price, and that Graham county paid the other half. The contract was made with Trego county; Graham county does not appear to have been a party to it. The \$2,145 was paid by Trego county, but it appears that Graham county reimbursed Trego county for one-half of that amount. It may be that Trego county will be responsible to Graham county for one-half of the amount of the judgment after it is collected, but that does not concern the defendants if Trego county had the right to maintain this action for the entire amount. The contract and the payments give to Trego county the right to maintain this action for the full amount of the loss sustained by reason of the defective construction of the bridge. Civ. Code, § 27 (Gen. St. 1915, § 6917).

[2] 2. Complaint is made of the evidence introduced to show that defective workmanship and materials were used in the construction of the bridge. Some time after it had broken down, one of the piers or abutments was opened by exploding dynamite in it, and material taken from the inside of the pier was introduced in evidence. That material could be crushed by the fingers, and showed that shale, a material not called for in the contract, was used in mixing the concrete for the pier. It is argued that the explosion of the dynamite

would have a tendency to crush the concrete, and make it friable. This criticism of the evidence cannot be sustained; in addition there was other evidence to show that the workmanship and materials used in the abutment were defective—an opening into the abutment for the purpose of introducing the dynamite was readily made with a bar of iron without the use of a hammer. That could not have been done if the concrete had been properly mixed and composed of proper materials. There was other evidence to show that the concrete was not properly mixed—the sand and cement were in separate layers, and in pockets in the abutment.

[3] 3. Large cracks appeared in the bridge before it was destroyed. The defendants insisted that those cracks could have been repaired at an expense not exceeding \$450. There was evidence to show that the cracks which appeared before the bridge washed out could have been repaired for that sum, but that did not include replacing the defective material in the bridge by other material of the kind and character required by the specifications. The cracks might have been repaired, but repairs could not remedy the defective workmanship or materials. That could be done only by replacing the bridge with a new one properly constructed with the kinds of materials called for by the plans and specifications. The jury found that it would have been impossible to repair the bridge at any time after its completion. That must have been true if defective workmanship and materials were used.

[4] 4. Another question was presented by the defendants. The contract provided for the construction of a bridge, not for making the approaches thereto. Trego and Graham counties built the approaches. Complaint is made of the construction of the one built by Trego county. The defendants argue that its proper construction was necessary to support the abutment and keep it from giving way under the weight of the bridge during high water. The approach was made of earth thrown against the pier. In answer to special questions the jury found that this approach was sufficient to withstand the action of the water in case of freshet, and that the washing away of the approach was not the proximate cause of the collapse of the bridge. The approach might have been made of piles, none of which would have touched the pier, and would not have given it any substantial support. Neither the contract nor the plans and specifications provided that the approaches should support the pier. It should have been constructed under the contract in such a way that it alone would support the bridge.

The judgment is affirmed.

All the Justices concurring, except DAWSON, J., who did not sit.

(109 Kan. 334)

GREENE v. ATCHISON, T. & S. F. RY. CO.
(No. 23243.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

Railroads §338—Automobile driver held not entitled to invoke last clear chance rule.

An automobile owner who negligently attempts to drive his car across a railroad track cannot recover from the railroad company for the injury done to the car, where it is hit by a passing train, which leaves the car by the side of the track in such a position that in a few minutes it is struck by another train, the engineer on which does not see it in time to stop his train before colliding with it.

Appeal from District Court, Finney County.

Action by A. R. Greene against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, Wm. Osmond, of Great Bend, and Wm. Easton Hutchison, of Garden City, for appellant.

Hoskinson & Field and Foster & Foster, all of Garden City, for appellee.

MARSHALL, J. The plaintiff recovered a judgment against the defendant for damages to an automobile caused by a collision with one of the trains of the defendant at a crossing of a public highway in Gray county. The defendant appeals.

The evidence of the plaintiff tended to prove that he was driving an automobile east on the Santa Fé trail along the north side of the right of way of the defendant; that there was an embankment which obscured the view of the railroad to one traveling along the trail; that the top of the car and back curtain were up, but the side curtains were not on; that plaintiff, about 10 rods before he turned south to cross the railroad track, looked for trains but did not see any; that he did not look when he turned to cross the track; that on the east side of the road where the collision occurred there was a wing fence 4 or 5 feet high which closely approached the railroad track; that after he turned he saw a passenger train coming from the west, but he was then so close to the track that he could not stop in time to avoid a collision, and quickly veered to the right and ran off the road into a culvert; that his car was still so near to the track that it was struck by the east-bound train; that he looked to the east and saw another passenger train headed west waiting on a side track at a station about 2 miles distant for the first train to pass; that the automobile was then about 2 feet from the rail, and

he knew that it would be struck by the west-bound train; that he attempted to move the car away from the railroad track, but was unable to do so; that he went to a house about a half a mile away to get help to move his car; and that he obtained assistance, but before he returned the west-bound passenger train struck the automobile and did further damage to it. A demurrer to the plaintiff's evidence was overruled.

The defendant then introduced evidence which tended to show that the automobile was first seen by the engineer of the second train when it was 75 feet from the automobile; that it was then impossible to stop the train in time to avoid striking the automobile; that the train could not be stopped in less than 1,500 feet; and that the stepladder of the engine slightly struck the car.

Special questions were answered by the jury, some of which were as follows:

"1. Was there anything to prevent the engineer on No. 11 seeing plaintiff's automobile in time to have stopped train No. 11 and avoided injury by that train? No.

"2. Could the engineer on No. 11 with ordinary care have discovered the automobile of plaintiff in time to have prevented the damage to said automobile? Yes.

"3. Was the engineer of defendant's train No. 11 guilty of negligence in failing to see the automobile of plaintiff in time to have avoided further injury thereto by said train? Yes.

"1. How far from the crossing was No. 11 when the engineer first discovered that the automobile was in danger? Seventy-five feet.

"2. After the engineer discovered that the automobile was so near the track as to be in danger, what, if anything, should he have done which would have averted the danger? Nothing.

"3. If you find that defendant was negligent, state fully in what such negligence consisted and who was guilty of it. Carelessness in not watching to see if the track was clear, by the engineer."

The court instructed the jury, in part, as follows:

"The evidence in this case clearly indicates that plaintiff is not entitled to recover for any damage received by his automobile occasioned by a collision with east-bound train, for the reason that he failed to stop, look, and listen for the approaching train before attempting to cross the railroad track; and you will not be required to consider any injuries received from the collision with the east-bound train, or consider the conduct of the defendant and its employees in running and operating that train."

"I instruct you that if you find from the evidence that after the automobile had been struck by train No. 2, the passenger train east bound, that it was so injured that plaintiff could not remove it from the place of danger, then plaintiff's negligence prior to his collision with train No. 2 would not bar a right of recovery against the defendant."

The defendant requested the following instruction, which was not given:

"In this case the plaintiff was responsible for his car being in the situation it was at the time it was struck by No. 11; the engineer was not obliged by the law to keep a lookout for an automobile stopped near the track, nor was he obliged to attempt to bring the train to a stop until he realized the automobile was in danger on account of its proximity to the track. If he did not discover the danger until it was too late to avert it, the defendant would not be liable in this case."

The plaintiff invokes the rule of the "last clear chance." The automobile was standing in such a situation as rendered it impossible for the enginemen to determine from a distance that the train would strike it, even if they had seen it. They were not required to anticipate that an automobile might be standing beside the track near enough to be hit by a passing train, nor to keep a lookout for an automobile in such a situation. The liability of the railroad did not attach until after its employes had actually seen the automobile and realized that the train would hit it. This rule is supported by *Railway Co. v. Prewitt*, 59 Kan. 734, 54 Pac. 1067; *Dunlap v. Railway Co.*, 87 Kan. 197, 123 Pac. 754, and *Morris v. Railway Co.*, 103 Kan. 220, 173 Pac. 346. In the last case this language was used:

"The rate of speed through such a country could hardly be regarded as excessive towards any one, but if it had been so as to persons rightfully on the track, it could not be a violation of duty to a trespasser whose presence was not within reasonable anticipation. Neither was the failure of the trainmen to keep a lookout along the track all of the time, or a failure to have discovered the child at the earliest possible moment, a violation of their duty to him. (*Nolan v. N. York, N. Haven & Hartford R. R. Co.*, 53 Conn. 461; note, 82 L. R. A. [N. S.] 564.) The men in charge of the train are not required to guard against a danger which is not to be anticipated, and under the circumstances of this case they owed the injured child no duty until they saw him on the track and in a place of danger. All the facts show, and the finding of the jury is, that the engineer shut off the steam, applied the emergency brakes, and did all in his power to save the little one as soon as he was discovered on the track. Liability of the defendants for such an injury can only result from a violation of their duty to the injured child, and since it has been established that no duty to it was violated, no recovery can be had against the defendants for the lamentable accident." 103 Kan. 225, 173 Pac. 348.

The defendant relies on *McBeth v. Railway Co.*, 95 Kan. 304, 148 Pac. 621, and *Rule v. Railway Co.*, 107 Kan. 479, 192 Pac. 729. In the former case the court said:

"Where through some unknown cause an automobile engine stopped on a railway crossing in the open country and a heavy passenger train was speeding towards the crossing at 55 miles an hour from a point in plain view half a mile away, and the occupants of the car step-

ped out and began to apply themselves in seeking to crank the car and to push it from the track, and where the engineer of the train applied the emergency brakes as soon as he had a chance to discover that the car was stalled on the track, but the train was not stopped in time to prevent a collision, the railway company cannot be held to have been negligent nor liable in damages for the value of the car." Syl. par. 2.

"The engineer has other duties besides observing the track, and the duty of observing the track may be assigned to the fireman. In this case the engineer says he might have had his attention drawn away from the track at the moment the automobile stopped on the track, but the fireman saw it. The enginemmen would not be expected to assume, at the very first instant of observation, that the automobile would stop on the track or that something was the matter with it so that it could not be cranked and driven or pushed off the track." 95 Kan. 370, 148 Pac. 623.

The plaintiff criticizes *McBeth v. Railway Co.*, and contends that it is out of harmony with other decisions of this court rendered both before and after that case was decided. The court is not disposed to either criticize that decision or to abandon the rule there followed. Under the rules declared in *Dunlap v. Railway Co.* and in *McBeth v. Railway Co.*, the instruction requested by the defendant should have been given, and it was reversible error to refuse to give it; the one given by the court did not correctly state the law.

In *Rule v. Railway Co.*, supra, the court held that one who had negligently driven his car into a switchyard and onto a railroad track, where it was struck by a train being switched in one direction, and was left near another track and was soon thereafter struck by another train being switched in the opposite direction, was not entitled to the benefit of the last clear chance rule. The plaintiff contends that the *Rule Case* may be distinguished from the present one, in this, that in the present case the engineer was where he could see the automobile in time to have stopped his train, while in the *Rule Case* there was no one on either train that struck the automobile who could have seen it; both trains there backed against the automobile, and there was no one at the rear of either train to look out for obstructions or to give warning. The present case comes within the principle followed in the *Rule Case* for the following reason: There, no one saw the car; here, no one saw the car until it was too late to prevent injury.

The judgment is reversed, and because of the finding of the jury that the train was only 75 feet from the crossing when the engineer first saw the car, the trial court is directed to render judgment for the defendant.

All the Justices concurring.

(109 Kan. 32.)

VONFELDT v. SCHNEIDEWIND et al.
(No. 23038.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Tenancy in common §15(10)—Possession under deed from alleged sole heirs with warranty presumed adverse to heirs not joining.

A deed describing the grantors as the sole and only heirs of a former owner who had died intestate, and the property conveyed as the land itself, is to be interpreted as purporting to convey a full title, and possession taken under it is presumed to be adverse to any heirs not joining in its execution, notwithstanding its covenants are that the grantors are seized of "a full interest," and will warrant and defend "their said interest."

2. Tenancy in common §15(10)—Evidence sustaining title by possession for more than 15 years.

The evidence is held to show adverse possession for more than fifteen years, and the acquiring of title by the plaintiff before the action was begun.

3. Admissibility of evidence.

The question whether certain evidence was properly admitted is not passed upon because the error, if any, would not be a ground of reversal.

Appeal from District Court, Ellis County.

Suit by Christian Vonfeldt against Mrs. William Schneidewind and others to quiet title. Decree for complainant, and defendants appeal. Affirmed.

Guy L. Hursh, of Holton, Corlett & Clare, of Joliet, Ill., A. D. Gilkeson and C. M. Holmquist, both of Hays, and C. M. Monroe, of Topeka, for appellants.

F. C. Flood and E. A. Rea, both of Hays, for appellee.

MASON, J. In an action begun December 6, 1917, Christian Vonfeldt obtained a decree quieting title to a quarter section of land and Mrs. William Schneidewind and Bernard McNiff appeal. As against the appellants, the plaintiff's title rests upon possession for 15 years and the question in controversy is whether such possession as to them was adverse.

[1] 1. The land was originally owned by John McNiff and Owen McNiff. John McNiff died intestate, and his half interest passed to his widow, Bridget McNiff, and their five children, two of whom are the appellants. Bridget McNiff thereby became the owner of a one-fourth interest, and each child of a one-twentieth interest. Owen McNiff conveyed his interest to David McNiff, who conveyed it to Bridget McNiff, whose interest was thereby increased to three-fourths. The title stood in this condition until Bridget

McNiff and her three children other than the appellants united in a deed to Mrs. M. Dowler and Hiram Russell, which was executed November 30, 1900, and recorded January 7, 1901. Possession has been held ever since under that deed, the rights of the grantees through a series of conveyances having passed to the plaintiff June 30, 1917. The correctness of the judgment turns principally upon whether the deed to Mrs. M. Dowler and Hiram Russell, in which the appellants did not join, is to be construed as purporting to convey the full title to the land. The deed which was executed in Illinois, read:

"This indenture, made this 15th day of November, A. D. 1900, between Catherine Monohan, a widow, Margaret A. McNiff, single, Ellen McNiff, single, and Bridget McNiff, a widow, sole and only heirs of John McNiff, deceased, and of Will county in the state of Illinois, of the first part, and Mrs. M. Dowler and Hiram Russell, of Ellis county in the state of Kansas, of the second part.

"Witnesseth, that the said parties of the first part in consideration of the sum of twelve hundred and dollars, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto said parties of the second part, their heirs and assigns, all the following described real estate, situated in the county of Ellis and state of Kansas, to wit:

"The northeast quarter of section No. nineteen (19) in township No. twelve (12) south of range No. nineteen (19) west of the 6th P. M., containing one hundred and sixty (160) acres.

"To have and to hold the same, together with all and singular the tenements and appurtenances thereunto belonging or in anywise appertaining, and said parties of the first part for themselves, their heirs, executors or administrators do hereby covenant, promise and agree to and with said parties of the second part, that at the delivery of these presents they are lawfully seized of a full interest in the above-described premises, and that they will warrant and defend their said interest therein to the said parties of the second part, their heirs and assigns, against the lawful demands of all persons claiming under or through said parties of the first part."

Possession by one of several cotenants is not ordinarily adverse as to the others. But by the great weight of authority a grantee of such a cotenant by a deed purporting to convey a full title is presumed to claim all that his deed calls for, and therefore to hold adversely to the other co-owners. 2 O. J. 185; 2 Encyc. of L. & P. 493; 1 R. C. L. 743, note 16. The deed in question recites specifically that the grantors were the sole and only heirs of John McNiff, and the granting clause describes the land itself, and not a mere interest in it. If the recital were true the deed would necessarily pass a complete title. The conveyance therefore explicitly undertook to vest full ownership in the grantees, and its terms were such as to advise the heirs who did not join in its execution that

occupancy taken under it was hostile to their claims. It is true that the covenant of title and warranty refers to "a full interest" instead of the full title, but we do not regard this ambiguous expression as sufficient to detract from the force of the unequivocal recital of exclusive heirship. Covenants of title and warranty are generally given weight in determining whether a deed is to be interpreted as assuming to pass a full title, upon the ground that the willingness of the grantor to enter into them is calculated to encourage the grantee to believe that no one else has an interest in the property (note, 109 Am. St. Rep. 611), although the editor of the note cited expresses the view (p. 612) that there can be no substantial difference in this regard between a conveyance with and one without covenants for title. A mere quitclaim which neither expressly nor by implication asserts full ownership in the grantor of course stands upon a different footing. It follows that possession taken under the deed in question was adverse to the appellants.

[2] 2. The appellants contend that there was no sufficient evidence to support a finding of possession by the plaintiff and his predecessors in interest for a period of 15 years. One witness testified that to his knowledge it had been continuously in possession of and farmed by claimants under the deed referred to since 1900; that during that time 110 acres of it had been cultivated, and the remainder under fence. The plaintiff testified that when Hiram Russell and Mrs. Dowler bought the land they did the breaking. His testimony as a whole was somewhat ambiguous, but the net effect was a matter for the determination of the trial court. After the evidence was all in the judge remarked that it warranted the court "in holding that open and notorious possession from and after that date in 1900 quiet the title." It is probable that the year 1909 was mentioned by inadvertence instead of 1900 (the year the deed quoted from was made). In any event, however, this obviously casual utterance cannot overcome the express finding incorporated in the judgment "that plaintiff and his immediate grantors have been in the open, notorious, and exclusive possession of the real estate described herein for more than 15 years last past," and the implied finding that such possession had continued for at least 15 years when the action was brought.

It is contended that the plaintiff had no standing to maintain the action because at the time it was brought he had merely a contract for the title, his deed not having been recorded until 1919. We need not determine whether the plaintiff would have been qualified to bring the action before acquiring the legal title, for there was evidence that the land was deeded to him June 30, 1917, and he said he obtained the deed in October or

November of that year. There being nothing to indicate the contrary, it must be assumed that the court properly found that the plaintiff was the owner of the farm when he filed the petition.

[3] 8. Complaint is made of the admission of incompetent evidence, but as the judgment does not appear to have been influenced by it and the case was tried without a jury, the error, if any, is not a ground of reversal.

The plaintiff's immediate grantor made an effort to procure a quitclaim from one of the appellants, but, as this took place after he had conveyed to the plaintiff, and more than 15 years from the record of the deed to Mrs. Dowler and Russell, it had no bearing upon the question of adverse possession; nor do we understand that the appellants rely upon it in that connection.

The judgment is affirmed.

All the Justices concurring.

(103 Kan. 285)

WARNER v. CARTER et al. (No. 23115.)

(Supreme Court of Kansas. June 11, 1921.
Rehearing Denied July 7, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 662(2)—Recitals in instructions held record evidence that certain contentions were made.

The proceedings in an action for replevin of an automobile, in which the defendant recovered the value of the automobile, examined, and held:

Recital in an instruction to the jury of the contentions made by the defendant under a general denial constituted record evidence that the contentions were made.

2. Replevin \S 69(4)—Evidence of collusion properly received under general denial.

Under the general denial, evidence that the plaintiff's claim of right to possession of the automobile was made in collusion with another, to defraud the defendant, was properly received.

3. Replevin \S 91—Evidence supporting instructions regarding fraud and collusion.

There was evidence on which to base instructions regarding collusion and fraud.

4. Chattel mortgages \S 157(1)—Instructions as to when bill of sale would take priority over mortgage held not erroneous.

Instructions stating conditions under which the defendant's bill of sale would take priority over the plaintiff's mortgage were not open to the criticisms directed against them.

5. Evidence \S 210—Replevin affidavit held admissible against plaintiff as to value.

The replevin affidavit was properly received in evidence against the plaintiff on the subject of value of the automobile.

Appeal from District Court, Jewell County.

Action by Lou E. Warner against Wilma Carter and others. Judgment for defendant Carter, and plaintiff appeals. Affirmed.

C. Clyde Myers, of Mankato, for appellant.

A. W. Relihan and T. D. Relihan, both of Smith Center, and R. W. Turner and D. F. Stanley, both of Mankato, for appellee.

BURCH, J. The action was one of replevin for an automobile. The defendant Wilma M. Carter recovered, and Warner appeals.

In the petition Warner claimed a special interest in the automobile, by virtue of a chattel mortgage dated January 16, 1919, and recorded on January 17. The mortgage was given by J. S. Johnson to the Motor Bank of Denver, Colo., to secure a note for \$550 due March 15. On June 18 Warner bought the note for the balance due, \$310, and took an assignment of the mortgage.

The car was a new one, for which Johnson gave another car as part consideration. In the forenoon of January 16 an automobile salesman demonstrated the car to the defendant. Johnson then "closed the deal for the car," and at noon prepared and signed a bill of sale of the car, in the office in Denver in which the defendant worked. The bill of sale was witnessed by two witnesses, and was delivered to the defendant as soon as executed. It recited a valuable consideration, permitted Johnson to use the car on condition he would keep it in repair, and provided he should relinquish his privilege on demand. The instrument was filed for record on June 10. When the bill of sale was delivered to the defendant, she went for a ride in the car with her sister and Johnson. When they returned the defendant went to dinner, and then went riding again during the evening. She kept the car in a garage, for which she paid rent, and she used it without restriction whenever she desired. When she took the bill of sale she had no knowledge of the existence of any chattel mortgage affecting it.

Johnson worked for Warner, at a salary of \$150 per month. Warner made loans on chattel security, and Johnson appraised the securities. When Johnson was investigating securities, the defendant made inventories of them for him, and used the car for that purpose. Warner testified he purchased the note and mortgage on a telephone call from the Motor Bank, so Johnson could use the car in doing Warner's business, but he allowed Johnson nothing for providing the car. Warner said he investigated the records before he took up Johnson's note, and found no bill of sale. Warner said Johnson had been using the car in Warner's business, and Warner purchased the car to obtain its use in his business. He said he was buying the note, and did not care who owned the car, and he

said he allowed Johnson to use the car with the understanding Warner owned the car and Johnson was to pay interest. Johnson paid nothing, but no deduction was made from his salary, because, Warner said, he was overdrawn. Johnson was under bond to answer some criminal charge when Warner bought the note.

There came a time when Johnson took the car to a garage other than the defendant's, and refused to allow the defendant to use it. Her home was in Lebanon, Kan. One day she telephoned Johnson to drive the car to the place where she was employed. They then drove to a restaurant, and, when Johnson went into the restaurant, she drove the car to Kansas. She was arrested at Lebanon, in Smith county, without a warrant, was taken to Mankato, in Jewell county, and was then released. A few days later she was again arrested at Lebanon, and was again released on telegraphic instructions to the sheriff from Denver. A few days later she was arrested, and was taken to the jail in Mankato, where she spent the night. Johnson was there when she arrived. After a preliminary examination, she was discharged, but when she went to the garage where she had left the car, she was served with Warner's summons in replevin. By direction of Warner, the car was delivered to Johnson. Johnson promptly drove it to Denver, and has ever since had possession of it. Johnson was named as a defendant in the action, but he filed no pleading and did not appear at the trial, either as party or witness.

[1] In presenting the issues of fact to the jury the court said the defendant Carter claimed the automobile as owner by virtue of the bill of sale, asserted the chattel mortgage was neither given nor recorded until she had purchased the automobile and had taken possession of it, asserted that Warner and Johnson had fraudulently colluded and conspired to deprive her of her property, and asserted that Warner was not in fact owner and holder of the chattel mortgage, but purchased it on behalf of Johnson. The usual necessary instructions on the subject of collusion and fraud were given. Warner says the record discloses no contention of collusion and fraud made by the defendant Carter. The instruction referred to is record evidence of the contention. The court's information may have been derived from the opening statement of counsel to the jury, or from statements of counsel made during progress of the trial, or at the close of the evidence, or by informal request for instructions. There is nothing in the record to contradict the court's statement, and the statement, being a portion of the record, is presumed to be true.

[2] It is said the issue of fraud could not be raised without pleading it. The action was replevin, the answer was a general denial, and the court has said time and again

that under a general denial in replevin a defendant may prove any fact which will defeat the plaintiff's cause of action. In the case of *Holmberg v. Dean*, 21 Kan. 73, the rule was applied to proof that the plaintiff's title was fraudulent. In the case of *Kerwood v. Ayres*, 59 Kan. 343, 53 Pac. 134, general denial in an action for conversion was placed on the same footing with general denial in replevin, and it was said the plaintiff's title might be impeached for fraud.

[3] It is said there was no evidence of collusion and fraud. It is not likely that Warner purchased a dishonored note merely on telephone call by a bank and without consultation with Johnson. It is not likely that Warner searched the record for adverse claims upon the automobile and failed to find Carter's bill of sale, which had been on record since June 10. Warner testified he purchased the car. Then he testified he purchased the note and was not interested in who owned the car. He testified he purchased the note and mortgage so Johnson might use the car in Warner's business, and then he testified he owned the car, but Johnson was to pay interest on the sum Warner paid for the car. When the car was taken by the sheriff from Carter, it was turned over to Johnson, by direction of Warner, and Johnson has had it ever since. This shuffling, considered in connection with the relations between Warner and Johnson, the sandbagging of the woman with repeated arrests, and Johnson's keeping away from the trial, indicated some collusion between Warner and Johnson.

[4] Defendant Carter's right to recovery was submitted to the jury in the following instruction:

"(3) If you should find from the evidence that the property in controversy was sold and transferred by the defendant J. S. Johnson to defendant Carter, and that said automobile was delivered to her prior to the execution of the mortgage upon which plaintiff bases his claim, and prior to the recording of said mortgage, and that the defendant Wilma M. Carter had no knowledge or notice of the existence of such mortgage at the time she took said car, then the claim of the plaintiff under said mortgage would be void as against the defendant Wilma M. Carter, and in such event your verdict should be for the defendant Wilma M. Carter."

The instruction is criticized because the court did not use the words "sale in good faith for a valuable consideration." The bill of sale recited a valuable consideration, and by statute imported a consideration (Gen. Stat. 1915, § 2040), which Warner did not offer to contest. The sale and delivery referred to clearly meant actual and not colorable sale and delivery, and the jury must have so understood the instruction. Actual purchase and possession for a valuable consideration before execution of the mortgage,

and without knowledge or notice of the mortgage, gave good title as against the mortgage. A subsequent instruction related to procuring title before record of the mortgage. It is said the court did not define procurement of title, and the subject of actual and continued change of possession was not mentioned. The instruction is to be read with instruction No. 3, and when this is done the meaning is clear. Indeed, the instruction was in effect instruction No. 3, with purchase before execution of the mortgage omitted, and consequently reference to continued possession was not necessary.

[5] Complaint is made that the replevin affidavit filed on behalf of Warner was introduced to prove value of the automobile. The complaint is made on the authority of *Edwards v. Bricker*, 66 Kan. 241, 71 Pac. 587. In that case the action was against a surety on the replevin bond, and, as the opinion points out, the plaintiff in the replevin action was not a party. Here we have the plaintiff's own valuation of the automobile, stated under oath, and so stated to enable him to obtain possession of the property. Clearly, as against him, the affidavit constituted an admission of value. Other complaints are made respecting proof of value, but there is no contention the verdict of the jury is too large, and the court would not be authorized to award a new trial to revalue the car.

There are ten divisions of the plaintiff's brief, some of which embrace several subdivisions. The court has considered them all. The foregoing covers the subjects of chief importance, and assignments of error not discussed are not deemed to be of sufficient merit to require a reversal. The judgment of the district court is affirmed.

All the Justices concurring.

(109 Kan. 322)

GONDER v. PHARES et al. (No. 23231.)

(Supreme Court of Kansas. June 11, 1921.
Rehearing Denied July 7, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser ⇨117—Overruling demurrer to evidence on cross-petition and of motion for judgment on pleadings because of failure to allege tender of possession held not prejudicial in action to cancel land contract.

Plaintiff sued to cancel a contract for the sale of land on the ground that the purchaser had failed to make payments when due, and asked judgment for damages and for possession. In her cross-petition defendant asked damages sustained because of the fraudulent representations of the plaintiff respecting the land. Her cross-petition was based on the theory of a rescission of the contract. *Held*, under the circumstances, the plaintiff was not prejudiced by the overruling of a demurrer

to the evidence under the cross-petition, and the overruling of a motion for judgment on the pleadings, by which he attempted to raise the point that the cross-petition made no tender of a deed and no tender of possession.

2. Vendor and purchaser ⇨44—Evidence sustaining judgment on cross-petition for damages for fraudulent representations.

Evidence considered and *held* sufficient to sustain a judgment against the plaintiff on the cross-petition for damages resulting from his fraudulent representations respecting the land.

3. Vendor and purchaser ⇨114—Purchaser under land contract held not estopped to rescind by offers to make payment.

Although the undisputed evidence showed that defendant offered at different times prior to October 1 to pay \$2,000 due under the contract at that time, she was not, as a matter of law, thereby estopped to rescind the contract and to claim damages, in view of evidence to the effect that plaintiff persuaded her to remain on the land and to allow the contract to stand under a promise to procure a purchaser at a price which would recoup the losses she had sustained by entering into the contract.

4. Vendor and purchaser ⇨123—Failure of judgment in suit to cancel land contract to order possession held not ground for reversal.

The failure of the judgment to order possession of land given to the plaintiff, under the facts stated in the opinion, *held* not ground for a reversal, as it is not too late for the plaintiff to ask the trial court to order possession surrendered to him.

Appeal from District Court, Gray County.

Action by M. D. Gonder against Minnie Phares and husband. Judgment for defendants, and plaintiff appeals. Affirmed.

C. M. Williams and D. C. Martindell, both of Hutchinson, for appellant.

Will N. Bendure, of Cimarron, and C. C. Wilson, of Meade, for appellees.

PORTER, J. The action was brought by the appellant for the rescission and cancellation of a contract for the sale of a quarter section of school land on the ground that the appellees had failed to make payment of the purchase price according to the terms of the contract. Mrs. Phares, who is the principal appellee, her husband being joined with her, filed an answer and cross-petition admitting the execution of the contract, the payment of \$2,500 on the purchase price by the indorsement of a note to the appellant which he had collected; admitting the failure to pay \$2,000 due on October 1, 1919, and subsequent payments; and alleging that she was induced to purchase the land by the fraudulent representations of the appellant as to the quality, character, and boundaries of the land. She asked to recover as damages the

\$2,500 and interest, and expenses incurred in moving from her home in Stafford county and in taking possession of the land. There was a general verdict in her favor for \$3,027, and with the verdict the jury returned a number of special findings.

A number of trial errors are complained of, but the principal contentions are that the court should have sustained a demurrer to the evidence under the cross-petition, and should have given judgment in appellant's favor on the pleadings and evidence. Error is also assigned with relation to the instructions and the overruling of the motion for a new trial.

The appellant, M. D. Gonder, is a real estate agent at Cimarron. Mrs. Phares and her husband owned a farm in Stafford county, which they sold in January, 1919, and were looking for another place. In company with her husband and two real estate agents, Mrs. Phares went to Gray county and examined land there. The agents introduced her to Mr. Gonder, who took her and her husband to look at the land on January 29.

Mrs. Phares testified in substance as follows: She was but a child when she came to this country, has never attended school, and is unable to read and understand English very well. It was late in the evening, and quite dark when they got to the land. The ground was covered with snow so deep that there was difficulty in getting there with the auto. The appellant told her the land was all hard land and would be all right. She was not able to get out and make an examination of the land. Mr. Gonder took her into the house, lighted a lamp, showed her the bathroom, tank heater, and other conveniences; told her that he was a good Christian, and never liked to beat a woman in a trade. She had full confidence in him, and they shook hands and she agreed to take the land. The contract was executed the same day, and Mrs. Phares indorsed to the appellant a note for \$2,500 as the first payment. She moved from Stafford county and reached the place on the 29th of March. The next day she examined the land, and discovered that it consisted mostly of what is called blow sand, and was of little value. The wheat, which had been represented to her as good, was blowing out. Mr. Gonder came to the place the next day, and she offered him \$500 to release her from the contract and give her back \$2,000 of her money. It was at this time that he made the misrepresentations as to the boundary line, telling her that there were 16 acres on the other side of a fence that belonged to the land she had bought; she discovered afterwards that the fence was the boundary line, and that the owner on the other side claimed the 16 acres. Mr. Gonder came to the place shortly afterwards, and she offered him \$1,000 if he would release her from the contract. He as-

sured her that if she would remain where she was and farm the land he would sell it for her for \$9,000. Her testimony is:

"He said the war is on and everything goes up, and he says if you stay there and work right good, and farm it good, he says, when the corn looks best in August, positive I will sell it, and, well, he come up to me, and he shakes hands two or three times, and he says, 'Woman, I will have that sold, now,' he says, 'mind what I say; when I say anything, I mean it; mind what I say, I will have that place sold before the last of August.'"

An additional agreement was then signed by Mr. Gonder and herself, by which she was to pay him a certain commission for selling the land, and agreed that if he received anything from the purchaser she was not to complain.

Several witnesses testified that they were familiar with the land; they had made an examination of it; had dug holes in places in the cultivated part which demonstrated that it was blow sand for a distance of two and one-half feet from the surface. There was some testimony tending to show that a half section of land in the immediate vicinity and of the same general quality had sold for \$10,500. The price which Mrs. Phares was to pay for the quarter section was \$8,500.

[1, 2] The appellant's testimony and that of his son, and some of the real estate agents who were assisting in the trade, and others, contradicted that of Mrs. Phares' witnesses, but the most that can be said is that there was a sharp conflict in the testimony, not only as to the representations, but other matters. The contention, however that the court erred in submitting the issues of fact to the jury cannot be sustained.

One of the main contentions is that the cross-petition stated no cause of action because of the failure to allege a tender to the appellant of a deed and possession of the land and that, as she was seeking by her cross-petition to recover damages on the theory of a rescission on the ground of fraud, it was necessary for her to tender a conveyance and possession. This point seems to have been raised merely by a demurrer to the evidence and by a motion for judgment on the pleadings. The court's attention does not seem to have been specifically called to any defect in the cross-petition. It may be conceded that it was defective in this respect, but the appellee's testimony showed that on two occasions after she discovered the fraudulent representations respecting the land she begged the appellant to release her from the contract, and offered to let him retain a considerable portion of the first payment. The appellant, understood, of course, that he was to have the title and possession of the land if he accepted either of these propositions. It is apparent, too, that a ten-

der would have been of no practical effect; it would never have been accepted. The position of the appellant has been from the first that there was no defense to the contract, and that because of the failure to make the subsequent payments of the purchase price he was entitled to have it canceled, and a judgment for the possession of the land.

[3] Another of the principal contentions urged is that, because the undisputed testimony showed that appellee offered at different times prior to October 1 to pay to appellant \$2,000 due at that time under the contract, she thereby estopped herself to set up a claim to recover damages on the theory of a rescission of the contract, and it is contended that the question of estoppel on the undisputed testimony became a question of law for the court, and not for the jury. A sufficient answer is that Mrs. Phares' testimony, which the jury accepted as true, shows that after she had informed appellant of her discovery that she had been defrauded he persuaded her to remain on the land and cultivate it and allow the contract to stand (which, of course, required her to make the payments when due), and that if she would do this he would procure a purchaser at a price which would be sufficient to recoup any losses she had sustained by entering into the original contract. At the time she made the offers of payment the subsequent agreement had not been carried out, and doubtless Mrs. Phares at that time was unwilling to risk the loss of everything by a failure on her part to comply with the contract. She frankly admits in her testimony that she tried to make the payments before they were due. Afterwards she determined, apparently, to make no further payments. It cannot be said that, as a matter of law, she was estopped by offering to pay at a time when she was relying upon appellant's agreement to resell the land. The jury probably gave the same explanation to the testimony showing that she did not complain to her neighbors and others about being dissatisfied with the land, and even went so far as to make statements indicating that she was satisfied with her contract. The court properly instructed the jury on the issue.

There is a complaint that the court erred in submitting to the jury the issue of the fraudulent representations respecting the boundaries, because the testimony showed that these representations were made after the execution of the contract. It is true the evidence is silent as to representations in respect to boundaries except those made when Mrs. Phares first informed appellant that she had discovered the fraud. Her theory is that these representations were made as an inducement for her to abide by the contract, and to remain where she was, until, by his subsequent agreement to find a

purchaser for the land, he had lulled her into security. Moreover, the principal representations upon which Mrs. Phares relied were those relating to the character of the soil—the quality of the land. Upon that issue there was sufficient evidence to sustain the verdict and special findings.

[4] The appellant complains of the failure of the judgment to protect his rights by ordering possession of the land given to him. He brought the action in the first place to recover possession, and for cancellation of the contract. The judgment against him on the cross-petition rests upon the theory that the contract has been rescinded, not by the appellant, but by the appellees. Moreover, by merely calling the attention of the court to the fact that, notwithstanding the general verdict, he was entitled to judgment for possession, appellant's rights would have been protected in the journal entry of judgment; and it is not too late for him to ask the court to give him that relief. There is a statement in the brief of the appellees that Mrs. Phares moved from the place after the judgment, and that she makes no claim of any right to possession. It is apparent that it would be folly to order another trial on the ground that the cross-petition made no offer to return possession, or because the trial court's attention was not called to the fact that appellant was entitled to possession.

We discover in the record no error prejudicial to the appellant, and the judgment is affirmed.

All the Justices concurring.

(109 Kan. 233)

**TRUSLER GRAIN CO. v. EARLTON
GRANGE CO-OPERATIVE
ASS'N. (No. 23214.)**

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Sales ¶32—Correspondence showing execution of contract for sale of two cars of wheat.

Correspondence touching the purchase of certain grain examined, and held to evidence a contract for two cars of wheat.

2. Sales ¶32—Letter of confirmation held to have supplied contract for sale of wheat by wire.

The letter of confirmation involved herein held to have supplied certain details of the contract indicated by the offer by letter and acceptance by wire.

3. Sales ¶32—Contract for sale of wheat held to authorize buyer to buy in on seller's account on failure to ship in time.

The contract evidenced by the offer, acceptance, and letter of confirmation held to have

given the plaintiff the right to buy in wheat on defendant's account on the latter's failure to ship in the time specified.

4. Appeal and error 78(3)—Order to strike matter from petition held appealable.

The allegations stricken from the petition on motion took certain matters constituting a part of the cause of action out of the case, and the order to strike is therefore held appealable.

5. Sales 32—Order to strike reference to letter of confirmation from petition held error.

The order to strike from the petition all reference to the letter of confirmation held error.

Appeal from District Court, Neosho County.

Action by the Trusler Grain Company against the Earlton Grange Co-operative Association. From an order striking certain matter from the petition, plaintiff appeals. Reversed and remanded.

Campbell & Campbell, of Wichita, for appellant.

W. R. Cline and J. Q. Stratton, both of Erie, for appellee.

WEST, J. This is an appeal by the plaintiff from an order striking from its petition all reference to a certain letter of confirmation following an exchange of communications between the parties touching a purchase of grain.

On October 28, 1919, the defendant wrote the plaintiff in response to an inquiry:

"On reflection I have decided to load you one or two cars of wheat at your offer of 8c above government price, no Com. If we can get the cars 15 or 20 days shipment. Let us know where to order the cars to."

The plaintiff in reply wired:

"Book two cars order cars for Fairbault Minnesota Thanks."

The same day the wire was sent and received, the plaintiff mailed the defendant a letter of confirmation, stating, among other things:

"We confirm purchase from you by letter and wire of two car capacity bushels of red wheat. Basis of grade No. 1 at \$2.26 per bushel basis of f. o. b. Kansas City, Mo. our option of diversion and routing, provided point at which weights and grades are to be obtained is not herein specified. Shipment via any road within fifteen to 20 days Minneapolis grades, Minneapolis weights, to be billed Fairbault, Minn. Lower grades to apply government scale. Lower grades do not apply on this contract without our consent. * * * When shipments are not made according to contract, we reserve the right, without further notice, to extend time of shipment, cancel, or buy in the grain for the seller's account, unless at seller's request previous to expiration of time limit of

shipment other arrangements are made covering seller's failure to make shipment within specified time. * * * Receipt of this contract by the seller, without immediate notice to us of error, is an acknowledgment of the acceptance of all the conditions thereof."

[1-3] It will be seen that, if this letter be considered binding on the defendant, it has the effect of clearing in the contract evidenced by the previous correspondence these items: It calls for two cars, not one or two; if shipments are not made in the specified time, the plaintiff can extend or buy in on the defendant's account. Aside from any other possible features working changes in addition thereto, these are manifest.

The petition alleged that this confirmation was pursuant to the general trade custom of the grain business, known and understood by the defendant who received it without objection.

The offer was to ship one or two cars and the order was to ship two. There is no diversity as to the time in which they were to be shipped, but as to the effects of the delay the contract, as evidenced by the letter and reply, was silent. It is a matter of business caution to confirm any contract made orally or by wire, by written communication supplying the details which are left out of the brief communications which have theretofore passed between the parties. Here, as was said in *Strong v. Ringle*, 96 Kan. 573, 152 Pac. 631, "there was a contract, and the question is: What were its terms?" 96 Kan. 575, 152 Pac. 632.

The allegation that this confirmation was sent to and received by the defendant pursuant to a known and understood custom of the grain business must be taken as true on demurrer, and if this allegation were expressly admitted we would then have a contract evidenced by the offer, the telegram, and the letter of confirmation, and not merely one evidenced by the offer and acceptance alone.

One of the proper offices of usage and custom is "to supply necessary matters upon which the contract itself is silent." *McSherry v. Blanchfield*, 68 Kan. 310, 75 Pac. 121, syl. par. 3.

In *Bossmeyer Bros. v. Nielson*, 108 Kan. 534, 196 Pac. 431, it was held that the rules of the grain association under which the parties were operating entered into and formed part of the contract. Under the allegations of the petition now before us the known and understood custom of the grain trade gave to the letter of confirmation the office of supplying the necessary matters of detail upon which the contract was silent. In *Cardwell v. Uhl*, 105 Kan. 249, 182 Pac. 415, it was held that, where there is evidence of a practice among grain dealers followed in prior transactions of mailing letters of confirmation of oral contracts, such confirmations are admis-

sible in corroboration of testimony that such oral contracts were made. In *Wallingford v. Grain Co.*, 100 Kan. 207, 164 Pac. 275, of the written confirmation of a phone contract it was said that, stating the terms, the price, the destination, and weight, it reserved "also the right to buy in the grain for the seller if shipments were not made according to contract." *Strong v. Thurston*, 107 Kan. 368, 191 Pac. 575, held that the failure of the defendant to make objection to the letter of confirmation amounted to an acceptance thereof.

[4] As the matter stricken from the petition took that part of the cause of action out of the case, the order to strike was appealable. *Whitlaw v. Insurance Co.*, 86 Kan. 826, 122 Pac. 1039; *Norman v. Railway Co.*, 101 Kan. 678, 168 Pac. 830.

[5] It is held that the offer meant that the seller would furnish one or two cars as desired by the buyer, and this, together with the acceptance, was a contract for two cars; that these, together with the letter of confirmation, gave the plaintiff the right to buy in in case the defendant refused to ship; and, further, that it was error to strike from the petition such letter of confirmation.

The judgment is therefore reversed, and the cause remanded for further proceedings in accordance herewith.

All the Justices concurring.

(109 Kan. 373)

HEMAN CONST. CO. v. MASON et al.
(No. 23452.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by Editorial Staff.)

1. Mandamus ¶7, 10 — Discretionary writ; should not be issued to compel delivery of warrants when services not performed.

Mandamus is a discretionary writ, and should not issue to compel delivery of warrants for services not performed.

2. Evidence ¶387(1) — Parol evidence contradicting public records held inadmissible.

In mandamus by a contractor to compel delivery of warrants for a public building, parol evidence required by an answer which would contradict the record of the board of administration or the auditor or the state treasurer as to the issuance of the warrants held inadmissible.

3. Estoppel ¶9 — State held not precluded from disputing public records.

While state officers may not dispute statements in records made by them, the state is not concluded by public records so as to be unable to dispute statements therein contained.

Application by the Heman Construction Company for mandamus, against Wilbur N.

Mason and others. Alternative writ was issued, and plaintiff demurs to the answer. Intervention by state suggested.

Frank Doster, James E. Larimer, and J. E. Addington, all of Topeka, for plaintiff.

Richard J. Hopkins, Atty. Gen., J. K. Rankin, of Topeka, and E. W. Clausen, of Atchison, for defendants.

PER CURIAM. In this, an original action in mandamus, the plaintiff seeks to compel the state board of administration and the state auditor to deliver to the plaintiff certain warrants signed and registered for a part of the contract price for the construction of a building at the State Normal in Emporia, and seeks to compel the state treasurer to pay the warrants after their delivery. An alternative writ has been issued, and an answer has been filed to which the plaintiff demurs.

The brief of the plaintiff gives a correct and concise statement of the issues made by the alternative writ and the answer thereto, and that statement, which is as follows, is adopted by the court:

"The alternative writ charges that plaintiff was awarded the contract for the erection of the Plumb Memorial Building, for the State Normal School; that it performed the work as contracted, and was paid all the contract price, except a balance of \$5,472.28; that June 30, 1917, the then state architect and superintendent of building construction and the then state board of administration in writing approved the work and the vouchers therefor; the then state auditor issued warrants for the said balance due, and the then state treasurer countersigned and registered the same; but that the said auditor and board of administration, and their successors since then, have refused to deliver said warrants to plaintiff; wherefore it has been unable to secure payment of the sum due.

"The answer admits all the allegations in the writ, except as to the due completion of the work, and in defense thereto says that plaintiff did not properly perform some of the work under the contract (specifying it); that on plaintiff's attention being called to the defective work it agreed to rectify it, but has never done so; that the legislative appropriation for the contractor's payment was to lapse and did lapse after June 30, 1917; that in order to save the appropriated fund for plaintiff's benefit the final estimates and vouchers were on July 10, 1917, approved and warrants drawn and countersigned and registered, as plaintiff alleges; that these papers were antedated June 30, 1917, but that on the later date it was orally agreed between plaintiff and defendants, and orally ordered by the defendants that said warrants should be withheld from delivery until plaintiff had made good the defective work. There is no allegation in the answer of any character of fraud or misrepresentation on plaintiff's part or mistake on defendant's part."

[1] The argument to support the demurrer is that the answer alleges facts which if established must be proved by parol evidence that will contradict the record of the board of administration, of the state auditor, and of the state treasurer. It is contended that such evidence is inadmissible, and that therefore the answer, which states no facts which can be proved in defense to the alternative writ, is insufficient. The answer alleges facts which, if true, should defeat the plaintiff's right to have delivered to it the warrants that have been signed. If the warrants should not be delivered, mandamus should not issue to compel their delivery. Mandamus is a discretionary writ (*Kansas & Oklahoma Railway Co. v. City of Liberal*, 198 Pac. 1067), and should not issue to compel the delivery of warrants to the plaintiff when it has not performed the service for which it was to receive them.

[2] There is much difficulty in holding that evidence to contradict the record may be introduced by the defendants. The record they made is at least prima facie correct, and there is ample authority holding that they cannot contradict it. 22 C. J. 1083, and subsequent pages. That record is very similar to the record of a board of county commissioners in a road proceeding. If such a board should establish a road, allow damages, and direct warrants to be issued, and the warrants are issued, signed, and registered, but the clerk should refuse to deliver them, in an action to compel their delivery, the board of county commissioners would not be permitted to say that the road was not established, that damages were not allowed, nor that warrants were not directed to be issued. The same principle must apply to the records made by the board of administration, by the auditor, and by the treasurer.

[3] While these officers probably cannot dispute any statement contained in the record made by them, the state is not concluded by that record if it does not recite the facts. The state, on the relation of the Attorney General, in this or in an action commenced for that purpose, may question the correctness of the record and may procure a judgment preventing the delivery of the warrants if the facts alleged in the answer are true. The court therefore suggests that the state on the relation of the Attorney General intervene in this action and file such pleadings as may be necessary to enable the court to determine the truth of the matters alleged in the answer filed by the defendants. When that is done, the answer now filed and the demurrer thereto will become immaterial, and it will be unnecessary for the court to say that the demurrer should or should not be sustained.

BRADLEY v. BURGESS et al. (No. 23257.)
(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Husband and wife \S 278(2)—Contract by old and infirm couple for division of property and to live apart held valid.

A contract between an old and infirm couple, husband and wife, for the division of their property, in which they agreed to separate because they could no longer continue to live together in comfort by reason of their infirmities and circumstances, and in which it was agreed that the husband, who was ill, should go to the home of a son by a former marriage, where he would receive proper attention and the wife be relieved of the burden of attempting to look after him, is *held*, under all the circumstances, a valid contract, and not open to the objection that it violates public policy.

2. Husband and wife \S 279(4)—Acceptance by husband of benefit of agreement for separation and division of property held to preclude him from setting it aside.

Where, in such a case, shortly after the separation the wife dies, leaving a will devising her property to her own relatives, *held*, the fact that the husband has accepted the benefits of the agreement, which was fairly entered into and was fully executed, precluded him from setting it aside or from recovering property disposed of under its provisions, and that persons claiming under him occupy no better position.

Appeal from District Court, Cowley County.

Action by J. D. Bradley, revived in the name of his heirs, against Betty Burgess and others, for partition. A demurrer to the answer was overruled, and defendants appeal. Affirmed.

Albert Faulconer and Kirke W. Dale, both of Arkansas City, for appellants.

C. T. Atkinson and Tom Pringle, both of Arkansas City, for appellee.

PORTER, J. James and Sarah Bradley were husband and wife, and resided at Arkansas City. The wife owned two residence lots in Arkansas City, two pieces of city property in Missouri, and some household goods. The husband was the owner of a small parcel of land in Reynolds county, Mo. They entered into a written agreement for the division of their property, each party thereafter to separately own, use, and dispose of his or her property as though the marriage relations had never existed. The reasons for making the agreement were stated in a preamble as follows:

"Witnesseth: That whereas, said parties are husband and wife and are both aged and infirm and in ill health and unable to properly care for each other, and it being deemed ad-

visible for said husband to go to the home of a son by a former marriage, there to make his home and have care and attention necessary, and said wife feeling that she being unable to be of assistance in taking care of said husband and be of care and expense to said son, it is hereby agreed by and between said husband and wife that said husband may go to the home of said son for the purposes and reasons above set forth, said wife to remain where she elects.

"Now therefore, it is agreed by and between the parties hereto that it shall be lawful for said parties to live apart as above stated, free from the marital control of each other, the same as if unmarried, and without any interference on the part of each party hereto."

There was a provision by which the wife agreed to accept in full of all demands for her support the sum of \$5 per month for the period of 14 months, payable quarterly at the time her husband's pension was due. Shortly after the execution of the contract and the separation of the parties the wife, while visiting in Missouri, died, leaving a will which devised all her property to the appellees. Claiming that as the surviving husband he was entitled under the law to an undivided one-half of the real estate, James Bradley brought this action to partition the property in Cowley county. He died while the action was pending, and it was revived in the name of his heirs. The devisees under the will of Mrs. Bradley filed an answer setting up the written contract and alleging that the husband had no interest in the real estate and that his heirs acquired none. A demurrer to the answer was overruled, and the heirs of James Bradley appeal.

[1] The appellants' contention is that the contract is void because it is contrary to public policy. It is argued that, inasmuch as an absolute divorce will not be granted upon the consent or agreement of the parties, there is equally as strong a reason for holding that the agreement in question which, it is insisted, is equivalent to a limited divorce, should not be recognized, and, further, that the contract is void because there is an entire lack of such consideration as will be recognized by the courts. The argument is based upon the proposition that a husband and wife cannot be permitted to live in a state of separation unless there is some failure on the part of one or both in the performance of duties, which, it is said, society has an interest in the fulfillment of. The appellants concede that postnuptial contracts are valid where they do not contravene public policy, but insist that in previous decisions the court has laid down the rule that agreements for the division of property based upon separation between husband and wife can only be upheld when the relations between the parties are such as to make a separation inevitable, because the conduct of one is such as to render separation necessary for

the health and happiness of the other. The principal case cited in support of this contention is *King v. Mollohan*, 61 Kan. 683, 60 Pac. 731, which, it is said in appellants' brief, is the very foundation of their claim.

In that case a contract for the division of property was made in contemplation of an immediate separation and with an unexpressed purpose that a divorce should at once be obtained. But even in that situation it was held that because the separation was simultaneous with the execution of the contract the latter was not to be regarded as intended to break the marriage relations at some future time. The appellants, however, stress a statement in the opinion to the effect that—

"An understanding that the separation, which was inevitable and immediate and legal in itself, should thereafter receive the sanction of the court, and effect a dissolution of the marriage relation, cannot be regarded as collusive or fraudulent or violative of public policy." 61 Kan. 690, 60 Pac. 733.

But in using this language the court spoke with reference to the facts of the particular case, and was not attempting to lay down a hard and fast rule applicable to all such contracts, nor to limit or define the circumstances or conditions which might be sufficient to render valid a contract of this character between husband and wife.

The appellants' argument is based upon the narrowest construction possible to be given to the word "inevitable" as used in the opinion in the *Mollohan* Case. The word is often employed in the sense of absolute certainty or of something as sure to happen as death. On the other hand, it is often used in a different sense. *Soule's Dictionary of English Synonyms* gives as synonymous words "unavoidable; necessary; not to be escaped; that must be suffered."

In the celebrated case of *McCulloch v. State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579, counsel for the state insisted upon placing upon the word "necessary" a narrow construction, as it appears in the provision of the federal Constitution that Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. The contention was that the word "necessary" should be construed as limiting the right of Congress to pass laws for carrying into effect the granted powers to such as are indispensable, and without which the power of Congress would be nugatory. In answering this contention, Chief Justice John Marshall said:

"Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common af-

fairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. * * * It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases." 4 Wheat. 412, 4 L. Ed. 579.

So in the Mollohan Case the court, in speaking of the separation of the husband and wife being inevitable, did not use the word "inevitable" as something bound to happen at all events, but as highly probable. Of course, it is always possible, even in extreme cases, that disagreements and quarrels between husband and wife will be adjusted; and the court spoke of the separation as inevitable, not in the sense of being absolutely sure to happen, but in the sense that, from all the circumstances, the parties understood that a separation was bound to occur.

The contract between James Bradley and his wife rests upon sufficient consideration, and we are unable to discover that it contains any provisions contrary to public policy. Here were two old infirm persons, husband and wife, each of whom had been married before. They realized that they could no longer continue to live together in comfort, not because of domestic strife, but because of their infirmities and circumstances. In order that the husband in his sickness might have proper attention they deemed it best to separate; the husband going to the home of his son, where his wants would be cared for, and the wife would be thereby relieved of the burden of attempting to look after him. The husband possessed some property, to which the wife was willing to forego her interest, in consideration of the right to retain for her sole use her own property. Under all the circumstances we think the contract was one which courts should not hesitate to uphold.

[2] But for another reason the appellants cannot maintain their action for partition. It was said in *King v. Mollohan*, *supra*, upon which appellants place so much reliance:

"In our view, the separation agreement does not violate public policy; but if for some reason it did, the fact that the husband had accepted the benefits of an agreement which fairly and equitably divided the property, and which was fully executed, would preclude him from setting it aside or recovering property disposed of under its provisions." 61 Kan. 694, 198 Pac. 969.

The appellants, who claim under James Bradley, occupy no better position.

The judgment is affirmed.

All the Justices concurring.

(61 Kan. 688)

KING v. MOLLOHAN et al.

(Supreme Court of Kansas. July 7, 1900.)

(Syllabus by Editorial Staff.)

Husband and wife \S 279(2)—Husband, having accepted benefits of agreement to divide property, may not set it aside.

Where a husband has accepted the benefits of an agreement between himself and wife for a fair and equitable division of the property, and which has been fully executed, he is precluded from setting it aside or recovering property disposed of under its provisions.

On rehearing. Affirmed.

For former opinion, see 61 Kan. 683, 60 Pac. 731.

PER CURIAM. A rehearing in this case was ordered because we assumed that a certain finding copied in the record was part of the same. It now appears that after the finding had been filed a motion to strike out the fourteenth finding was made and sustained. That finding was to the effect that the conduct of John J. Bartel toward his wife was such as to render a separation necessary for the health and happiness of the wife. Although the motion was sustained, the finding was allowed to remain in the record, and the fact that it was printed there, as well as the further fact that counsel in their printed brief and argument assumed it to be a part of the record, led us to the same assumption, and to overlook the correction made in the manuscript brief filed after the oral argument.

The absence of the finding, however, does not invalidate the postnuptial contract, nor warrant a change in the ultimate decision of the case. The specific finding that the husband and wife were incompatible and that a separation was necessary to the health and happiness of the wife was cited to show that the separation was not collusive, or fraudulent, or violative of public policy. We did not hinge the decision, however, on this finding, as a reading of the testimony sufficiently

shows the absence of collusion and fraud in the separation, as well as in the agreement for the division of property; and this is sufficient to sustain the general finding. A separation between the parties had been fully decided upon, and the agreement which was made contemplated, and was followed by an immediate separation. The facts show, and the court found, that the adjustment of the property rights under the agreement was fair, reasonable, and just, and it was held in *Randall v. Randall*, 37 Mich. 503, and other cases cited in the former opinion, that—

When a separation "has been fully decided upon, and the articles contemplated a suitable provision for the wife and children, or an equitable and suitable division of the property the benefits of which both have enjoyed during coverture, no principle of public policy is disturbed by them."

We are satisfied with the views taken and already expressed as to the stipulation that the husband should stay away from his wife's place and not molest her or trespass on her premises, and as to the understanding had between them with reference to a divorce. In our view, the separation agreement does not violate public policy; but, if for some reason it did, the fact that the husband had accepted the benefits of an agreement which fairly and equitably divided the property, and which was fully executed, would preclude him from setting it aside or recovering property disposed of under its provisions.

The judgment of affirmance will not be disturbed.

(109 Kan. 328)

AHALT v. GATEWOOD et al. (No. 23232.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Attorney and client ⇨180—Attorney's lien statute furnishes only means for securing liens on judgments, and written notice is essential.

The statute concerning attorneys' liens supersedes the common law, and furnishes the only means and remedy for securing such liens on a judgment procured by an attorney for his client, and a written notice thereof is essential.

2. Attorney and client ⇨180—Indorsement on summons held not a sufficient notice of attorney's lien under the statute.

The summons in an action on certain notes providing for attorney's fee in case of suit thereon had indorsed the following: "Amount claimed \$6,617, with interest from August 6, 1906, at 10 per cent. per annum, and costs of suit, and \$661.70 as attorney's fee for collection." Below the clerk's signature was the following: "Nelson Case, Oswego, Attorney for Plaintiff." *Held*, that such indorsement was

not a sufficient notice of an attorney's lien under section 484 of the General Statutes of 1915.

Appeal from District Court, Labette County.

Action by B. F. Ahalt and another against Rawlings Gatewood and another. Judgment for plaintiff, and sale of land on execution to wife of Rawlings Gatewood. Motions by Nelson Case, attorney for plaintiff, to enforce against the purchaser, Sophia Gatewood, a lien for attorney's fees. Motions denied and Nelson appeals. Affirmed.

Nelson Case, of Oswego, in pro. per.

E. L. Burton and Paul MacCaskill, both of Parsons, for appellee.

WEST, J. In 1906, the defendant Rawlings Gatewood gave the plaintiff, a resident of Oregon, three promissory notes for \$6,617, bearing interest at 10 per cent. Each note contained a provision that in case of suit to collect it the maker promised "to pay such sum as the court may adjudge reasonable as attorney's fee in said suit or action." The notes were made payable in Oregon.

Nelson Case, in 1907, brought suit on these notes in Labette county, taking judgment for \$7,774.65, with interest at 10 per cent. The summons was indorsed with the amount sued for and costs of suit "and \$661.70 as attorney's fee for collection"; and below the clerk's signature this indorsement was made: "Nelson Case, Oswego, Attorney for Plaintiff. The defendant was personally served. In 1908, the plaintiff made proof of his allegations, and the court found generally in favor of the plaintiff, and rendered judgment for \$7,774.65, with 10 per cent. interest and costs, and attorney's fee for \$300, which it directed to be taxed as part of the costs in the case. Mr. Case appeared as sole attorney for the plaintiff, and was never discharged as such attorney, and has never received any compensation for his services. In May, 1919, the plaintiff, for \$900, assigned this judgment to Sophia Gatewood, the defendant's wife, who had execution issued and sale made and bought in the property for \$4,500. She paid in cash only the amount of the court costs, the printer's fee, fee for notice of sale, and the sheriff's fees, amounting in all to \$61.91, retaining the balance of the \$4,500 to be applied as a credit on the judgment. On June 8, 1919, Mr. Case filed a motion for an order to direct the proper officer to pay him the attorney fee allowed by the court. May 4, 1920, he filed another motion to require the purchaser at sheriff's sale to pay into court the amount of the attorney's fee for his use, and, in default of such payment, the sale to be set aside. On May 28, 1920, Sophia Gatewood, the purchaser, moved for confirmation. June 11, 1920, Mr. Case combined his two motions into one, which he then filed, asking that the sale be not confirmed until the pur-

chaser paid into court a sufficient sum to pay him the attorney fee, and asking, further, that the court require the sheriff to collect and pay into court the amount of such fee for his use, and that otherwise the sale be not confirmed. The three motions were presented at the same time, and argued and taken under advisement. Afterwards, the combined motion of Mr. Case was overruled, and the motion for confirmation sustained, and from these orders this appeal is taken.

Mr. Case contends that the attorney fee contract was made for his benefit, was one which he can enforce, and that the judgment for such fee, or the fee so allowed by the judgment, belongs to him. He argues that the common law recognizes two classes of attorney liens, the retaining and the charging; that his lien partakes of the nature of both, and that the statutory lien, which is of later origin, does not supplant or impair the common-law remedy, but is an additional and supplemental remedy. He argues that his lien, so far as considered a charging lien, is an equitable right to the fee and costs due him for services, and that he is regarded as an equitable assignee of the judgment, based on the principle that the plaintiff should not be allowed to appropriate the whole of the judgment without paying for the services of his attorney in obtaining it. He argues, further, that the assignment should not destroy his right to his remedy, and contends that the assignee took subject to the lien of the attorney through whose services the judgment was secured.

The defendant contends that the judgment was not in favor of Mr. Case, but of his client; that the assignment had the effect of ending his employment as attorney in the matter, and that Mr. Case is not a party to this litigation; and, further, that he has not complied with the Kansas statute by serving notice of his lien as required.

Of course, strictly speaking, the judgment was in favor of the plaintiff, and not the plaintiff's attorney, although that part now in controversy was expressly termed an attorney's fee in the journal entry, and the summons in the action asked for an attorney's fee. Whether the assignment ended the matter, and whether Mr. Case has a right to be considered a party, need not now be determined. The effect of our statute prohibiting a contract or judgment thereon for attorney's fee embodied in a note or similar instrument is not invoked by either party, and will therefore not be considered.

[1] The serious and controlling question in the case is whether the right to the fee and lien can be invoked without having complied with our statute. This statute (Gen. Stat. 1915, § 484) provides that—

"An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon

money in his hands belonging to his client, and upon money due to his client and in the hands of the adverse party, in any matter, action or proceeding in which the attorney was employed, from the time of giving notice of the lien to the party. * * *

Section 485 provides that—

"Where any judgment has or may be collected or paid to the clerk of any court rendering the same, on execution or otherwise, upon which an attorney's lien is claimed, the court in which such judgment was or is rendered may in term time, or the judge of said court at chambers, without formal pleadings, on application of any party interested, determine the amount due on said attorney's lien, if any, and make any order for the distribution of said moneys according to the respective rights of the parties."

It would seem by the language of section 484 that the Legislature must have intended to cover both kinds of common-law liens, the retaining and charging. Of course, an attorney cannot be required to deliver possession of his client's papers or money which have come into his hands in the course of his employment until the client settles with him for his fees. But that matter is not involved here, this being an affirmative action on the part of the attorney to enforce what might be called his charging lien.

The retaining lien is said to be an attorney's right to retain possession of all papers and money of his client coming into his hands professionally until a general balance due him for services is paid. This is said to have been recognized from earliest times.

"It is of common-law origin, and the statutes providing for it and for its enforcement are merely declaratory of the common-law rule." 6 C. J. 766, § 363.

The special or charging lien is said to be an equitable right to have the fees and costs due the lawyer for his services secured to him out of the judgment therein—

"the attorney, to the extent of such services, being regarded as an equitable assignee of the judgment. It is based on the natural equity that the plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment." Page 766, § 364.

"A retaining lien is complete and effective without notice to any one. On the other hand, as a general rule, a charging lien is not perfected until notice thereof has been given to the obligor against whom it is asserted, unless such person has knowledge of the claim, or has notice of facts sufficient to put a prudent person upon inquiry." 6 C. J. 772, § 370.

See, also, 2 R. C. L. 1063, §§ 150-154, and 1069, § 159.

Whether the statute should be considered merely as providing a remedy to enforce a common-law right or as superseding such right seems to be settled in favor of the latter view. In their brief in *K. P. Ry. Co. v.*

Thacher, 17 Kan. 92, 97, 101, Thacher & Stephens said:

"At common law also, and independent of the statutes, we insist that the action should be maintained."

But the court said:

"It is unnecessary to inquire whether this would have been the rule independent of statute."

In *Holmes v. Waymire*, 73 Kan. 104, 105, 84 Pac. 558, 9 Ann. Cas. 624, it was said:

"This section is a substitute for, and may be said to be a substantial enactment of, the common law upon the subject of attorneys' liens."

The Indiana Supreme Court in *Alderman v. Nelson et al.*, 111 Ind. 255, 257, 258, 12 N. E. 394, 395, considering a similar enactment, said:

"The statute gives the lien, and, to secure it, the statutory provisions must be pursued with reasonable strictness and accuracy. * * *

"It is not necessary to inquire whether an attorney had a lien on his client's judgment at common law, for the statute covers the entire subject and creates the lien, and that is the only one that can be enforced. * * * The statute is now the source from which the lien is derived, and it can only exist as the statute creates it."

The Washington Supreme Court, in *Hump-tulps Driving Co. v. Cross*, 65 Wash. 636, 638, 118 Pac. 827, 828 (37 L. R. A. [N. S.] 226), said:

"The cases necessarily proceed upon the assumption that the right to an attorney's lien in this state rests upon the statute, and that there is no common-law or equitable right of lien."

The Alderman Case was quoted from with approval.

Thornton on Attorneys At Law states that charging liens are usually regulated by statutes. 2 Thornt. 970, § 572.

"In most jurisdictions the attorney's charging lien is provided for and regulated by legislation; and, of course, where this is true, the statutory provisions must govern." Page 979, § 582.

We held, therefore, that for a charging lien an attorney must look to the statute. In his brief, Mr. Case suggests that the payee had actual notice of the lien provided for by the notes themselves, and was also personally served with a summons which not only stated the claim for the attorney's fee, but gave the name and address of the attorney prosecuting the suit. In *Cobbey v. Dorland*, 50 Neb. 373, 375, 69 N. W. 951, there was an indorsement on the summons that if the defendant failed to appear and answer, the plaintiff would—

"take judgment for \$800, together with interest at 7 per cent. * * * and attorney fees and costs of suit."

The indorsement was signed by the clerk by his deputy. The court said this had none of the requisites of a notice of a claim of lien; it did not refer to the attorney, or his fees, and was not signed by himself or for him, and did not purport to emanate from him. In *Smith & Bayles v. C., R. I. & P. R. Co.*, 56 Iowa, 720, 721, 10 N. W. 244, notice of a claim for attorney's lien was indorsed by the plaintiff's attorney on the original notice served upon the defendant. The court said:

"The statute simply requires the notice to be given in writing. In this respect the notice given conformed to the statute. It was not a part of the original notice, but was written in a blank space between the parts of the original notice. If it had been written upon the margin, below the original notice, and properly signed, we think no question could be properly raised as to its sufficiency."

"The object of the notice is to protect the judgment debtor, and any notice which serves that purpose will be held sufficient. All that is required is that the notice shall contain a general statement of the amount claimed, and of the services for which rendered. The notice must be clear and explicit that a lien is claimed and that payment to the attorney will be required." 6 C. J. 774, § 875.

[2] The trouble with the indorsement on this summons is that it was not a notice that the attorney claimed a lien. At most it indicated a desire to have an attorney fee allowed, only this, and nothing more. Counsel cites *Greek v. McDaniel*, 68 Neb. 569, 91 N. W. 518; *Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85; *Whitecotton v. Railroad*, 250 Mo. 624, 157 S. W. 776; *Barthell v. Railway Co.*, 138 Iowa, 688, 116 N. W. 813; *Northrup v. Hayward*, 102 Minn. 307, 113 N. W. 701, 12 Ann. Cas. 341.

In the first case, it was held that the petition of intervention was of itself sufficient notice of the lien, so long as it did not appear that the judgment debtor had previously paid the judgment. In *Cones v. Brooks*, the statute was construed as not to require written notice. In the *Whitecotton Case* no notice in writing was served, but the court said the defendant did have the notice implied by the bringing of the suit and service of summons, under a certain section of the Missouri statute. In the *Barthell Case* a notice of the attorney's lien was embodied in the original notice of the action, but it claimed a lien for legal services rendered and to be rendered, the language being:

"You are further notified that the undersigned attorneys claim an attorney's lien of 50 per cent. upon the amount due or to become due for legal services rendered and to be rendered." 138 Iowa, 689, 116 N. W. 813.

In the *Northrup Case* it was held that the Iowa statute did not require a written notice. These authorities, therefore, do not support the contention that the notice was sufficient, and we have been unable to find

those which do. It must be held, therefore, that this notice required by the attorney's lien act was not given in this case, and the claim therefor cannot be sustained.

The judgment is affirmed.
All the Justices concurring.

NASH et al. v. STATE. (No. A-3819.)

(Criminal Court of Appeals of Oklahoma.
Aug. 4, 1921.)

(Syllabus by the Court.)

Criminal law §1069(1)—An appeal must be taken within six months; appeal may be taken by filing petition in error with case-made or a transcript of record with proof of service of notice to appeal.

In felony cases, the appeal must be taken within six months after the judgment is rendered. Section 5991, Rev. Laws 1910. In such cases an appeal is taken by filing in this court a petition in error with case-made attached, or a transcript of the record, together with proof of service of notices of appeal as required by statute, and when this is not done within the time prescribed by the statute, this court does not acquire jurisdiction of the appeal, and such an appeal will be dismissed.

Appeal from District Court, Washita County; Thos. A. Edwards, Judge.

Frank Nash, George W. Meyers, and Edward Wade were convicted of burglary, and they appeal. On motion of the Attorney General to dismiss appeal. Appeal dismissed, and cause remanded.

James W. Smith, of Cordell, for plaintiffs in error.

S. P. Freeling, Atty. Gen., and W. O. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiffs in error, Frank Nash, George W. Meyers, and Edward Wade, were jointly charged, tried, and convicted on an information charging that in Washita county, on or about the 18th day of October, 1919, they did commit the crime of burglary with explosives, in that they did feloniously enter the building of the Corn State Bank, of Corn, and by the use of and aid of dynamite, nitroglycerine, gunpowder, and other explosives open a certain bank vault therein, and their punishment was assessed at imprisonment in the penitentiary each for the term of 25 years. On December 16, 1919, the court rendered judgment in accordance with the verdict of the jury, from which judgment an appeal was attempted to be taken by filing in this court on July 19, 1920, a petition in error with case-made.

On April 30, 1921, the Attorney General filed a motion to dismiss the appeal—

"because the same was not filed in this court within 6 months after the rendition of the judgment, for which reason this court has no jurisdiction to entertain or hear said appeal."

Section 5991, Rev. Laws, provides:

"In felony cases the appeal must be taken within six months after the judgment is rendered."

In this case it appears from the record that the petition in error and case-made were not filed with the clerk of this court within 6 months after the judgment was rendered. The last day for filing the appeal was June 17th. The record shows that the appeal was not filed within 7 months from the date the judgment was rendered. It follows that the motion to dismiss the appeal should be sustained. It is therefore adjudged and ordered that the purported appeal be and the same is hereby dismissed, and the cause remanded to the trial court.

MATSON and BESSEY, JJ., concur.

MURRAY v. STATE. (No. A-3691.)

(Criminal Court of Appeals of Oklahoma.
Aug. 3, 1921.)

(Syllabus by the Court.)

1. Criminal law §301 — Where the record showed defendant not anxious for speedy trial held not error to refuse to permit withdrawal of plea of not guilty to interpose motion to dismiss for state's delay.

Where the record shows that the accused was not anxious for a speedy trial, and where the accused, without insisting upon his right to have the cause dismissed for want of prosecution, under the provisions of section 6005, Rev. Laws 1910, on his own motion subsequently has the cause continued from time to time, when the cause is finally set for trial it is not error for the trial court to refuse to permit him to withdraw his plea of not guilty in order to interpose a motion to dismiss the prosecution for the reason that the state had previously delayed trial.

2. Criminal law §576(5)—Defendant held to have waived right to speedy trial.

The constitutional and statutory right to a speedy trial in a criminal case is one that may be waived by the defendant, and under the circumstances in this case it was waived.

3. Criminal law §1151—Application for continuance is addressed to trial court's discretion, and will not be reversed in absence of abuse.

An application for a continuance is addressed to the sound discretion of the trial court.

and in the absence of any abuse of such discretion the same will not be reversed upon appeal. Applying this rule to the facts in this case, there was no error in overruling the defendant's motion for a continuance.

4. Criminal law. ⚡629—Misspelling of witness' name on list held not to have misled accused; accused held to have waived any rights from misspelling by failure to object at first trial.

It was not error for the court to refuse to exclude the testimony of Bluford Wills whose name appeared "Buford Wills" among the list of witnesses for the state served on the defendant before the trial, where it appears that the defendant was not prejudiced nor misled by the misspelling of the name.

5. Homicide ⚡255(3)—Evidence held to support verdict for manslaughter.

The evidence examined, and found amply sufficient to support the verdict.

Appeal from District Court, McIntosh County; Harve L. Melton, Judge.

Charlie Murray was convicted of the crime of manslaughter in the first degree, and sentenced to 12 years' imprisonment in the state penitentiary, and he appeals. Affirmed.

Green & Green, of Eufaula, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

BESSEY, J. Charlie Murray was, by information filed in the district court of McIntosh county, January 19, 1918, charged with the murder of Jess Rogers on the 19th day of April, 1917, upon which charge he was tried and convicted of manslaughter in the first degree, September 25, 1919, and his punishment fixed at imprisonment for 12 years in the state penitentiary. From this conviction, judgment, and sentence he appeals.

The circumstances leading up to this homicide occurred at the home of the defendant, Charlie Murray, in the country near Salem, in McIntosh county. Late in the afternoon of the day of the tragedy the defendant had returned from Henryetta. The weather was rainy and disagreeable, and the defendant, upon reaching home, had disrobed and gone to bed and to sleep. There was a dance at the defendant's house that night, and after the people had begun to gather and after the dancing had begun the defendant awoke, and called to his wife to bring him a pair of dry socks. The wife thereupon went to a table, and, removing the defendant's revolver from the table, hid it beneath some papers, and then procured the socks, as requested.

Bert Nelson, a brother of the defendant's wife, had been living with the defendant and his sister prior to this time, in their employ-

ment, and had been discharged or released from employment a short time previous. Soon after the defendant arose on this night, he and Nelson engaged in an altercation or fist fight, after which Nelson ran out of the house. Immediately following, the defendant and his wife had a scuffle, in which both fell to the floor. After this some of the witnesses noticed that the defendant's face had been scratched and was bleeding, and that the defendant's wife had a knot or bruised place on her forehead. The defendant then took down a loaded shotgun from the place where it was kept and held it in his hands, until presently Jess Rogers came in at the door and demanded of the defendant that he put up the gun. The defendant refused, whereupon the parties cursed and swore at each other. While this was going on Jess Rogers started approaching the defendant, and the defendant ordered him to stop. The testimony here is conflicting; a half dozen or more witnesses for the state testified that Jess Rogers did stop or hesitate before the shooting began. The defendant fired one of the barrels of his shotgun into the floor near Jess Rogers' feet, and Jess Rogers turned to retreat or get out, and a second shot was fired, the load entering his left hip and side, and he fell over upon a couch nearby. The defendant then extracted the shells, and placed two other loaded shells in the gun. From the effect of the shotgun wound in the hip and side the deceased died a week later.

The defendant claimed that the deceased was advancing upon him in a threatening manner, and had one hand back of him or in his hip pocket. It subsequently developed that the deceased was unarmed, and it also developed from the testimony of both the state and the defendant that there had been no previous difficulty between the two men.

There is evidence tending to show that the brother-in-law, Bert Nelson, brought some Choctaw beer to the premises that evening. At any rate there was Choctaw beer there, but whether any of the parties to the quarrels were intoxicated or under the influence of liquor does not clearly appear. There is testimony to the effect that after the shooting the deceased moaned and groaned on account of his physical suffering, and that he addressed the defendant and said, "Charlie, you killed me in cold blood," and that the defendant said to him, "Shut up, or I'll finish the job." The testimony shows that after the shooting, and before the arrival of the physician and others who took charge of the wounded man, a curtain was hung up at the connecting door or opening into the other room, and the keg of Choctaw beer was removed from the room to a field or lot near the barn.

At the time of this trial the defendant and his wife were living separate and apart, and

the wife did not testify. At the first trial the jury failed to agree, and at the second trial the defendant was convicted, as before stated.

The following assignments of error are urged in the brief:

First. The court erred in overruling the defendant's motion for permission to withdraw his plea of not guilty for the purpose of filing a motion to dismiss the cause for want of prosecution, and in refusing to dismiss the case for want of prosecution.

Second. The court erred in overruling the defendant's motion for a continuance.

Third. The court erred in permitting the witness Bluford Wills to testify as a witness against the defendant, for the reason that the name "Bluford Wills" did not appear on the list of witnesses served on the defendant.

Fourth. The court erred in overruling the defendant's demurrer to the evidence and his motion for a directed verdict of not guilty.

[1, 2] 1. The record discloses that a preliminary hearing was had before a justice of the peace on the 3d day of May, 1917, and that the information was not filed until the 9th day of January, 1918, and that the August, 1917, term of court convened and adjourned between those two dates. Section 6095, R. L. 1910, provides:

"When a person has been held for a public offense, if an indictment or information is not filed against him at the next term of court at which he is held to answer, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown."

The record shows that on February 4, 1918, the defendant filed his demurrer to the information, and when the same was overruled entered his plea of not guilty. The case was set for trial on February 8, 1918, and on that day, on application of counsel for defendant, the trial was continued until February 11, 1918. On that day the case came on for trial before the court and jury, and a mistrial resulted on account of the failure of the jury to agree. The case was then passed from time to time until February 5, 1919, when it was again set for trial and again continued, upon application of the defendant, over the term. On September 19, 1919, the defendant filed his motion to dismiss the action for want of prosecution, which was but a few days before the case was set for trial.

It appears from the record that the defendant and his counsel were not anxious for a speedy trial, and that he and his counsel had an understanding with the prosecuting attorney that the case should not be tried at the August, 1917, term of court; and that the reason that the same was not filed before this term of court was because the county attorney had inadvertently or for

some reason misplaced the information. Under this state of the record, it would seem that the court did not abuse his discretion in refusing the defendant to withdraw his plea and in refusing to dismiss the case for want of prosecution. The constitutional and statutory right to a speedy trial is one that may be waived, and the court holds that under the circumstances in this case the defendant did waive his right to have the cause dismissed for want of prosecution. *Ex parte Hudson*, 8 Okl. Cr. 403, 106 Pac. 540, 107 Pac. 735; *Dalton v. State*, 6 Okl. Cr. 89, 116 Pac. 954; *Stouse v. State*, 6 Okl. Cr. 424, 119 Pac. 271; *State v. Frisbee*, 8 Okl. Cr. 406, 127 Pac. 1091; *Head v. State*, 9 Okl. Cr. 356, 131 Pac. 937, 44 L. R. A. (N. S.) 871.

[3] 2. The grounds upon which the defendant bases his right to a continuance on account of the absence of his wife are that she was sick and about to be confined, and consequently unable to attend the trial at that time. The defendant and his wife were living apart, and had been for some time, and the last time the defendant had even seen his wife was in April, 1919, and the application for a continuance was made on September 23, 1919. A subpoena was issued for Mrs. Murray, then residing at Antlers, in Pushmataha county, Okl., on the 4th day of September, 1919, and the same was served on the 16th day of September. Under this state of facts it was evident that the defendant had known for a long time that his wife would not be physically able to attend the trial, and if the defendant desired her testimony it became his duty to have his wife's deposition taken. No proper diligence to procure the testimony of this witness was shown. She may, in fact, have been physically able to appear and testify at the trial. After service and nonattendance of this witness, no application for an attachment for this witness was made. Under all these circumstances it was not error for the court to overrule the application for a continuance on the grounds of the absence of Mrs. Murray.

Another reason alleged as grounds for a continuance in the motion for a continuance was the absence of Dave Guinn, who resided at Texanna, in McIntosh county. The record shows that the witness Dave Guinn did not testify at the first trial, and that a subpoena was not issued for him until the 4th day of September, 1919, and that the same was served on the 16th day of September, seven days before the trial. It is alleged that if he had been present he would have testified that he heard Jess Rogers tell Bert Nelson that he would "stay with him"; that this statement was made in the yard of the home of the defendant immediately before Bert Nelson entered the house and entered into the difficulty which led up to the shooting immediately after Nelson had been

ejected. This testimony does not appear to be competent or material. The defendant applied for no attachment to procure the attendance of Dave Guinn.

Evidence was heard upon the merits of the application for a continuance, and the trial court must have come to the conclusion that the application was without merit. Under the repeated rulings of this court, an application for a continuance is addressed to the sound discretion of the trial court, and, in the absence of any abuse of such discretion, the same will not be reversed upon appeal. There being no showing of an abuse of discretion in the case of either witness, the ruling of the trial court will not be disturbed. *Lee v. State*, 7 Okl. Cr. 141, 122 Pac. 1111; *Musgraves v. State*, 3 Okl. Cr. 421, 106 Pac. 544.

[4] 8. It is next contended that the court erred in permitting Bluford Wills to testify in this case, for the reason that his name was not included among the names of witnesses served upon the defendant, as required by statute. The record shows that within the proper time before the first trial a list of witnesses was served upon the defendant, which included the name "*Buford Wills*," and that Bluford Wills did in fact testify at that trial; at the second trial the same witnesses were sworn and testified. The witness testified that his true name was *Bluford Wills*; that prior to that time there was a person in being named *Buford Wills*, who had died in 1913. It was plain that the spelling of the name, as it appeared in the list of witnesses, was merely a typographical error, and under the circumstances the de-

fendant and his counsel must have known or had notice of the identity of the person. Furthermore, the defendant went to trial without first making objection to the testimony of Bluford Wills on the ground that his name was not among the witnesses served on the defendant, and the failure of the defendant to interpose an objection at the first trial constituted a waiver of whatever right, if any, he had on account of the misspelling of the name. The court committed no error in permitting this witness to testify.

[5] The last assignment of error is that the court erred in overruling the motion of the defendant to direct a verdict, upon the grounds that the evidence did not show that the death of the deceased was the result of the shots fired by the plaintiff in error. The testimony is that the deceased, after he was shot and wounded, gradually grew worse from day to day, and died on the seventh day after receiving the wound. There is nothing in the record to show, or that would tend to show, that his death could have been due to any other cause. On the contrary, the evidence shows that his death was the result of the wounds inflicted by the defendant. It was for the jury to say, under all the evidence, whether or not they were convinced beyond a reasonable doubt that the deceased came to his death by reason of the wounds inflicted by the defendant.

For the reasons stated in this opinion, the judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

(116 Wash. 199)

BEYER v. ZINDORF et al. (No. 16519.)

(Supreme Court of Washington. June 22, 1921.)

Highways —(13(4)—Amount retained by state from amount due contractor held not a trust fund for benefit of contractor's creditors.

Contract for construction of state highway under Rem. Code 1915, §§ 5867-5878, providing that the contractor should receive monthly payments not in excess of 80 per cent. of the work done, that the state highway commissioner should retain 20 per cent. until 30 days after final completion and acceptance of the entire work, and might retain in addition to such 20 per cent. enough to cover claims that might be filed until such time as the contractor should show receipts for all payments, does not require the state to keep the retained percentage as a trust fund for the benefit of contractor's creditors who performed labor and furnished material in the performance of the contract, but entitled the state, in taking over the contract and completing the work, to use the money so retained for such purpose.

Department 1.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by W. L. Beyer against M. P. Zindorf, the State of Washington, James Allen, State Highway Commissioner of the State of Washington, and the State Board of Highway Commissioners of the State of Washington. From that portion of the judgment dismissing the action against the state and its officers, the plaintiff appeals. Affirmed.

Fred M. Bond, of South Bend, for appellant.

L. L. Thompson and O. R. Schumann, both of Olympia, for respondents.

MACKINTOSH, J. Plaintiff desires to recover for labor and material performed and furnished on a state highway under a contract entered into August 5, 1916, between the state highway board and the defendant, M. P. Zindorf. The contract contemplated the grading of part of the National Park Highway, located in Pacific county. Under the contract the price to be paid for the work amounted to \$25,550.21. The work was to be completed by August 20, 1917. On account of the failure of Zindorf to complete his work according to his contract, the state highway department took charge of the job on August 31, 1917, and completed it 15 months thereafter, at a cost of \$18,834.57. Zindorf had been paid under the contract the sum of \$12,285.22, and he had also earned, but not been paid, a retained percentage of 20 per cent., amounting to \$3,397.01, and upon his last monthly statement an estimated amount of \$1,302.82. In other words, there was retained the sum of \$4,699.83 at the time the state highway department took over the

contract. The state highway department used up in completing the contract all this and several thousand dollars in addition.

The plaintiff performed labor and furnished materials to the job while it was being carried on by Zindorf, and, not being paid therefor, he filed his claim with the state highway department, claiming an interest in the retained percentage as a trust fund. His claim, together with other claims assigned to him, amounts to \$3,581.11.

Plaintiff is seeking judgment against the state upon the theory that the retained percentage was a trust fund, which had been used by the state, which was therefore rendered liable. Plaintiff secured judgment below against Zindorf, but his action was dismissed as against the state and its officers, and from this latter portion of the judgment he has appealed.

As much of the contract as it is necessary for us to set forth is as follows:

"IV. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the state highway commissioner shall be at liberty, after three (3) days' written notice to the contractor, to provide any such labor or materials and deduct the cost thereof from any moneys then due or thereafter to become due to the contractor under this contract; and if the state highway commissioner shall consider that such refusal, neglect or failure is sufficient ground for such action, he may, by written notice, terminate the employment of the contractor for said work and enter upon the premises and take possession of all materials, tools, and appliances thereon, for the purpose of completing the work included under this contract, and employ, by contract or otherwise, any person or persons to finish the work, and provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further balance of the amount to be paid under this contract until the work shall be fully finished, at which time, if the unpaid balance of the amount to be paid under this contract, shall exceed the expense incurred by the state highway commissioner in finishing the work, such excess shall be paid by the state to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the state treasurer. * * *

"VII. Partial payments under this contract, not to exceed eighty per cent. (80%) of the work done, shall be made at the request of the contractor once each month, said payments to be made upon estimates of the state highway commissioner. In case of lump sum price, a schedule of prices to be used as basis of partial payments, shall be based upon the prices in the preliminary estimate, which prices shall be increased or reduced in the same ratio that the lump sum price bears to the preliminary estimate. Final payments for said work shall be made

within thirty (30) days of the final completion and acceptance of the entire work by the state highway commissioner: Provided, that the state highway commissioner may require the contractor to show to the satisfaction of said commissioner before the making of such final payment, that all just debts due all laborers, mechanics, materialmen, and persons who have supplied such contractor, or subcontractor, with materials or goods of any kind for this work, have been paid, and, provided, further, that if prior to any payment being made the state highway commissioner receives notice from any person or persons that any laborers, mechanics or materialmen, or other persons who have furnished or supplied said contractor, or any subcontractor, with any labor, service, material, goods or provisions of any kind, in connection with the construction of said portion of the National Park Highway that may be ordered for said portion of the National Park Highway have claims against said contractor, or any subcontractor, for any such service or things, and for which any such laborers, mechanics, materialmen, or other persons, would be entitled to a lien under the laws of this state were said highway not a public highway, or proper claim against the bond in such cases required by law, the state highway commissioner may, in his discretion, retain out of the payments then due or to become due said contractor, an amount, in addition to the twenty per cent. (20%) above provided to be retained until the final completion of said work, sufficient to cover all such claim or claims of which notice shall have been so given, until such claim or claims shall have been fully satisfied and paid and receipts in full for the same shall have been furnished by said contractor or to the state highway commissioner, and the said contractor hereby expressly agrees to pay all such claims."

We have already stated the theory upon which the appellant seeks recovery, and it thus becomes necessary to examine the contract to determine whether by its terms it creates such a trust fund as claimed.

This court has held that, where the contract reserves a balance for the protection of materialmen and laborers, such reserve balance is a trust fund, and the municipality making the contract is under obligation to hold it as such for their benefit. But this rule, as we take it, has been applied only in those cases where the contract unmistakably provides for such a fund.

The case of *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26, had to do with a contract which provided that no payment was to be made to the contractor until the work was completed and "all labor paid thereon." The assignee of the contractor brought suit against the city to compel the delivery of bonds to the contractor under the contract. Certain unpaid laborers and materialmen intervened, and the court held that the contract was valid, and that by its terms a trust fund was created in favor of such unpaid laborers and materialmen.

The court, in *First National Bank v. Seattle*, 71 Wash 122, 127 Pac. 837, followed the

Liebes Case, supra, and held that a contract which expressly provided for the retention by the city of 30 per cent. of the contract price to secure the payment of laborers and materialmen created a trust in their behalf: the contract in that case, expressly binding the city to withhold the designated percentage.

In *Maryland Casualty Co. v. Washington National Bank*, 92 Wash. 497, 159 Pac. 689, the court had before it a contract providing that the contractor might receive current payments of 80 per cent., but that 20 per cent. should not be paid until after the work had been accepted and the municipality satisfied that the laborers and materialmen had been paid. The court held that such a contract was for the protection of the laborers and materialmen, following the *Liebes* and *First National Bank Cases*, supra.

The contract in the case of *Denham v. Pioneer Sand & Gravel Co.*, 104 Wash. 357, 176 Pac. 333, provided "for the withholding by the county of 20 per cent. of the contract price for the satisfaction of unpaid labor and material claims." We there reannounced the doctrine that the reserved percentage was a trust fund for the benefit of laborers and materialmen.

In all of these cases the contracts expressly or necessarily impliedly bound the municipalities to hold out a certain percentage for the benefit of laborers and materialmen.

In *Northwestern National Bank of Bellingham v. Guardian, C. & G. Co.*, 93 Wash. 635, 161 Pac. 473, Ann. Cas. 1918D, 644, the contract provided that—

"The said contractor agrees to pay the wages of all persons * * * and for all materials purchased therefor, and the said city of Bellingham may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for."

The court said in regard to that contract:

"It did not contain the usual provision for the payment of certain percentage of the estimated value of the work as it progressed, and for a retention of a certain percentage by the city until the work was completed to meet any unpaid labor and material claims, nor did it contain any provision for the holding up of any sum by the city, except that above quoted."

The decision of the court was that in those contracts which provided for the retention of a certain balance for the benefit of laborers and materialmen, such retained percentage was a trust fund, but:

"It is only where there is a clear and express reservation in the contract of a fund to be held up for the benefit of laborers and materialmen that there is any fund the contractor may not effectually assign by an assignment made prior to his default and notice of such default to the board, or, as in this case, to the city, and that it is only as to such reserve fund that the labor and material claims have any priority over such assignments; hence only as to such reserve fund that there is any right of subro-

gation in favor of the bondsmen. * * * In the case before us * * * the contract itself contained no provision for an absolute reserve of any percentage as security for labor and material claims. It contained nothing but a provision permitting the city to withhold payment until satisfied that all labor and material claims had been paid."

Both appellant and respondents agree that the contract alone covers this case, and it is not to be considered in regard to any statute, for the reason that Rem. Code, 5867-5878, under which the state highway board was contracting for the construction of this road, contains no provision in regard to the retention of any trust fund.

An examination of the contract shows that there is no express provision for the creation of a trust fund, nor is there any provision which has that necessarily implied result. Under paragraph 7 the contractor, as a matter of right, received each month payments not in excess of 80 per cent. of the work done, the unpaid balance to be paid 30 days after final completion and acceptance of the entire work. It is provided that before final payment all debts shall have been paid, and that the state highway commissioner may retain, in addition to the 20 per cent., enough to cover claims that may be filed until such time as the contractor should show receipts for all such payments. Although the contract provides that the contractor shall receive only 80 per cent. per month and the balance 30 days after the completion of the work, with a provision allowing the state to require the contractor to show that he had paid all his bills, the measure of the appellant's right is whether this 20 per cent. has been placed beyond the control of the contractor, and it seems to us, upon an examination of the contract, that it was no more placed beyond his control than was the reserve in the Northwestern National Bank Case, *supra*. In that case the contract provided that the municipality might withhold "any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for." If that was not an absolute reserve, the provision in this case that the state highway commissioner "may require the contractor to show to the satisfaction of said commissioner before making such final payments that all just debts * * * have been paid" does not create an absolute reserve. Although the contract provides the state highway commissioner "may" withhold 20 per cent. of the contract price, and, as a matter of fact, he did so withhold such amount, the fact that the withholding may have been optional only made it impossible for the contractor to collect the entire price before final acceptance, and required him to satisfy the commissioner that he had paid all the debts, if the commis-

sioner so chose, yet the contractor was entitled to the 20 per cent. within 30 days after final completion, if the commissioner did not require him to show that he had paid all claims, the contract being that the commissioner "may" so require such payment to be shown.

In *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709, where the contract provided that the "city of Seattle may withhold any and all payments under this contract until satisfied that such wages, assistance, and materials have been fully paid for," it was held:

"It is true that the city, by virtue of a provision of the agreement which he have hereinbefore noted, might have withheld all payments from the contractor until it was satisfied that all just claims for labor and materials had been fully paid; but it does not follow from that fact, as contended by the learned counsel for appellants, that it was obliged to do so, and that, having done otherwise, it should now be held to be a trustee of the laborers and materialmen, and, as such, liable to them directly for the amount of the fund assigned and of the bond delivered to the contractor."

In the *Northwestern National Bank Case*, *supra*, this court, in referring to the *Dowling Case*, *supra*, held it to be still good law, and that the provision just quoted meant nothing but permission granted to the city to withhold payments.

Taking the contract as a whole, and giving it the interpretation which would best effect the intention of the parties (*Dyer v. Middle Kittitas Irrigation District*, 25 Wash. 80, 64 Pac. 1009, and *Norton v. State*, 104 Wash. 248, 176 Pac. 347), it will be seen that the contract contemplated the use by the state highway commissioner of all amounts earned by the contractor and not yet paid to him in carrying out the contract, in the event the state highway commissioner was forced to complete the work. This was what was done in this case. To say that this was unauthorized would be to read out of the contract that section which provides for this very contingency. Section 7 was inserted for the purpose of aiding the commissioner in securing the performance of the contract, but does not take the title of the 20 per cent. from the contractor. *Columbia Brick Co. v. District of Columbia*, 1 App. D. C. 351; *Jones v. Savage*, 24 Misc. Rep. 158, 53 N. Y. Supp. 308; *Epeneter v. Montgomery County*, 98 Iowa, 159, 67 N. W. 93. See, also, *State ex rel. Fairhaven Land Co. v. Cheetham*, 17 Wash. 131, 49 Pac. 227.

We find no merit in the other contentions made by the appellant, and the judgment is therefore affirmed.

PARKER, C. J., and BRIDGES, FULLERTON, and HOLCOMB, JJ., concur.

(116 Wash. 97)

STATE v. WASHBURN. (No. 16377.)

(Supreme Court of Washington. June 10, 1921.)

1. Witnesses \S 388(1)—Refusal to permit foundation to be laid for impeachment of witness by examination as to statements inconsistent with stricken testimony proper.

Refusal to permit defendant's counsel on cross-examination of a state's witness to lay the foundation for impeachment of the witness by asking him if he had not made statements to named person contrary to facts to which he had testified *held* proper, where his testimony as to such facts had been stricken.

2. Criminal law \S 448(11)—Nonexpert's testimony as to what she saw during physician's examination of girl *held* proper.

In a prosecution for carnally knowing a young girl, testimony of nonexpert witness as to what she saw during the examination of the girl by a physician *held* proper.

3. Criminal law \S 553—State's witnesses are not required to agree entirely.

The state is not bound to produce witnesses who agree entirely in their statements concerning a transaction.

4. Criminal law \S 742(1)—Credibility for the jury.

The credibility of witnesses is for the jury.

5. Criminal law \S 1144(7)—Court presumed to have correctly exercised its discretion in refusing continuance.

Refusal of continuance for absence of witness *held* not error in absence of a showing as to the materiality of the testimony of the absent witness and the circumstances excusing his nonattendance, since it will be presumed in such case that the court correctly exercised its discretion.

6. Criminal law \S 1163(3)—Error not presumed.

Appellant cannot be presumed to have been prejudiced by the admission of improper rebuttal testimony.

Department 1.

Appeal from Superior Court, Lewis County; G. D. Abel, Judge.

J. G. Washburn was convicted of carnal knowledge of a female child over the age of 10 years and under the age of 15 years, and he appeals. Affirmed.

Gus L. Thacker, of Chehalis, for appellant.

Herman Allen, of Chehalis, J. H. Jahnke, of Centralia, and John I. O'Phelan, of Raymond, for the State.

HOLCOMB, J. The appellant appeals from a verdict and judgment convicting him on an information charging him with having willfully, unlawfully, and feloniously carnally known and abused Bula Morgus, a female child over the age of 10 years and under the

age of 15 years, and not the wife of appellant, in Lewis county, Wash., on December 2, 1918.

The evidence in the case shows that on December 2, 1918, Bula Morgus was almost 12 years of age. Her parents reside in South Bend, Wash. For about 2 weeks prior to December 2, 1918, she had been on a visit to her uncle in St. Helens, Ore. Leaving St. Helens to return home she was accompanied by the wife of her uncle to Kalama, Wash., she continuing the journey from Kalama, Wash., by herself, to Chehalis, Lewis county, where it was necessary for her to make a change of trains to proceed to South Bend. While at the depot in Chehalis, she became acquainted with appellant. He took her to a restaurant and gave her her dinner, and when she had finished and returned to the depot the train had departed for South Bend, so that she could not go on that night. Appellant then suggested that they go to Centralia and secure rooms there, to which the girl consented, and they went by street car to Centralia. Appellant took the girl to the Landers Hotel, and, registering for both as "Mr. and Mrs. Brown," they were assigned a room. The girl was not in the presence of the landlady of the hotel when appellant registered. Appellant and the girl went to a show, and returned afterwards to the hotel and went up to the room. The landlady of the hotel shortly afterwards went to the room and asked appellant if the girl was his wife. He stated that she was. The landlady asked him why the girl wore her hair down in braids, and wore such short dresses. Appellant explained that that was because they were traveling on the road so much. He stated to the landlady that the girl was 17 years of age and that they had been married for about a year and a half. The landlady then left them and did not molest them further. Appellant and the girl occupied the room that night, both occupying the same bed, and the offense, according to the girl's testimony, was committed that night.

The first assignment of error by appellant is that the court erred in refusing him the right to lay the foundation for impeaching witness John Morgus, the father of the prosecuting witness.

Morgus testified as a witness for the state, and, among other things, testified as to the visit of the girl to St. Helens, her return journey, stopping at Chehalis, and going on to Centralia with appellant. All of this testimony was over the objection of counsel for appellant, and on motion was stricken by the court and the jury instructed to disregard it. Counsel for appellant then questioned Morgus as to his acquaintance with a Mrs. Leber of South Bend, and upon objection being sustained thereto, upon the ground that it was not proper cross-examination, appellant offered to lay the foundation by the witness that

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he had made statements to Mrs. Leber to the effect that he did not know anything about the journey of the girl to Chehalis and Centralia from St. Helens, and that the girl did not always tell the truth in any event.

[1] The testimony of Morgus having been stricken respecting the journey of the girl from St. Helens to Chehalis and Centralia, the offer of proof made by counsel for appellant was certainly improper. The proposed questioning of the witness Morgus was not within the scope of his direct examination, was not proper cross-examination, and was certainly not a proper method of attempting to impeach the prosecuting witness.

The next error claimed is that the court allowed the witness Amanda Williams to testify as an expert, and give impeaching testimony of Dr. Kennicott, who was another of the state's witnesses.

[2-4] No testimony was asked of Mrs. Williams as an expert. She was merely asked to state what she saw at the examination of the girl by Dr. Kennicott. This was perfectly proper and competent. The whole of her testimony was confined to what she observed during the examination. Her testimony disagreed somewhat with that of Dr. Kennicott, but the state is not bound to produce witnesses who agree entirely in their statements concerning a transaction. The question of credibility of witnesses is for the jury to weigh and determine.

The next error assigned is that the court refused to grant a continuance to enable appellant to secure the testimony of one S. M. Ragan.

[5] Ragan was a person mentioned by appellant as having occupied a room in another hotel in Centralia than the one shown by the state in company with appellant on the night of December 2-3, 1918. He had been subpoenaed as a witness at the previous trial of the same case in September 1919, and appeared two days late for the trial. Upon this trial counsel for appellant made an attempt to show why Ragan was late at the previous trial, and also some kind of a written showing to the court to explain the necessity of the attendance of Ragan as a witness, the materiality of his testimony, and why counsel believed he was not present when the case was tried in March, 1920. Whatever showing appellant made to the trial court as to the materiality of the testimony of Ragan and the circumstances excusing his nonattendance in March, 1920, is not before us, not having been brought up in the record. We are therefore obliged to presume that the trial court correctly exercised its discretion upon whatever the showing was in refusing a continuance.

[6] The next error assigned is that the court allowed Mrs. Landers, a witness for the state, to restate the whole case in rebuttal.

There is no merit whatever in this contention. Mrs. Landers was the landlady of the hotel at which it was shown appellant and the girl stayed all night. She was asked and answered four questions to rebut evidence given by appellant. Her testimony in rebuttal was proper rebuttal testimony of the testimony of appellant, which had not been covered by her testimony in the case in chief. In any event, it cannot be presumed that appellant was prejudiced thereby.

The judgment is affirmed.

PARKER, C. J., and BRIDGES, MACKINTOSH, and FULLERTON, JJ., concur.

(116 Wash. 136)

PETTIJOHN v. RAY. (No. 16159.)

(Supreme Court of Washington. June 17, 1921.

1. Contribution \S 6—No right to contribution arises by paying discharged debt of codebtor.

Where a threshing outfit was jointly purchased by plaintiff and defendant, two neighboring farmers, and after a fire injuring the outfit while it was in plaintiff's custody he agreed that the seller could look for payment to him as the sole debtor, which agreement was acquiesced in by the seller, and the defendant was released by the seller, *held* that plaintiff, by paying the balance due on the outfit to the seller, acquired no rights, and his payment cast no duty on defendant to contribute.

2. Trial \S 330(1)—Verdict not insufficient because not showing items of set-off allowed.

That the Supreme Court cannot determine from the verdict which items the jury found in favor of plaintiff and which in favor of defendant on his set-off is not ground for the court's interference with the verdict.

3. Appeal and error \S 699(4), 757(4), 1078 (4)—Refusal of instruction not considered, in absence of the instruction and arguments as to why court erred.

Where neither requested instruction or its substance is set forth in the brief or preserved in the record, and where no argument is offered in the brief why the court erred in refusing the instruction the refusal of the instruction cannot be considered on appeal.

Department 2.

Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by W. T. Pettijohn against A. L. Ray. From a judgment giving him insufficient relief plaintiff appeals. Affirmed.

John C. Hurspool, of Walla Walla, for appellant.

E. L. Casey, of Walla Walla, for respondent.

TOLMAN, J. Appellant as plaintiff below brought this action to recover on five causes of action, praying for judgment in the aggregate of \$2,078.48. The action was tried to a jury, which returned a general verdict in plaintiff's favor in the sum of \$721.66, upon which a judgment was entered. Plaintiff has appealed from the judgment, contending that under the evidence in the case he should have recovered a much larger amount.

The parties were neighboring farmers, and had transactions back and forth running over a number of years. The evidence was vague and unsatisfactory in many respects, conflicting on all vital points of any importance, and no useful purpose will be served by setting forth the issues or the testimony except as may be necessary to understand what we consider to be the only debatable point of law raised by the appeal.

It appears that before the harvest in the year 1915, appellant and respondent jointly purchased a harvesting outfit from one Rogers, for the sum of \$1,200, on credit; but whether the obligation was oral or reduced to writing and signed by one or both does not appear. There was evidence from which the jury might have found that in the year 1915 respondent's lands were summer-fallowed; that he had no crop to harvest that year, and that it was agreed between them that appellant should use the harvesting machinery so purchased and owned jointly, during that year, becoming an insurer thereof while so using it, and would return it to respondent before the harvest in 1916 in good order and operating condition, for respondent's use in that year. All agree that while appellant was in the sole possession of, and threshing with the outfit in 1915, it was destroyed, or very seriously damaged, by fire, and that he did not return it in good condition to respondent before the 1916 harvest. It is also admitted that shortly before the harvest of 1916 respondent purchased for \$425 what remained of the machinery, though respondent contends and testified that he, relying on the previous agreement to return in good order, which was then impossible of fulfillment, purchased the full title from appellant for the sum mentioned; while appellant contends, and testified, that there was no such agreement to return in good order; that the fire loss was a joint loss, and that respondent purchased only the outstanding half interest in the machinery; his liability to pay Rogers one-half of the original purchase price still remaining unaffected by the subsequent transaction between them. That this would be true as against Rogers if nothing else appeared may be conceded, but there was testimony from which the jury might have found that Rogers was advised of what respondent claims was the agreement between the parties, acquiesced therein, never made any demand upon respondent for any portion

of the purchase price, settled other matters with respondent in the year 1918, and then gave him a written receipt in full of all accounts against him, understanding that this account no longer existed, and thereafter looked only to appellant for his money. At any rate, appellant paid Rogers various sums on account from time to time, and just before bringing this action paid to Rogers, by giving his note, the remainder due on the original purchase of \$750, which he now contends represented the \$600 originally to have been paid by respondent, and interest accrued thereon, which amount he here seeks to recover as one of his causes of action.

[1] The respondent's defense is based upon the theory that by agreement each should be an insurer while in possession of, and using, the joint property. Appellant by his reply pleaded the statute of limitations and contends that, the fire having occurred in 1915, respondent's right to recover his loss was barred by the three-year statute of limitations before he (appellant) paid Rogers in full and became entitled to contribution from respondent. Whether respondent's set-off was no part of the mutual accounts between the parties, but was for damages arising out of the breach of an independent contract such as would not be kept alive by the existence of the mutual accounts, as appellant contends, or whether seeking no affirmative relief respondent's defensive rights would still remain unaffected by the statute, need not be here determined, because, if Rogers acquiesced in the asserted agreement of the parties that after the fire appellant became and was his sole debtor, and thereafter looking only to him for payment he released respondent, then clearly appellant acquired no rights by paying Rogers, and that payment cast no duty on respondent to contribute. Hence we cannot interfere with the verdict upon this ground.

[2] We find that there was evidence sufficient to go to the jury upon all of the other issues. Merely because we cannot determine from the verdict which items the jury found in favor of one party, and which in favor of the other, is not ground for our interference.

[3] Error is assigned upon the refusal of the trial court to give appellant's requested instruction No. 1. Neither this requested instruction nor its substance is set forth in the brief. No argument is offered thereon, nor reason given why it is thought the court erred in refusing it, and if the requested instruction is preserved in the record we have, in a somewhat intensive study of the case, not happened to find it. Under these conditions we cannot consider it.

Finding no error, the judgment appealed from is affirmed.

PARKER, C. J., and MAIN and MITCHELL, JJ., concur.

(82 Okl. 244)

SAND SPRINGS PARK v. SCHRADER et al.
(No. 10057.)(Supreme Court of Oklahoma. May 31, 1921.
Rehearing Denied July 19, 1921.)*(Syllabus by the Court.)*

1. Theaters and shows \Leftrightarrow 6—Operators of scenic railways must exercise the highest degree of care reasonably possible.

Operators of scenic railways or rolly-coasters, such as are conducted in amusement parks, and take passengers thereon for hire, and being sources of peril by reason of their steep inclines, sharp curves, and great speed, owe to those who patronize them the duty to exercise the highest degree of care, skill, and diligence that it is reasonably possible to afford, keeping in mind the practical operation of the railway.

2. Negligence \Leftrightarrow 121(2)—“*Res ipsa loquitur*” defined.

The phrase “*res ipsa loquitur*” is “merely a short way of saying that the circumstances attendant upon an accident are themselves of such character as to justify a jury in inferring negligence as to the cause of the accident.” *Cohen v. Farmers’ Loan & Trust Co.*, 70 Misc. Rep. 561, 127 N. Y. Supp. 564, 565 (citing Words and Phrases, *Res Ipsa Loquitur*.)

3. Theaters and shows \Leftrightarrow 6—Instruction on *res ipsa loquitur* in action based on collision on scenic railway held proper; operator of scenic railway may rebut presumption of negligence from happening of accident by showing inspection or actual cause of accident.

When two cars on a scenic railway collide by the one in the lead ceasing to go forward, but receding and colliding with the one following it, and in a suit for personal injuries by one injured by such collision the court applies the doctrine of *res ipsa loquitur* to such facts and instructs the jury that the proof of the collision raises a presumption of negligence on the part of the owners and operators of said railway, and thereby makes out a *prima facie* case of negligence on the part of said owners and operators, but which presumption the said owners and operators may rebut by proofs sufficient to show they were not guilty of negligence, *held*, such instruction is a proper application of the law and was not erroneous. *Held* further that the owners and operators may rebut this presumption of negligence by either showing the actual cause of the accident, so the jury can determine whether or not such cause could be discovered by proper inspection, or they may show that the inspection made was so careful that no defect discoverable by inspection could be overlooked. *Cohen v. Farmers’ Loan & Trust Co.*, 70 Misc. Rep. 548, 127 N. Y. Supp. 564, 565.

4. Appeal and error \Leftrightarrow 1140(1)—Damages \Leftrightarrow 132(6)—Where issues properly submitted and verdict does not show passion nor prejudice, Supreme Court will not order remittitur; \$12,958 held not excessive for permanent injury to foot.

When the proofs of damages are submitted to a jury under proper instructions in a suit

(198 P.)

for personal injuries, and the verdict not being so excessive as to raise the presumption that the jury was actuated in rendering such verdict by passion or prejudice, and there being no specific proofs otherwise showing that the jury was so actuated, and the trial judge fails to act and enters judgment on the verdict, *held*, this court will not interfere with the verdict of the jury by ordering a remittitur.

5. Appeal and error \Leftrightarrow 1001(1)—Verdict not disturbed where supported by evidence.

In a civil action triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal.

Appeal from District Court, Tulsa County; N. E. McNeill, Judge.

Action by Nellie R. Shrader against the Sand Springs Park and others. Judgment for plaintiff, and defendant Sand Springs Park appeals. Affirmed.

Stuart, Cruce & Riddle, Poe & Lundy, and H. O. Bland, all of Tulsa, J. F. Sharp, of Oklahoma City, and Paul P. Pinkerton, of Sand Springs, for plaintiff in error.

Bush, Moss & Owen, and H. B. Martin, all of Tulsa, for defendants in error.

ELTING, J. This action was filed in the district court in and for Tulsa county, state of Oklahoma, June 25, 1917, by the plaintiff, Nellie R. Shrader, against Chas. Page, Sand Springs Park, a corporation, and E. M. Monse, defendants, was tried by a jury, and a verdict returned in favor of the plaintiff in the sum of \$12,958 on January 11, 1918. The appeal was filed in this court July 26, 1918.

This is an action by the plaintiff against the defendants in which the plaintiff prayed for a judgment in the sum of \$20,200 for personal injury alleged to have been received by her while a passenger on a scenic railway or rolly-coaster operated by one or all of the defendants, said scenic railway being located in the park under the control and management of one or all of the defendants near Tulsa, Okl. Defendant in error herein alleged, in substance: That at the time of the injury the defendants were operating and conducting a public amusement park, commonly known as Sand Springs Park. They were operating many devices for the amusement and entertainment of those who attended the park, which was widely advertised, and among those were the rolly-coaster or scenic railway, which was operated for hire, charging an admission fee. On this scenic railway were operated something like nine cars, each car would carry four passengers. The cars ran upon a track, the track being crook-

ed, with sudden curves, dips, and inclines, some more steep than others and the cars were propelled to the highest point about 40 feet from the ground by power and were released, after the passengers were boarded, from such highest point and started and were propelled by the force of gravitation, carrying the passengers over the curves and inclines, affording thrills, etc. The said scenic railway at the time of said injury was in the control and charge of the servants, agents, and employees of the defendants, and, by reason of the carelessness, neglect, and failure to use that degree of care commensurate with the hazards and dangers of the said scenic railway which the law required in the operation of the same, the plaintiff was injured in her left foot and left lower limb. That the car that had preceded the car upon which the plaintiff below, defendant in error herein, was riding, instead of making its trip over the railway, hitting one of the elevations, began to recede, and running backwards, collided with the car in which the defendant in error was riding. Said cars being propelled by their own momentum, and not being under the control or direction of the defendants or their agents, or servants after being released, or being capable of being so controlled, or of the defendant in error, the collision took place, and the injury resulted to the defendant in error.

The defendants answered separately and also filed a joint answer, denying particularly the allegations of negligence and setting up the fact that they had exercised all the care that the law required of them, that the said railway had been constructed by men skilled in such work, and that the same had been constructed according to approved standards of construction, had been kept in good repair, and had been operated by experienced operators and under careful and continuous inspection.

Proofs were introduced to the jury by the plaintiff below, defendant in error herein, proving the collision between the cars, proving the injury to the defendant in error, and the nature and extent of same.

The defendants made proofs showing that one of the defendants, Chas. Page, was not the owner of said scenic railway, but that the same had been leased to one of the defendants, E. M. Monsell; there being some conflict of evidence as to whether the corporation or Monsell were the real owners and proprietors in control of said scenic railway.

The trial court held that the proofs showed no legal liability as to Chas. Page and dismissed the suit as to him, and submitted to the jury the question of liability as to the other two defendants, the said Sand Springs Corporation and E. M. Monsell, and with directions that they could hold either one or both if the evidence so warranted.

The defendants introduced further evidence for the purpose of showing the pre-

cautions, care, and diligence in the construction, operation, repair, and inspection in the operation of said scenic railway, for the purpose of showing their compliance with all the legal requirements and in satisfaction of their duties toward the patrons of said railway.

There were also allegations and contentions that the defendant in error leaped from the car and thereby contributed to her injury. There was also the contention that the injury, in the beginning, was slight, and that the defendant in error failed to give the injury proper treatment, and, if said injury had become permanent, it was because of the actions of the defendant in error; also contentions that the defendant in error had received compensation and satisfaction for the injury received, but all of said contentions were overruled by the court, and the question of negligence and measure of damage was submitted by the court to the jury, and a verdict was returned in the sum stated, \$12,958, against the Sand Springs Corporation; Chas. Page being released by the order of the court, and E. M. Monsell being released by the verdict of the jury.

The defendants below, plaintiffs in error herein, at the close of the evidence of the plaintiff below, demurred to the evidence, and the trial court overruled the same. The same parties, at the close of the evidence, moved for an instructed verdict, and the court overruled the same. After the verdict of the jury, the same parties also moved for judgment non obstante veredicto, and that motion was also overruled by the trial court. In all of said rulings we do not think the court committed any error.

At the close of the trial the defendant below requested the court to give 15 instructions which were refused by the court, and such refusal was excepted to by defendants below, and the court gave to the jury 21 instructions, including a statement of the cause in his instruction No. 1, and to the giving of 18 of said instructions the defendants below excepted.

The plaintiff in error in their brief made several assignments of error, objecting to several of the instructions given by the court to the jury, their objections being particularly directed to instructions Nos. 11, 12, and 16 given by the court; they contending that the court committed reversible error in giving those three instructions. The contention being further that the court committed reversible error in failing to give the requested instructions asked for by the plaintiff in error, and particularly his refusal to give requested instruction No. 11.

[3] We will consider first the giving of instruction No. 12 by the court, which instruction No. 12 was as follows:

"No. 12. You are further instructed that the collision of two cars upon the railroad track of a scenic railway operated by the operators

creates a presumption of negligence on the part of the owner and operators and makes out a prima facie case of negligence on behalf of the owners and operators of said scenic railway."

In this instruction the court sets forth and applies to the facts of the case the doctrine of *res ipsa loquitur*. The explanation of the doctrine of *res ipsa loquitur* is fully set out on pages 6136-6139 of 7 Words and Phrases, First Series: We quote the following from page 6139:

"The most apt and concise statement of the principle of *res ipsa loquitur* is found in the leading case of *Scott v. London & St. Katherine Docks Co.*, 3 Hurl. & O. 596, where the plaintiff sued for personal injuries, and the court held there must be reasonable evidence of negligence, but, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care. *Chenall v. Palmer Brick Co.*, 43 S. E. 443, 445, 117 Ga. 106 (citing *Waterhouse v. Schlitz Brewing Co.*, 81 N. W. 725, 12 S. D. 397, 48 L. R. A. 157)."

We think that the court was correct in said instruction and that the doctrine applied to the facts in this case.

The collision between these cars was such a happening that in the ordinary course of things does not result if those who were in charge of the cars had used proper care, and the proof of the collision raised a presumption of negligence, and, if permitted to go unexplained, is sufficient to sustain the verdict.

The defendant below offered proofs in rebuttal of said presumption of carelessness, and the court submitted to the jury that issue in instruction No. 16, which was as follows:

"No. 16. You are instructed that, where the plaintiff by proof of the happening of an accident presumptively due to the negligence of the carrier in a case of this kind has made out a case against the carrier, the carrier may show, as a sufficient defense, that in all matters which, under the evidence, might have been connected with the accident, they have exercised that high degree of care, skill, and foresight which was required of them to exercise by the nature of the business; and if you find from the evidence that the owners and operators of said scenic railway in this case prior to the time of the accident in the operation of said railway through their agents exercised that high degree of care, skill, and foresight that a reasonably prudent person would exercise under like circumstances and in a like situation, then your verdict should be for the defendant and against the plaintiff."

To this instruction the defendants below excepted, and requested instruction No. 11,

which was refused by the court, and which was as follows:

"No. 11. You are instructed, gentlemen of the jury, that if you find from the evidence that the defendants used that degree of care commensurate with the danger incident to or attending the operation and running of the scenic railway system in the inspection of the track, the cars used thereon, and other machinery and appliances, and in properly equipping and oiling the same, then the court tells you that said defendants would have discharged their duty owing to the plaintiff, and it will be your duty in such case to find for the defendants, notwithstanding said injury; and this although you may be unable to account for the cause of said collision and injury."

We think that instruction No. 16 properly submitted that issue to the jury. We do not think that instruction No. 11, requested by the defendant below, was a proper instruction as applied to the facts in this case, and that the court committed no error in refusing the same, in that it fails to define the degree of care required.

In the case of *Stott v. Churchill*, 15 Misc. Rep. 83, 36 N. Y. Supp. 477, the court held that the refusal to give the following instruction by the trial court was not error:

"If the jury find that the elevator and its machinery were built by reputable manufacturers, and that the defendants had it regularly inspected by experts in that business, and promptly executed the repairs and changes suggested by them, they performed their duty, and are not liable for any injury caused by the breaking of the machinery."

And in the opinion the court gave the following reasons for its holding:

"However correct an exposition of the law this might have been had the plaintiff been a servant seeking to recover from the master for the negligence of a competent fellow servant, it was inapplicable to the case on trial. Appellants owed it to respondent to exercise at least ordinary care and prudence in the care and management of the elevator and the inspection thereof. A personal duty cannot be delegated to another, so as to relieve the person bound to perform the duty from liability, for its nonperformance. *Shear & R. Neg.* p. 17, par. 15. Besides, in this case the defect—i. e., the corrosion—was palpable to any one of common observation and intelligence had the rods been examined at the place where it existed, and it was properly left to the jury, under the circumstances, to determine the question of prudence and care."

It was brought out in the cross-examination of one or two of the witnesses of the defendant below that one of the wheels was off of the car that was ahead of the car upon which the plaintiff was riding, and which first-named car turned back and collided with the car in which the plaintiff was riding. It was also shown that the cotter pin which held the wheel on the axle was gone. These facts are undisputed.

We have examined the evidence of the defendant below bearing upon the question of the inspection of these cars, and we think that it was not an unreasonable inference for the jury to conclude that the evidence of the defendants below was not sufficient to overcome the presumption that there must have been a careless inspection of said cars. The whole crux of the question of neglect centers around the absence of the cotter pin. The most natural thing that an inspector would think of, as this court views it, would be to look well to the cotter pins. The evidence showed that these inspections took place often on this busy 5th of July, and the presumption arises very strongly that the cotter pin in the axle of this car must have been in bad condition at the time of the last inspection before the accident. No witness testified to the fact that there had been any special examination of the cotter pin of this particular wheel of this particular car or of the cotter pins of any other car.

If the doctrine of *res ipsa loquitur* is held to be applicable to any state of facts in any particular case, and it is so being held applicable in this particular case, then the burden rested upon the plaintiffs in error to show one of two conditions: First, what the cause of the accident really was, and that said cause was of such a nature that the jury would reasonably conclude that the collision was unavoidable after the exercise of that care that the law required of the defendants; or, second, their proofs must be such as to rebut the inference that the accident arose from a defect that should have been discovered by proper inspection.

[2] We quote the following from the opinion by Lehman, Justice, in the case of *Cohen v. Farmers' Loan and Trust Co.*, 70 Misc. Rep. 551, 127 N. Y. Supp. 564:

"The phrase '*res ipsa loquitur*' is 'merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as to the cause of the accident.' Same case, at page 196 of 166 N. Y., at page 927 of 59 N. E. (52 L. R. A. 922, 82 Am. St. Rep. 630).

"The question presented to us is, as stated by Mr. Justice Delany, whether the explanation provided by the defendant is sufficient to overcome the inference of negligence created by the circumstances attendant upon the accident; that is, has the defendant shown that it has used due care in providing, maintaining, and operating the elevator? The defendant gave little evidence as to the appliance provided or as to its operation. Conceding, however, that the evidence was sufficient to show that the elevator was a proper appliance and was operated without negligence, it still must rebut the inference that it arose from a defect that should have been discovered by proper inspection. In other words, if the doctrine of *res ipsa loquitur* has been properly applied, it

was fairly inferable that the accident must have occurred from one of three causes, and it is quite immaterial which of these causes actually produced the accident, and, though we concede that the defendant's testimony shows that two of the possible causes of the accident did not exist in the case, it has not rebutted the inference of negligence, but has merely made the inference of negligence more narrow. To rebut this remaining inference the defendant must show that the defect could not be discovered by reasonable inspection. It has shown only that competent men have inspected the elevator and found it safe, but has in no way shown that these competent men were not negligent in their inspection.

"The appellant owed it to the respondent 'to exercise at least ordinary care and prudence in the care and management of the elevator and the inspection thereof. A personal duty cannot be delegated to another, so as to relieve the person bound to perform the duty from liability for its nonperformance.' *Scott v. Churchill*, 15 Misc. Rep. 80, 38 N. Y. Supp. 476, affirmed 157 N. Y. 692, 51 N. E. 1094. And for this reason it was held in that case that there was 'no error in refusing to charge: "if the jury find that the elevator and its machinery were built by reputable manufacturers, and that the defendants had it regularly inspected by experts in that business, and promptly executed the repairs and changes suggested by them, they performed their duty, and are not liable for an injury, caused by the breaking of machinery." However correct an exposition of the law this might have been had the plaintiff been a servant seeking to recover from the master for negligence of a competent fellow servant, it was inapplicable to the case on trial.' *Stott v. Churchill*, *supra*.

"Since an owner of a building cannot delegate his duty of inspection of an elevator to an expert in that business, the proof that an expert has examined it in no wise rebuts the presumption of negligence raised by the circumstances attendant on the accident. To rebut this presumption he must show either the actual cause of the accident, so that the trial justice or jury can determine whether or not such cause could be discovered by proper inspection, or he must show that the inspection made by the expert was so careful that no defect discoverable by inspection could be overlooked.

"The appellant relies upon the case of *Young v. Mason Stable Co.*, 193 N. Y. 188, 86 N. E. 15, 21 L. R. A. (N. S.) 592, 127 Am. St. Rep. 939, where evidence of an examination by an expert was held sufficient to rebut a possible presumption, caused by the fall of a freight elevator operated by a servant who was injured by the fall, that the master had failed in the duty imposed * * * by law, 'to provide for an adequate inspection thereof.' That case, however, proceeded upon the theory that the master, in relation to a servant, was bound only to 'provide' adequate inspection, and that this duty was met by putting the inspection in the hands of an expert; but it distinguishes the case from one where the relationship of the parties imposed a personal duty upon the owner to use due care in the inspection of the elevator. It cites as authority for the distinction the case of *Stott v. Churchill*, *supra*, and

we must therefore regard that case as a correct exposition of the law.

"I believe, for these reasons, that the judgments should be reversed only on the ground that a question was excluded which, if answered, might have shown the actual cause of the accident."

For a very learned discussion of the doctrine and application of the doctrine of *res ipsa loquitur*, see *Griffen v. Manice*, by Cullen, Justice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. This case is cited approvingly by Lehman, Justice, in the above-quoted portion of his opinion. From said case we take the following short quotations as we regard them important:

"To put it tersely, the court thought that, in the absence of tempest or external violence, a building does not ordinarily fall without negligence; while it also thought that the disruption of a flywheel proceeds so often from causes which science has been unable to discover, or against which art cannot guard, that negligence cannot be inferred from the occurrence alone.

"* * * When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of *res ipsa loquitur*; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. In *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, it is said: 'In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. * * * This phrase [*res ipsa loquitur*], which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident.'"

There is a distinction running through the law books between the duty as to inspection that an employer owes an employee and the nature of an inspection where a special duty is owed by the defendant to the plaintiff, as in the instant case. The distinction is referred to by Justice Lehman in the quoted portion of his opinion. See the case of *Young v. Mason Stable Co.*, 193 N. Y. 188, 86 N. E. 15, 21 L. R. A. (N. S.) 592, 127 Am. St. Rep. 939, and notes thereto. See, also, *Illinois Central Ry. Co. v. Phillips*, 49 Ill. 234; *Toledo, Wabash & Western Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Best Park & Amusement Co. v. Hollins*, 192 Ala. 534, 68 South. 417, Ann. Cas. 1917D, 929; *Georgia R. Co. v. Wall*, 80 Ga. 202, 7 S. E. 639; *Johnson et ux. v. Seattle Electric Co.*, 35 Wash. 382, 77 Pac. 677.

To repeat, after we had read over the

evidence offered by the defendants below in rebuttal of the presumption of negligence, there still lingered in the mind of the writer of this opinion the feeling that there must have been something lacking in the inspection of those cars, and that there had been a failure to make such an inspection as would have discovered the defect in the cotter pin.

It is true there were nine cars, and, if there were four wheels to the car, the inspection of nine cars would require the inspection of 36 cotter pins, but we think that the degree of care required of one operating a contrivance such as was this scenic railway required at least a reasonable inspection of each one of the 36 cotter pins, and in all of the evidence introduced by the defendants below no one testified to the fact that an inspection of the cotter pins was made at all. As we view the case, no part of the car was more important than were the cotter pins.

[1] The defendants below, plaintiffs in error herein, objected to instruction No. 11 given by the trial court, and assigned the giving of the same as reversible error herein. Said instruction was as follows:

"No. 11. The operator of a scenic railway is bound to use the highest degree of care and caution for the safety of his patrons, and do all that human care and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to patrons for hire while riding in its cars."

This court thinks that said instruction properly defines the degree of care and diligence required of those operating an instrumentality such as is involved in the instant case. We are not seeking to draw any analogy between the rule that applies to the common carrier of passengers for hire and those who carry passengers on scenic railways for hire. We doubt the practicability and necessity of drawing such an analogy, but we do think that the rule laid down in instruction No. 11 is not too rigid nor is it unreasonable that it be applied to such an instrumentality as was this scenic railway and as it is shown to be by this record.

We are unable to see the force of the contention that one who rides a scenic railway should be held to assume any other or further risks than would a passenger riding a passenger train. The fact that the passenger on a scenic railway might be seeking pleasure and recklessly accepts the risks, it may be stated, would be no more different than would a passenger riding a passenger train on a pleasure trip. And, to say the least of it, when you commence drawing the distinction between the two classes of passengers, you bring up contentions that are irreconcilable, and in fact lead to no

practical solution, and we are finally brought to the conclusion that the risks and hazards in riding a scenic railway are such that it raised a duty upon the part of those who operated it toward those who patronized it that requires, as we deem it, the highest degree of care and caution in the operation of the same and requires the exercise of the highest skill and foresight as is commensurate with its practical operation.

The authorities that we have heretofore cited seem to hold the degrees of diligence above defined to be the very least that would be required of those who operate any such instrumentality.

In the case of *Johnson et ux. v. Seattle Electric Co.*, supra, the syllabus of said case states the following:

"A carrier is not bound to do everything that can be done to insure the safety of its passengers, but need exercise only the highest degree of care consistent with the practical conduct of its business."

To the same effect are the other authorities heretofore cited.

We are not holding those who operate scenic railways to be insurers of the life and safety of those who patronize them, but to acquit themselves of liability the operators of such machines must not fall short of the degree of care and diligence as is defined in instruction No. 11.

We are not going to condemn the scenic railway involved in the instant case as on a parallel with such a dangerous and explosive instrumentality as was dealt with by Chief Justice Owen in the case of *Oklahoma Gas & Electric Co. v. Oklahoma Railway Co.*, reported in 77 Okl. 290, 188 Pac. 331. Neither are we going to designate it as a death trap, but we are not so certain that such a contrivance may not become such in a very short time, if those who operate them fail to practice the degree of care and diligence that the trial court defines in his instruction No. 11.

[6] We have examined the instructions given by the trial court in this cause, and we find that they properly define and present the issues involved in the instant case, and we find no other errors by the trial court that would warrant a reversal.

[4] The plaintiff in error contends that the verdict of the jury is excessive, and that there should be a remittitur ordered by this court. The rule in Oklahoma seems to be where the verdict is not so excessive as to raise a presumption that the jury was actuated by prejudice and passion in rendering the same, and in the absence of any specific proofs of passion and prejudice in rendering the judgment, and where the facts have been submitted to the jury under proper instructions, to leave it to the discretion of the jury as to the amount of the recovery,

and this is especially true where the appellate court is called upon to make the remittitur and where the trial court has failed to take action.

The following Oklahoma cases support the above rule as to ordering remittiturs by this court: *Henryetta Coal & Mining Co. v. O'Hara*, 50 Okl. 159, 150 Pac. 1114; *Waters-Pierce Oil Co. v. Deselms*, 18 Okl. 107, 89 Pac. 212.

In this case the plaintiff below was 35 years of age, in good health, and was drawing a salary of \$50 a month and other benefits, and at the time of the trial, while the proofs were conflicting, it appears she had a permanent injury to her foot. She had taught two terms of school since the injury, in country districts, but, owing to the trouble that her wound was giving her, she had to abandon this pursuit.

There is no evidence in this case that the jury was actuated by passion or prejudice in the rendering of the judgment. The trial judge heard the evidence and had an opportunity to observe the condition of the plaintiff, and, if the trial judge had concluded that the judgment was excessive, we have reason to believe that he would have ordered a remittitur or granted a new trial. This court will therefore refuse to order a remittitur in this case.

The judgment of the trial court is therefore affirmed.

HARRISON, C. J., and JOHNSON, MILLER, and KANNEMER, JJ., concur.

(32 Okl. 142)

BOSWELL et al. v. STATE. (No. 10225.)

(Supreme Court of Oklahoma. June 7, 1921.)

(Syllabus by the Court.)

Intoxicating liquors — 247—Scout car used in transporting intoxicants actually conveyed in another machine not subject to confiscation under statute.

A certain Ford sedan, driven by one W. M. Boswell, was seized by the sheriff of Cotton county, Okl., under and by virtue of the prohibitory laws of the state. At the time of seizure no liquors were found in the car. Boswell intervened, claiming ownership of the sedan. Upon trial, the county court of Cotton county rendered judgment confiscating the sedan for the reasons following, to wit: "The court finds that W. M. Boswell used a sedan car to aid, abet, and assist some party, unknown to the court, using a Davis automobile, to transport and convey 158 quarts of whisky from one place within Cotton county, Okl., to another place within Cotton county, Okl., by using the Ford sedan as what is commonly called the scout car, to search out the road and see whether or not the officers of Cotton county were along this route intended to be traveled

by said Davis automobile conveying said whisky." Held: (a) That the findings made by the trial court did not justify the judgment of confiscation; (b) that the legislative intent, as found in Laws 1917, p. 352, c. 188, was to confiscate all vehicles, including automobiles, and all animals used in hauling or transporting any liquor in violation of the prohibitory laws; (c) and that said act cannot be construed to include a scout car, used to search out the road and see whether or not the officers were along the road intended to be traveled by an automobile conveying whisky.

Appeal from District Court, Cotton County; J. C. Norman, Judge.

Action by the State for the seizure of an automobile. W. M. Boswell filed an interplea. Judgment for plaintiff, and intervener appeals. Reversed and remanded, with directions.

Charles H. Ruth, of Oklahoma City, for plaintiff in error.

E. L. Richardson, of Lawton, for defendant in error.

PITCHFORD, J. This action was commenced in the county court of Cotton county, Okl., by the seizure of one Ford sedan automobile by L. O. Watson, deputy sheriff of Cotton county, on March 15, 1918. The seizure was made without a warrant and for an alleged violation of the prohibitory liquor laws of the state of Oklahoma. On the same day and date the officer making the seizure filed complaint in the county court, as provided by section 3617, Revised Laws of Oklahoma of 1910. Thereupon the county judge of said county issued an order directing the sheriff to hold the property so seized until further orders of the court.

W. M. Boswell filed an interplea, claiming the ownership of the sedan, and denied that said car was being used at the time of seizure, or had ever been used with the knowledge or consent of the intervener, for the purposes of violating the prohibitory laws of the state of Oklahoma, or of the United States. Upon trial in the county court, judgment was rendered against the intervener. The car was confiscated to the state, and the sheriff was ordered to advertise and sell the same. From this judgment the intervener appeals, and assigns numerous errors, only one of which, however, it is, necessary for us to consider; that is, error in not sustaining the motion filed by intervener for judgment in his favor upon the conclusion of all the evidence in the case.

It is admitted by the state, and the evidence clearly justified this admission, that no intoxicating liquors were found in the Ford sedan at the time of the search and seizure. The contention of the state is that the sedan was being used as a scout for the car in which the whisky was found. The judgment of the court finding the sedan guilty contains the following clause:

"The court finds that W. M. Boswell used said car to abet and assist some party unknown to the court using a Davis automobile to transport and convey 158 quarts of whisky from one place within Cotton county, Okl., to another place within Cotton county, Okl., by using the Ford sedan as what is commonly called the 'scout car' to search out the road and see whether or not the officers of Cotton county were along this route intended to be traveled by said Davis automobile conveying said whisky."

We are not informed, either by the record or the brief on the part of the state, by what method or means the Ford sedan was to communicate to the Davis car carrying the whisky any information gained by the sedan as to the dangerous proximity of the Cotton county officers along the route intended to be traveled by the Davis car. The state has failed to furnish us with a single authority which in the least tends to sustain the contention that the Sedan is subject to confiscation by being an aider and an abettor. We have been unable, after diligent search, to find where this identical question has ever before been presented to any appellate court. We are able to understand how an individual can aid and abet an act, and how he can be accessory after the act; but this seems to be the original effort in attempting to make an automobile driving upon the public highway three-fourths of a mile away from the offending car, an aider and an abettor to the latter.

The evidence of the officers is that, when they first noticed the Ford sedan, the same was about three miles northeast of the bridge leading from the Texas to the Oklahoma line. When the sedan was seized, nothing suspicious was found, except some gunny sacks and side curtains; but no evidence that the gunny sacks or side curtains gave forth the fast-vanishing aroma that they had been used in any manner for the transportation or the concealing of liquors. While the officers were searching the sedan, the Davis car came from toward the south, and when within about three-fourths of a mile of the sedan, it stopped and turned. The officers then abandoned the sedan and pursued the Davis car, which led them a merry chase for something like 2½ miles—first in an easterly direction, then northeast, and then south in the direction of the bridge. The officers, realizing that in all probability the Davis car would beat them to the Texas line, resorted to the use of the telephone, and instructed the keeper of the bridge to close the gates and not allow the Davis car to cross. The gates were closed. When the Davis car approached and found the gates closed, it came to a halt, it stopped, and like the fox, pursued by the hounds, realizing that escape was impossible, ceased to make any further efforts, and gave up in despair; the driver abandoned the Davis car containing 158

quarts of whisky, jumped over the banisters, and made his escape, and so far as the record discloses the name of that driver is unknown to the officers of Cotton county, even unto this day, and no one has been so poor as to assert ownership to the Davis automobile.

Boswell, the driver of the sedan, evidently became greatly interested in the race and followed in the wake of the officers. After the capture of the Davis car, when the officers were felicitating each other over their success, Boswell, the intervener, drove up. It appears this excited the suspicion of the officers; they remembered the gunny sacks; they remembered the side curtains; they looked with suspicion on the fact that Boswell turned back and followed them; and the arrest of Boswell and the seizure of the sedan followed.

The evidence points strongly to the guilt of Boswell. There seems to be no question but that he was interested in the whisky in the Davis automobile. The gatekeeper testified that the two cars crossed the bridge the evening before the seizure; that they were together; that they came back together the next day, the sedan being in the front; that the intervener, Boswell, was driving the sedan at the time; and that Boswell paid the toll for the two cars as they came over. The intervener also paid the toll for both cars on the 14th, the day before the seizure. On that occasion, the Davis automobile was in front. But, even if Boswell, the intervener, was the owner of the Davis automobile, and was guilty of transporting the liquor in the Davis automobile, that would not make the sedan guilty, unless the sedan was also being used for the purposes of transporting the liquor.

The act of the Legislature found in the Session Laws of Oklahoma of 1917, p. 352, c. 188, § 1, provides that:

"All vehicles, including automobiles, and all animals used in hauling or transporting any liquor the sale of which is prohibited by the laws of this state, from one place to another in this state in violation of the laws thereof, shall be forfeited to the state."

Prior to this act an automobile used for the unlawful transportation of liquors was not subject to seizure and confiscation therefor. *First National Bank of Roff et al. v. State of Oklahoma*, 178 Pac. 670.

The power conferred on officers to search and seize, without a warrant, is given by virtue of section 3617, Revised Laws of Oklahoma of 1910. Section 3613 of the same provides for the disposition of the property seized. We are heartily in favor of a strict enforcement of the law involved, the same as all other laws, and while it has been held by this court that the statute involved is highly penal, and must be strictly construed,

we are inclined to the view that these statutes should be construed according to the fair import of their terms, with the view of making the intention of our lawmakers effective, and so as not to make futile the efforts of the officers charged with the arduous and difficult duty of enforcing the laws of the state, while so many are seeking, by schemes various and cunning, to circumvent these laws.

But we do not believe that the Legislature ever intended, by the act of 1917, supra, to forfeit an automobile or other vehicle merely because the same man might have been the owner of the car containing the whisky as well as the car sought to be forfeited, when there was no whisky being transported in the latter car, notwithstanding the fact that the two cars were traveling the same highway.

We conclude that the court was in error in not sustaining the motion of the intervener for judgment in his favor, and it is therefore ordered that the judgment of the trial court be reversed, and the cause remanded, with instructions to sustain the motion of the intervener for judgment, and to restore the Ford sedan to the person entitled to the possession thereof.

HARRISON, C. J., and McNEILL, NICHOLSON, and ELTING, JJ., concur.

(82 Okl. 155)

J. I. CASE THRESHING MACH. CO. v. BARNEY et al. (No. 10142.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

Appeal and error — 773(5) — Where defendant in error has neither filed a brief nor offered excuse, the court will reverse where assignments of error appear reasonably sustained.

Where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition.

Appeal from District Court, Woods County; W. C. Crow, Judge.

Action by the J. I. Case Threshing Machine Company against W. H. Barney and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Keaton, Wells & Johnston, of Oklahoma City, and T. J. Womack, of Alva, for plaintiff in error.

E. W. Snoddy and J. P. Grove, both of Alva, for defendants in error.

KANE, J. This was an action upon several promissory notes and to foreclose a chattel mortgage given to secure their payment, commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below. The cause has been before this court before, coming up on the issue of conversion, which issue was decided in favor of the plaintiff in error, *J. I. Case Threshing Machine Co. v. Barney et al.*, 54 Okl. 686, 154 Pac. 674. Upon the former trial the court, after allowing the introduction of certain testimony, struck the same from the record upon the motion of the plaintiff upon the ground that it tended to vary the terms of the written instruments involved. Upon the new trial the trial court admitted this testimony in evidence, not, as he says in his conclusions of law, for the purpose of varying the terms of the written instruments, but for the purpose of proving a separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instruments. This is the first ground for reversal assigned, and counsel for plaintiff in error say that the question thus raised is open for review on this second appeal because the case at the last trial in the district court was considered upon written record previously made and not on oral proof.

In support of this proposition counsel cite the Faulkner Case, 68 Neb. 295, 89 N. W. 171, 94 N. W. 113, the Parsons Case, 19 Idaho, 619, 115 Pac. 8, and Hatch v. Smith, 50 Pac. 952,¹ which seem to sustain their view of the law.

Counsel for plaintiff in error have fully and ably briefed this and the other grounds for reversal presented for review, citing many authorities which seem to support their contentions. The defendant in error has neither filed a brief nor given any reason for not doing so, although the time for filing a brief has long since expired.

In these circumstances the case seems to fall within the rule laid down by this court in an unbroken line of decisions to the effect that, where plaintiff in error has served and filed his brief in compliance with rule of this court, and defendant in error has neither filed a brief nor offered an excuse for such failure, the court is not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where the brief appears reasonably to sustain the assignments of er-

ror, reverse the case in accordance with the prayer of the petition. *Hampton v. Thomas*, 35 Okl. 529, 130 Pac. 961; *Dievert v. Rainey*, 41 Okl. 31, 136 Pac. 1086; *Butler v. Gill*, 34 Okl. 814, 127 Pac. 439; *Clark v. First Natl. Bank*, 36 Okl. 601, 129 Pac. 696; *Purcell Bridge & Transfer Co. v. Hine*, 40 Okl. 200, 137 Pac. 668.

For the reasons stated, the judgment of the trial court is reversed and the cause remanded, with directions to grant a new trial.

PITCHFORD, V. C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

(82 Okl. 168)

AULT v. PAGE. (No. 9947.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

1. Partnership — 311(3) — Written contract of settlement between partners conclusive.

Where two parties, who have engaged in business for several years as partners, agree upon a settlement of their business transactions and enter into a written contract of settlement wherein one of the partners to the settlement acknowledges an indebtedness in a certain amount to the other partner, such a contract of settlement is conclusive upon the parties in the absence of fraud or mistake clearly established by the party seeking to avoid the contract of settlement.

2. Partnership — 296(5) — Demurrer to evidence failing to show mistake in partnership settlement forming basis of counterclaim held improperly overruled.

In an action by plaintiff against defendant, as indorser upon a promissory note, where the defendant admits the execution of the note, the transfer and indorsement thereof, but files a counterclaim against the plaintiff alleging that the plaintiff is indebted to him in the sum of \$30,000 by reason of the defendant's having paid to the plaintiff \$30,000 through mistake in settling with the plaintiff and accounting to him for the proceeds of the sale of certain oil properties sold by the defendant, part of the property sold being owned jointly by the plaintiff and defendant and in part by the defendant individually, and the evidence in the action discloses that about two years after the sale of the properties by the defendant the plaintiff and the defendant entered into a written contract of settlement in which the defendant acknowledged himself, on account of past transactions including the sale of the property, indebted to the plaintiff in the sum of \$30,000, and the evidence shows that the contract was fairly entered into, and the defendant wholly failed to introduce any testimony tending to establish fraud or mistake in entering into the contract of settlement, and at the close of the testimony of the defendant attacking the contract

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 6 Kan. App. 649.

of settlement a demurrer was filed to defendant's testimony, held, that the trial court erred in overruling the plaintiff's demurrer to the defendant's testimony, and under the evidence as presented it was the duty of the trial court to sustain the demurrer of the plaintiff to the defendant's testimony and instruct the jury to return a verdict in favor of the plaintiff for the amount found to be due from the evidence.

Appeal from District Court, Tulsa County; N. E. McNeill, Judge.

Action by A. F. Ault against Chas. Page on a note. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Biddison & Campbell, of Tulsa, for plaintiff in error.

Stuart, Cruce & Riddle, of Tulsa, for defendant in error.

KENNAMER, J. A. F. Ault, plaintiff in error, filed this action in the district court of Tulsa county in June, 1917, to recover the sum of \$15,595.31 from Chas. Page, defendant in error, upon a promissory note executed on May 16, 1912, by Clifford B. Harmon, promising to pay to Chas. Page, six months after date, the sum of \$13,125, with interest thereon. The plaintiff, Ault, claimed that the note, before maturity, had been sold and transferred to him by Chas. Page for a valuable consideration and indorsed said note to the plaintiff, and that by reason of the indorsement by the defendant, Page, upon said note he was liable to the plaintiff for the balance due upon the same. The defendant filed an amended answer and counterclaim denying each and every allegation of the plaintiff's petition except such matters as were specifically admitted. Defendant admitted the execution of the note as pleaded, the transfer and indorsement, but denied that the same was for a valuable consideration. Defendant filed a cross-petition counterclaim alleging that during the years 1908 and 1919 and for several years thereafter the plaintiff and defendant were jointly interested in certain oil and gas leases and production thereon; that during the year 1911 the defendant negotiated a joint sale of certain properties owned by the defendant and plaintiff and properties owned by the defendant individually to certain parties in New York for an aggregate sum of \$1,000,000; that the sale was based upon so much per barrel daily production; that long after said negotiation had been practically closed upon the basis herein set out the defendant found it necessary and was required to reduce the purchase price of the properties sold to the sum of \$800,000, which was necessary in order to close said deal and collect the purchase price thereof; that the negotiation and sale of said properties covered a period of more than one year. Defendant alleged that the actual interest of the Omega Oil Company in the properties

sold was a fraction over one-fourth, this being the properties in which the plaintiff owned an interest with the defendant and which were sold with other properties. Defendant alleges in the fifth paragraph of his cross-petition that during all of said years herein mentioned he kept one bookkeeper, and that he undertook to carry all his business transactions in his mind and from time to time in most instances would verbally give the bookkeeper data from which to make up a record and keep his books; that the defendant never or seldom used any memorandum or written data of his business transactions, but made a practice of keeping the same in his head. The defendant in the sixth paragraph of his cross-petition alleged that during the time herein and up until an audit of his books was made he was not advised and did not know the relative percentage that each property going into the sale would bear to the other property, and did not know and was not advised as to the actual percentage which the Omega Oil Company owned or to which it would be entitled out of the proceeds of said sale and was under the impression and believed that its interest would be practically one-third of the full purchase price of said properties, and that it was his intention to allow the said plaintiff herein one-half of the net proceeds of the interest or the amount which the said Omega Oil Company would receive from said sale; that before said sale was reduced to \$800,000 he estimated that the interest of the Omega Oil Company on the basis of \$900,000 for the aggregate of the purchase price of said properties would be \$300,000, and that after said purchase price was reduced to \$800,000 its interest would be approximately \$266,000, and, assuming that the Omega Oil Company was entitled to practically one-third interest in the proceeds of said properties, he directed his bookkeeper to give the plaintiff credit for one-half of the one-third interest, which, as figured out by the bookkeeper, would be \$133,033; that this defendant at said time was in error and mistaken as to the amount to which the Omega Oil Company was entitled; whereas in truth and in fact the said Omega Oil Company was entitled to a little less than one-fourth of the aggregate purchase price of said properties; and that the plaintiff's interest therein could not have exceeded the sum of \$100,000.

In the eighth paragraph of the defendant's counterclaim it was alleged that on the 14th day of August, 1913, the plaintiff herein came to this defendant and requested him to sign an agreement or contract of settlement acknowledging the defendant to be indebted to the plaintiff in the sum of balance due of \$30,000 upon said transaction relative to the oil and gas leases and the sale of the same as herein recited, and stating to this defendant at said time that, according to a settlement rendered to him by the defendant's bookkeeper, and according to the inter-

est which this defendant had stated was due the Omega Oil Company, further stating that after allowing all the payments made thereon there was still \$30,000 due the plaintiff, and this defendant believing and relying upon such belief, but without any actual knowledge or data as to the real facts, the Omega Oil Company was entitled to practically a one-third interest in the proceeds of the sale of all of said properties, and having great confidence in the plaintiff and believing him to be a fair man who would not take advantage of this defendant, and relying upon his statements, under a misapprehension of the real facts signed said agreement acknowledging his indebtedness to said plaintiff of a balance due in the sum of \$30,000, whereas in truth and in fact plaintiff was laboring under an erroneous impression or an erroneous assumption of facts as to the interest of the Omega Oil Company in the proceeds of said sale, in that the interest of said company was a little less than a one-fourth interest instead of a one-third interest, and where as this defendant had made an error and mistake in directing his bookkeeper to give the Omega Oil Company credit for a one-third interest and the plaintiff credit for one-half of the one-third interest, and whereas this defendant was misled by the plaintiff's statements, which were misleading and untrue, and whereas at said time this defendant was not indebted to the said plaintiff in the sum of \$30,000 as stated, but only in the sum not to exceed the amount of \$1,972.79, all of which facts this defendant believes that plaintiff at said time well knew, but that said plaintiff, as this defendant believes and charges to be true knowing that said defendant was not indebted to said plaintiff in said sum of \$30,000, caused said agreement of settlement to be prepared and written for the purpose of inducing this defendant to sign the same, thereby having him acknowledge in writing that he was indebted to said plaintiff in order to cheat and defraud said defendant out of said amount of \$30,000.

Defendant alleged that he caused his books to be audited in the year 1914, and that the same showed that he had overpaid the plaintiff the sum of approximately \$30,000, including the note sued on by the plaintiff, and that he mailed the plaintiff a copy of the result of said audit of his books, and that the plaintiff made no objection to the statement so mailed.

For his second defense and for an additional counterclaim the defendant alleged that he agreed with the plaintiff to allow him as his interest in the properties sold by him to the New York parties the sum of \$100,000, which he estimated would be approximately the amount due the plaintiff after deducting all expenses, and that this agreement was made with the plaintiff subsequent to the time he had estimated and stated to the plaintiff that the Omega Oil Company's in-

terest in the properties sold would amount to approximately one-third, and that he agreed to allow the plaintiff the sum of \$100,000 out of the proceeds of the sale, without regard to the percentage which the properties of the Omega Oil Company would bear to the other properties sold, and that the plaintiff agreed to accept said amount, and the same was entirely satisfactory with the plaintiff; that the defendant has paid the plaintiff more than \$33,000 more than was due him and in excess of the amount which he agreed to let him have out of the sale of said properties. Wherefore the defendant prayed the judgment of the court for the sum of \$30,000 upon his counterclaim with interest and such other relief as the court deemed proper in the premises.

To the answer and cross-petition of the defendant the plaintiff filed a reply in which it was alleged that Clifford B. Harmon, who executed the note sued on in the plaintiff's petition, had prior to maturity thereof paid the same in full to the defendant and fully indemnified him as an indorser thereon against any loss by such indorsement, denying each and every allegation contained in defendant's answer and counterclaim not specifically admitted. In the third paragraph of the plaintiff's reply he alleged that on the 14th day of August, 1913, plaintiff and defendant made a written agreement, signed and executed by both parties, whereby plaintiff and defendant settled certain affairs between them, including the properties sold of the Omega Oil Company, attaching a copy of the agreement to the reply. In the fourth paragraph of the reply plaintiff pleaded the statute of limitations as to the cause of action set out in the cross-petition and counterclaim not arising on contract for relief on the ground of fraud for the reason it did not accrue within two years after the filing of said cross-petition and counterclaim. The cause was tried to a jury, which resulted in a verdict for the defendant, and judgment was entered in accordance with the verdict. The plaintiff prosecutes this appeal and presents 20 assignments of error as grounds for a reversal of the judgment.

Upon a careful examination of the record in this cause, we are convinced that the decisive question is raised by the nineteenth assignment of error, "that the court erred in overruling the plaintiff's demurrer to the defendant's evidence," and to this assignment of error we shall first give our attention. The decisive question in this controversy revolves around the one proposition as to what amount of money was due the plaintiff, Ault, from the defendant, Page, on the sale of certain oil properties owned jointly by Ault and Page in the name of the Omega Oil Company, and which were sold by Page together with other properties to parties in New York. The record is clear that Page made the sale of the properties together with other proper-

ties owned by him, individually, for a lump sum of \$800,000. It is undisputed that Page negotiated the sale; that he first represented to Ault that, after deducting all expenses incurred by reason of the sale, the share of the properties in the name of the Omega Oil Company, which belonged to Ault and Page, would amount to \$286,000, being \$133,000 for Ault, and the same amount for Page. The sale of the properties to the parties in New York was made some time in the year 1911. In August, 1913, the plaintiff and the defendant entered into a written agreement of settlement which was signed by both parties in this action. In this written agreement the defendant, Page, admitted an indebtedness of \$30,000 to the plaintiff, Ault, and the note sued on herein was indorsed to the plaintiff as a part payment upon the settlement made. The plaintiff, Ault, contends that at the time the written agreement of settlement was signed a statement of their accounts was presented to Mr. Page for examination, and in that statement the Omega Oil Company's property that went into the sale made by the defendant, Page, to the New York parties was valued at \$286,000, and the one-half interest, which it is admitted by both parties that the plaintiff, Ault, owned, was valued at \$133,000, and the defendant, Page, at the time of signing the written contract of settlement, was familiar with all the facts with regard to the sale of the properties owned by the Omega Oil Company to the New York parties, for he had personally negotiated and consummated the sale himself about two years prior to entering into the contract of settlement. He knew to a certainty how much money was paid for all the properties sold to the New York parties; that a total sum of \$800,000 had been paid, and he had had two years to determine just how much money Ault was entitled to for his one-half interest in the Omega Oil Company's properties that was included in this sale. The entire record is barren of any fact that even tends to show that Mr. Page was ignorant, mistaken, deceived, or in any way imposed upon in entering into the contract of settlement. All the facts upon which the settlement was based were peculiarly within the knowledge of Mr. Page. He had had charge of the properties and had made the sale. He is a man of extensive business dealings and the evidence of Mr. Page himself found in the record failed to disclose that he was in any way imposed upon or taken advantage of when the contract of settlement was executed, but the record of his testimony does disclose that he almost uniformly and successfully evaded each direct question touching the most important issue and the one decisive of this action as to whether or not he was misled or acted in ignorance of the real facts in executing the contract of settlement. On page 96 of the record we find the following questions propounded to Mr. Page:

"Q. Isn't it true that a form of contract together with this statement was handed to you, that you went over the matter, that either you or some one in your office altered the contract and put it in this form, that you finally signed it and then you and Mr. Ault signed it after you had arranged it in this form? A. Now—
"Q. (interrupting). Isn't that true? A. I couldn't say."

The question propounded Mr. Page was of vital importance in a controversy of this kind. He was asked to state upon his oath whether he himself had had the contract of settlement rewritten so as to conform to his wishes, and in his answer he refused to deny that that was a fact.

The plaintiff, Ault, in his testimony positively stated that he prepared a form of contract of settlement together with a statement of the items of settlement and personally presented the same to Mr. Page, and they went over it item by item, and that Mr. Page took the contract of settlement, and either prepared one or had it prepared which was the contract finally signed by the parties, and Mr. Page does not deny that this state of facts are true, but in his testimony, as herein set out, evades the question. The amount agreed upon as to the value of the property of the Omega Oil Company which went into the sale and the amount of the indebtedness acknowledged by the defendant, Page, as contended for by the plaintiff, Ault, is sustained by the testimony of C. F. Tingley, associated with Mr. Page at the time the sale was negotiated by Mr. Page to the New York parties, and his testimony shows conclusively that Mr. Page was not ignorant of the facts as to the value placed on the properties of the Omega Oil Company at the time he executed the contract of settlement.

[1] We conclude, upon an examination of this record, that upon the signing of the contract of settlement the account of Ault against Page by reason of their years of business dealings became a stated account; that the same was binding upon both parties, and could only be set aside or held for naught upon clear and convincing evidence of fraud or mistake. This rule of law is supported universally by the highest courts of the nation and the text-books. The rule will be found in 1 Corpus Juris, § 330, at page 705:

"An account stated, whether expressly or by implication, is prima facie evidence of the accuracy and correctness of the items thereof and of the liability of the party against whom the balance is found. And this is true although the statement of the account expressly provides for the correction of errors and omissions; such a stipulation does not render the statement any the less a settled account and subject to all the rules applicable to a stated account. Accordingly the burden of adducing evidence of fraud or mistake rests on the party who would avoid its binding force, and in the absence of such evidence the account stated is conclusive both at law and in equity."

The cases thereunder cited are so numerous that the writer of this opinion does not deem it necessary to cite additional authority in support of this rule.

In the case of *Knox v. Pearson*, 64 Kan. 711, 68 Pac. 613, the Supreme Court of Kansas had before it a case very similar to the case at bar, where two parties in business had entered into a contract of settlement, and in a subsequent action the contract of settlement was attacked on a ground of fraud and mistake by one of the parties entering into the same. The court said:

"The answer filed by defendant below pleaded an account stated. A balance was struck, and the amount due Knox agreed on between the parties. Such settlement was conclusive, in the absence of fraud, mistake, or error, and the burden to impeach it by clear and convincing testimony rested on the plaintiff below."

In the case of *Dobbs et al. v. Campbell*, the Court of Appeals of Kansas (10 Kan. App. 185, 63 Pac. 289) held:

"A settlement of an account is conclusive between the parties until impeached for fraud, mistake, the omission of something, accident, or undue advantage taken; and where such settlement is evidenced wholly by correspondence, and there is no evidence to impeach it, its legal effect is a matter of law for the court, and it is error to submit the same to the jury, for which error a new trial was properly granted in this case."

In the case at bar the defendant, Page, does not anywhere in his testimony state that prior to entering into the written contract of settlement he intended to settle with Ault for his share of the property sold to the New York parties on a percentage basis, but his testimony as a whole shows that he intended to make a settlement upon a lump basis. He does not contend that the properties were valued by anybody with a view of settling with the interested parties on a percentage basis at the time of the sale, but he contents himself by saying that he intended to give the plaintiff a lump sum of \$100,000, and it is clear from the record that he never signed the written agreement of settlement assuming that he was settling with Ault upon a percentage basis. It is clear from the record and from the testimony of the defendant that in entering into the written contract of settlement he did not assume to act upon the theory that the settlement was being made with regard to the Omega Oil Company's property on a percentage basis; therefore the defendant could not be mistaken about something he never contemplated doing, but all his acts and declarations show that he intended to settle upon a lump sum basis.

An error of fact is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist; but where an accounting is had between two parties and the facts are equally well known to both

parties and they have equal information, and something of doubtful nature is agreed upon by the parties in good faith, and the contract is free from fraud, the court will not disturb the same.

An examination of the authorities defining what constitutes a stated account hold that a case may be brought within the principles of an estoppel, or of an obligatory agreement between the parties, and it appears that this distinction must be recognized. In modern business transactions as between a bank and its customers a stated account is merely prima facie evidence of the correctness of the account, but a settlement and compromise of a doubtful controversy comes within the rule where the agreement is reduced to writing that the same constitutes an obligatory agreement, as in the case at bar, where there had been no particular agreement as to the value of the property owned by the Omega Oil Company, it was perfectly competent for the parties in their settlement to agree upon a value to be placed upon this property, and, having agreed and reduced the agreement to writing, the same has all the force of a contract.

In the case of *McCormick v. Interstate Consol. Rapid Transit R. Company*, 154 Mo. 191, 55 S. W. 252, the court said:

"When parties, having mutual matters of account between them, growing out of a contract, deliberately account together and state a balance, and the party who, on such accounting, is found indebted to the other pays the debt or gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be reopened or gone into, either at law or in equity, except upon clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment."

In the case of *Downing v. Murry*, 113 Cal. 455, 45 Pac. 869, the plaintiff sought to open a stated account, and the court, in holding that the prima facie evidence of correctness had not been overcome, said:

"It abundantly appears that he did not make the settlement ignorantly. On the other hand, it appears that he knew, and for a long time before the settlement had known, what the other parties claimed, and, substantially, the extent and amounts of their claims; that he was a man of good business capacity; and that, looking over the whole field, and considering the advantages and disadvantages of any particular line of action, he concluded to accept the account as stated, settle in accordance with it, and take the money which he could not then have otherwise received. Such an act cannot be set aside at the will of either party. It could be legally set aside only upon a showing of fraud, undue influence, etc., which showing was not made. There were averments of such things, and of a conspiracy against him, but there was no evidence making a prima facie case of their existence."

For an extensive review of the authorities upon the conclusiveness of an account stated

and settlement, see 11 A. L. R. 586, under the head of Annotation.

In the case of *Killer v. Wohletz*, 79 Kan. 719, 101 Pac. 475, L. R. A. 1915B, 11, the Supreme Court of Kansas said:

"It will be observed that Wohletz conceded that he purchased the rods, and that he was owing something for them. There was a substantial controversy between the parties and a compromise and settlement of that controversy. That being true, the court cannot go behind the settlement to determine whether the original claim of McCann was just, or whether Wohletz's version of the negotiations was right. If the parties met on equal terms, and the dispute was settled without fraud, the settlement concludes both of the parties."

Now, in the case at bar it appears that the defendant, Page, met the plaintiff, Ault, in the settlement on more than equal terms for the reason that the matters in controversy that were being settled were entirely familiar to Page, in that he had had charge of the properties and negotiated and made the sale, the proceeds of which were being accounted for in the settlement.

In the case of *Noyes v. Young et al.*, 32 Mont. 235, 79 Pac. 1065, the Supreme Court of Montana said:

"An account stated is an agreement between the parties, either expressed or implied, that all the items are correct. * * * The action is based upon the agreement, the consideration of which is the original account, and the agreement has the force of a contract."

In the case of *Holmes v. Page*, 19 Or. 233, 23 Pac. 962, the Supreme Court of Oregon said:

"An account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly, or by implication of law from failure to object. * * * The action is based on an agreement between the parties founded upon an examination of the transaction embraced, and has all the force of a contract."

In the case at bar, where there was no agreement as to the value of the property of the Omega Oil Company having been sold jointly with other property, and, had it not been for the agreement of settlement fairly entered into between the parties having been made, no question but what then it would have been competent to have established the value of this property on a percentage basis to the other property sold, but this agreement having been made in writing and the evidence failing to disclose any fraud or mistake in entering into the contract, it was the duty of the trial court in such a situation to sustain the written contract of settlement.

The Supreme Court of the United States, in the case of *Upton v. Tribilcock*, 91 U. S. 50, 23 L. Ed. 205, said:

"It will not do for a man to enter into a contract, and, when called upon to respond to

its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But this is not the law."

The decisions are numerous holding that it is the policy of the law to encourage settlements, and after settlements have been made and fairly entered into and the parties have reduced their settlements to writing, if the courts would permit the parties to evade their contracts of settlement upon such testimony as is presented in this record, then the policy of the law would be brought to naught.

[2] We conclude that the trial court erred in overruling the demurrer of the plaintiff to the defendant's testimony in this cause. The judgment of the trial court is reversed, and the cause is remanded, with directions to the trial court to sustain the motion of the plaintiff for a new trial and proceed with the cause in harmony with the views expressed in this opinion.

PITCHFORD, V. C. J., and JOHNSON, MILLER, ELTING, and NICHOLSON, JJ., concur.

(82 Okl. 159)

SCWAKE v. STATE. (No. 10966.)

(Supreme Court of Oklahoma. (June 14, 1921.)

(Syllabus by the Court.)

Reversal on confession of error.

Upon the confession of error by the Attorney General, and under the rule heretofore announced by this court in *Crossland v. State*, 176 Pac. 944, and *Baldrige v. State*, 80 Okl. 85, 194 Pac. 217, which is controlling in the instant case, the judgment of the trial court is reversed and the cause remanded, with directions.

Appeal from County Court, Rogers County, Edward Jordan, Judge.

Proceedings by the State to forfeit one five-passenger Buick automobile, seized in the possession of Otto Scwake, wherein Otto Scwake intervenes, claiming ownership. Judgment for the State, and intervener appeals. Reversed and remanded, with directions to dismiss.

J. S. Davenport, of Vinita, and Jennings & Hall, of Claremore, for plaintiff in error. S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

JOHNSON, J. The record discloses that on August 13, 1919, Mack R. Shanks, as county attorney, filed a petition in the county court of Rogers county in the name of the state of Oklahoma, wherein it was sought to forfeit to the state one five-passenger Buick

automobile, wherein it was alleged that the same was seized while in the possession of one Otto Scwake, the owner thereof, while said automobile was being used by the owner in violation of the prohibitory laws of the state in conveying intoxicating liquors from a point about two miles north of the town of Tallala to the south line of the said town in Rogers county. Thereafter Otto Scwake filed an amended plea of intervention, wherein he claimed the ownership of the automobile and specifically denied the allegations of the petition of the plaintiff. The record discloses that the automobile was seized under order of the county court aforesaid, by A. C. Dykes, constable, who made a return showing such seizure, and upon the issues joined by the pleadings aforesaid the county court entered a judgment forfeiting the car and ordering that the same be sold, from which judgment the intervener has appealed and commenced this proceeding in error to reverse the same.

The intervener, as plaintiff in error herein, has filed his petition in error, containing numerous assignments of error, and likewise his brief in support of the same, in answer to which the Attorney General has filed an answer brief through his assistant, W. C. Hall, in which he confesses error, stating that this appeal is a parallel case to Crossland v. State, 176 Pac. 944, and Baldrige v. State, 80 Okl. 85, 194 Pac. 217, and that the rule announced in said cases is controlling in the instant case, and from an examination of the record, we are of the opinion that this statement of the Attorney General is correct, and upon the confession of error by the Attorney General, and under the rule announced in the decisions of this court, supra, the judgment of the trial court is reversed, and the cause remanded, with directions to the trial court to dismiss the petition of plaintiff.

PITCHFORD, V. C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

(82 Okl. 193)

McKINLAY v. FEAGINS et al. (No. 11470.)

(Supreme Court of Oklahoma. May 31, 1921.
Rehearing Denied June 28, 1921.)

(Syllabus by the Court.)

1. Mines and minerals \S 78(2)—Lessee's failure to commence drilling well or to pay rental held to automatically terminate oil and gas lease.

An oil and gas lease contained the following provision: "If no well be commenced on said land on or before the 26th day of June, 1919, this lease shall terminate as to both parties, unless the lessee on or before

that date shall pay or tender to the lessor, or to the lessor's credit, in the Farmers' State Bank at Newkirk, Oklahoma, or its successors, which shall continue as the depository, regardless of changes in the ownership of said land, the sum of \$40, which shall operate as a rental and cover the privilege of deferring the commencement of a well for six months from said date, and in like manner and upon like payments, or tenders, the commencement of a well may be further deferred for a like period on the same number of months successively." Held, a failure on the part of the lessee to commence the drilling of a well or to pay the rental as stipulated automatically terminated the lease contract.

2. Mines and minerals \S 78(2)—Oil and gas lease containing an "unless" clause strictly construed in lessor's favor.

An oil and gas lease containing the "unless" clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee, and time is of the essence of the contract.

Appeal from District Court, Kay County; J. W. Bird, Judge.

Suit by Jesse C. Feagins and another against L. McKinlay. Decree for complainants, and defendant appeals. Affirmed.

J. F. King, of Newkirk, for plaintiff in error.

William S. Cline, of Newkirk, for defendants in error.

KENNAMER, J. The plaintiff in error, L. McKinlay, prosecutes this appeal to reverse a judgment rendered in the district court of Kay county, decreeing a cancellation and removal as a cloud upon the title of the lands in controversy, an oil and gas lease executed by the defendants in error, Jesse C. Feagins and Annie Feagins, to the plaintiff in error. The parties will be referred to as they appeared in the trial of the cause; Feagins as plaintiff, and McKinlay as defendant.

Cancellation and removal of the lease as a cloud upon the title were asked for upon two grounds—that no well was commenced as was provided in the lease, nor delay money paid as stipulated in the contract. The lease contained this provision:

"If no well be commenced on said land on or before the 26th day of June, 1919, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor or to the lessor's credit in the Farmers' State Bank at Newkirk, Oklahoma, or its successors, which shall continue as the depository regardless of changes in ownership of said land, the sum of \$40, which shall operate as a rental and cover the privilege of deferring the commencement of a well for six months from said date, and in like manner and upon like payments or tenders the commencement of a well may be further deferred for a like period of the same number of months successively."

[1] It is admitted by the defendant that the well provided for in the lease was not commenced within the period mentioned and that the delay money was not paid within the time as provided in the contract. The time for the payment of the delay money expired on the 26th day of June, 1919. The defendant contended in the trial of the cause that he was in Newkirk on the 24th day of June, two days prior to the expiration of the time for the payment of the rental, and had a conversation with one of the plaintiffs, Mr. Feagins, in which Mr. Feagins agreed to give him additional time to go to Wichita, Kan., and see other parties interested in the lease and remit the money, which he did pursuant to the conversation had with the plaintiff Feagins. This testimony was denied by Mr. Feagins. The court found the issues in favor of the plaintiffs. It being admitted that according to the terms of the written contract the time expired for the payment of the delay money on the 26th day of June, 1919, and that it had not been paid on that date the burden of proof was upon the defendant to establish some reasonable excuse for not having paid the money. The only evidence offered in support of the contentions of the defendant was his own testimony and it tended to change the terms and operation of a written instrument. He failed to convince the trial court that his contentions stood established by his own testimony.

This being an equitable action this court has the power where the judgment is challenged upon the ground that it is supported by insufficient testimony to examine the entire record and pass upon the weight of the testimony. In this case we have examined the record and weighed the testimony, and we find that the defendant in this cause acted as the agent of the lessors, plaintiffs herein, in selling this lease; that he was paid \$100 commission to sell the same to the best advantage of the lessors; that he sold the lease for \$800, retaining his \$100 commission for selling the lease, when in truth and in fact he sold four-fifths of the lease for \$800 and retained an undivided one-fifth interest himself in the lease, and it is admitted that in the sale of the lease he deceived the lessors. Therefore we conclude that the trial court did not err in finding the issues in favor of the plaintiffs. The lessors in this case were under no obligation, as contended by counsel, to furnish the lessee the information as to the due date for the payment of the rentals.

This court, in the case of *Curtis v. Harris*, 76 Okl. 226, 184 Pac. 574, in an opinion delivered by Chief Justice Owen, held:

"Under the express and unequivocal terms of the lease, the rights of both parties would terminate January 8, 1917, if a well was not completed, unless the lessee elected to avail himself of the option to delay the completion

of such well by paying the stipulated rental in advance. The lessee was not bound to pay the rental, but payment was a condition precedent to his right to defer drilling. The rule contended for, which seeks to prevent forfeiture, has no application. The lease terminated by its terms on the 8th of January; no well having been drilled, no payment tendered, and no facts appearing that amount to a sufficient legal excuse to relieve the lessee from the effect of neither completing a well nor paying the stipulated rental."

This court in the case of *Garfield Oil Co. v. Champlin*, 78 Okl. 91, 189 Pac. 514, held:

"Where an oil and gas lease expressly provides that the rights of parties shall terminate if no well be drilled within a fixed period, unless the lessee on or before that date shall pay or tender to the lessor a fixed sum, time is of the essence of the contract."

[2] It is an important rule of law, founded upon equity and justice, that in construing oil and gas leases containing the provision found in the contract under consideration that the courts adhere to the rule that time is of the essence of the contract. Such properties have a fluctuating value, and may be very valuable one day and practically valueless the next day, and the "unless" clause in this character of leases operates entirely for the benefit of the lessee, and will be strictly construed in favor of the party that is bound and against the party that is not bound. *Kolachny v. Galbreath et al.*, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

HARRISON, O. J., and JOHNSON, McNEILL, ELTING, and MILLER, JJ., concur.

(82 Okl. 158)

SMALL v. RICE et al. (No. 10023.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 564(4)—Where case made not served within time granted, appeal will be dismissed.

Appeal dismissed for the reason the case made was not served within the time granted by the trial court.

2. Appeal and error \S 345(1)—Unnecessary motion for new trial ineffectual to extend time for appeal.

Where a motion for a new trial is unnecessary to present to this court for review an order or judgment appealed from, such motion and decision thereon by the trial court are ineffectual to extend the time within which to perfect an appeal.

Appeal from District Court, Tulsa County; Con Linn, Judge.

Action by A. A. Small against Benjamin F. Rice and another, Judgment for defendants, and plaintiff appeals. Appeal dismissed.

Walker, Underwood & Rodolf and A. A. Small, all of Tulsa, for plaintiff in error.

Rice & Lyons, of Tulsa, for defendants in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss the appeal filed by the defendants in error upon the ground that the case-made was not served within the time granted by the trial court. The motion must be sustained.

The record shows that the judgment appealed from was rendered in favor of the defendant upon the opening statement of counsel for the plaintiff, and that notice of appeal was immediately given, and 60 days granted to make and serve case-made. Thereafter the plaintiff filed a motion for new trial, which was subsequently overruled, the trial court also granting 60 days to make and serve case-made for appeal from this order. The case-made was served within 60 days after the motion for new trial was overruled, but not within 60 days from the time first granted for making and serving case-made.

[1, 2] The contention of counsel for movant is that, inasmuch as the motion for a new trial was unnecessary for the review of the action of the trial court in entering judgment on the opening statement, the further extension of time granted for making and serving of a case-made for the purpose of reviewing the order overruling the motion for new trial did not enlarge the time for serving the case-made originally granted. In support of this counsel cite Clapper et al. v. Putnam Co. et al., 158 Pac. 297, from which he quotes as follows:

"Where a motion for new trial is unnecessary to present to this court for review an order or judgment appealed from, such motion and decision thereon by the trial court are ineffectual to extend the time within which to perfect an appeal."

It seems to us that this authority sustains the contention of counsel for defendants in error. That a motion for a new trial was required to review the action of the trial court in entering judgment upon the opening statement of counsel is not seriously questioned by counsel for plaintiff in error. They argue in their brief that:

"Assuming that no motion for new trial was necessary herein, still the plaintiff in error served his case-made upon the defendants in error within the extension of time granted to plaintiff in error by the trial court on the date of the judgment, to wit, December 18, 1917, and within the order of the trial court extending the time to a specific date within which the case-made might be served, which order

was made and entered with the original extension."

Whilst the point sought to be made by counsel is not entirely clear to us, we take it this argument is based upon the assumption that the final judgment was not entered until the motion for new trial was overruled, and therefore the time granted for making and serving a case-made commenced to run from that date, and not from the date of the former order. Judgment seems to have been entered in favor of the defendant upon the opening statement of counsel on the day the first order extending time was made. This was the only final judgment entered in the case, and the only ground for reversal urged by counsel in their brief is that the court erred in entering judgment in favor of the defendants upon the opening statement of counsel. The subsequent action of the court consisted merely of an order overruling the motion for a new trial. As this action of the trial court was wholly unnecessary, it does not seem to us that the last order was effective to extend time previously granted.

For the reason stated, the appeal must be dismissed.

HARRISON, C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

(82 Okl. 158)

HALL et al. v. PHOENIX INS. CO. OF HARTFORD, CONN. (No. 9967.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 569(3)—Case-made, not settled and signed by trial judge and attested by clerk, held ineffective.

A purported case-made, which has not been settled and signed by the judge who tried the case and attested by the clerk and filed with the papers of the case in the trial court, is ineffective as a case-made, and confers no jurisdiction upon this court to review any of the proceedings of the trial court.

2. Appeal and error \S 612(2)—Where proceedings in error are by transcript of record, transcript must be certified.

Where the proceedings in error are by transcript of the record the transcript must be certified as such by the clerk of the trial court.

3. Appeal and error \S 575, 612(1)—Stenographer's report held insufficient either as case-made or transcript.

A stenographer's report of the proceedings in the trial court, which has not been signed and settled by the trial judge as a case-made or attested by the clerk or filed in the district court or certified by the clerk of the trial court as a transcript, cannot be considered by this court either as a case-made or a trans-

script. It is a nullity, and confers no jurisdiction upon this court to review the proceedings of the trial court.

Appeal from District Court, Texas County; W. C. Crow, Judge.

Action by the Phoenix Insurance Company of Hartford, Conn., against Emil Hall and others, copartners in the firm name of the Tyrone Lumber & Supply Company. Judgment for plaintiff, and defendants appeal. Appeal dismissed.

Jno. L. Gleason, of Enid, for plaintiffs in error.

Albert L. McRill and J. W. Scothorn, both of Oklahoma City, for defendant in error.

KANE, J. The proceedings were had herein on the 23d day of November, 1917, and were upon a motion by the defendant in error for judgment upon the pleadings, in accordance with the mandate of this court in a prior appeal (cause No. 7362, Phoenix Ins. Co. v. Hall et al., 60 Okl. 30, 158 Pac. 903). Upon the granting of judgment for the plaintiff, defendant in error herein, the defendants, plaintiffs in error herein, served notice of appeal, and thereafter filed their petition in error, with a stenographic report of the proceedings in the trial court attached thereto, in this court. Defendant in error has filed its motion to dismiss and, among other grounds, alleges that there is nothing before this court which can be considered either as a case-made or as a transcript, for the reasons that the stenographic report of the proceedings in the trial court was not settled and signed as a case-made by the trial judge or attested by the clerk, or filed with the papers in the case, as provided by section 5242, R. L. 1910, as amended by chapter 218, Sess. L. 1917, or certified by the clerk of the trial court as a transcript.

[1] A purported case-made, which has not been settled and signed by the judge who tried the case and attested by the clerk and filed with the papers of the case in the trial court is ineffective as a case-made, and confers no jurisdiction upon this court to review any of the proceedings of the trial court. Oil Fields & S. F. Ry. Co. v. Wheeler, 75 Okl. 9, 180 Pac. 868; Helms v. Faulkner, 79 Okl. 308, 193 Pac. 621; Canfield v. Bell, 47 Okl. 622, 149 Pac. 1088; Landis v. Beal & Hines, 43 Okl. 287, 142 Pac. 1109; Abbott v. Rodgers, 35 Okl. 189, 128 Pac. 908; Upton v. American Trust Co., 31 Okl. 456, 122 Pac. 159.

[2] Where the proceedings in error are by transcript of the record, the transcript must be certified as such by the clerk of the trial court. Buell v. American Indemnity Co., 178 Pac. 884.

[3] Plaintiffs in error herein have attached to their petition in error nothing more than

a stenographic report of the proceedings in the trial court. Such stenographic report is neither signed and settled as a case-made, certified by the clerk of the trial court, filed with the papers in the trial court, nor certified by the clerk of the trial court as a transcript. It is therefore a nullity, and confers no jurisdiction upon this court to review the proceedings of the trial court. Oil Fields & S. F. Ry. Co. v. Wheeler, supra.

For the reasons stated, the appeal is therefore dismissed.

HARRISON, C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

(82 Okl. 15.)

MISSOURI, K. & T. RY. CO. v. LINDSEY.
(No. 10016.)

(Supreme Court of Oklahoma. June 14, 1921.)

(Syllabus by the Court.)

Appeal and error \S 773(5)—Cause reversed, in absence of brief for defendant in error.

There is no brief on behalf of the defendant in error, and as the cases cited by counsel for plaintiff in error reasonably tend to support their contention, the judgment of the court below must be reversed, and the cause remanded, with directions to reinstate the first verdict and to set aside the proceedings subsequent thereto.

Appeal from District Court, Washington County; R. B. Boone, Judge.

Action by P. D. Lindsey against the Missouri, Kansas & Texas Railway Company. Verdict for plaintiff. A new trial was granted, on plaintiff's motion, for insufficient damages, and defendant appeals. Reversed and remanded with directions.

Clifford L. Jackson, M. D. Green, and H. L. Smith, all of Muskogee, for plaintiff in error.

Leahy & MacDonald, of Pawhuska, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for personal injuries. Upon trial to a jury there was a verdict in favor of the plaintiff for \$400. Thereafter, upon motion for a new trial filed by the plaintiff, a new trial was granted, for the reason that in the opinion of the court the damages awarded by the jury did not equal the actual pecuniary injuries sustained by the plaintiff. From this order granting a new trial the defendant appeals; the sole ground for reversal being that the trial court was prohibited from granting a new trial, on account of the smallness of the damages, by section 5034, R. L. 1910, which provides:

"A new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained."

It is contended by counsel for plaintiff in error that the first part of this section constitutes an absolute limitation upon the power of the trial court to grant a new trial on account of the smallness of the damages in an action for an injury to the person. This is the construction placed upon this statute by the Supreme Court of Kansas, from which state it was adopted by the territorial Legislature prior to statehood. *Met. St. Ry. Co. v. O'Neill*, 68 Kan. 252, 74 Pac. 1105. While the decision in the *O'Neill* Case, *supra*, was rendered subsequent to the adoption of the statute by the territory, it was rendered long before the subsequent adoption of the same statute by the state by section 2 of the Schedule of the Constitution. In these circumstances, the construction placed upon the statute by the Supreme Court of Kansas should be highly persuasive, if not controlling, on this court. *Chisolm v. Weiss*, 2 Okl. 611, 39 Pac. 467; *St. L. & S. F. Ry. Co. v. Bruner*, 52 Okl. 349, 152 Pac. 1103; *Robinson & Co. v. Bilt et al.*, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65; *Reaves v. Reaves*, 15 Okl. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353.

In the *O'Neill* Case, as in the case at bar, the trial court entertained the view that the second clause of the section modified the absolute limitation placed upon the power of the court by the first clause, and that the section construed as a whole authorized the court to grant a new trial in all actions where, in the court's opinion, the verdict of the jury was less than the actual pecuniary injury sustained. In passing upon this question the Supreme Court of Kansas said:

"The sole error urged here is the granting of the motion for a new trial. It is urged that this was error, because of the language of section 307 of the Code of Civil Procedure (section 4755, Gen. St. 1901). 'A new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained.' We are here confronted with a positive denial of power in the court to grant a new trial in certain cases. The statute has assumed to regulate the matter of the granting of new trials. In section 306, eight grounds are enumerated for which new trials may be granted, and none of them include the right to a trial on account of the smallness of the assessment of recovery, except the fifth, where it is provided that a new trial may be had for that reason in actions upon a contract or for the injury or detention of property. It seems that the Code makers, not content with leaving out a provision for a new trial in cases like the one now under discussion, added the positive prohibition to the granting of such motions in cases enumerated in section 307."

Cases from other jurisdictions which seem to be in point are as follows: *Bunn v. Mason City*, 64 Iowa 257, 20 N. W. 2d 399; *Shoff v. Wells*, 1 Neb. 165; *Harper v. O'Brien*, 39 Ind. 504. After reviewing these cases we are confirmed in the opinion that the construction placed upon this statute by the Supreme Court of Kansas is correct.

There is no brief on behalf of the defendant in error, and as the cases cited by counsel for plaintiff in error reasonably tend to support their contention, the judgment of the court below must be reversed and the case remanded, with directions to reinstate the first verdict and to set aside the proceedings subsequent thereto.

PITCHFORD, V. C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

(52 Cal. App. 152)

LOS ANGELES TITLE INS. CO. v. CITY OF LOS ANGELES et al. (Civ. 3492.)

(District Court of Appeal, Second District, Division 1, California. April 4, 1921. Rehearing Denied June 3, 1921.)

1. Injunction §105(1)—Insurer of titles cannot restrain enforcement of inapplicable municipal license tax ordinance.

Where a municipal ordinance imposing license taxes on various businesses, including the business of preparing abstracts, excepted companies insuring titles, a title insurance company will not be granted an injunction restraining municipal authorities from enforcing the ordinance as to it, though not applicable, and though such companies were exempted by Const. art. 13, § 14; for equity will not enjoin a criminal prosecution on the ground of insufficiency of evidence of guilt.

2. Injunction §85(1)—Enforcement of ordinance not restrained on theory that it imposed excessive penalties so that it could not be tested.

Although equity by injunction proceedings may determine the validity of a statute or ordinance which imposes such extreme or cumulative penalties that the persons affected are practically prevented from resorting to the courts to determine the validity or the applicability of the law, the proposed enforcement of a license ordinance which imposed a fine of \$500 and imprisonment against violators, and declared that each day business was conducted without the payment of a license should be a separate violation will not be restrained on that ground, at the suit of a title insurance company which, though not within the terms of the ordinance, asserted that the municipal authorities were about to enforce the same against it.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Los Angeles Title Insurance Company against the City of Los Angeles and others for an injunction to restrain enforcement of a license tax ordinance. From a judgment for plaintiff, defendants appeal. Reversed.

Jesse E. Stephens, Wm. P. Mealey, and Julius V. Patrosso, all of Los Angeles, for appellants.

Tom C. Thornton and O'Melveny, Millikin & Tuller, all of Los Angeles, for respondent.

CONREY, P. J. From the complaint in this action it appears that the city council of the city of Los Angeles adopted an ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations. It was provided in the ordinance that on and after January 1, 1920, it shall be unlawful for any person, etc., to carry on any of said occupations without having first procured a license from the city so to do. Certain fees are to be paid for each license. Among the businesses specified is that of searching titles to real property and issuing abstracts, statements, or certificates purporting to show the condition of the title to any particular property, "but which abstract, statement, or certificate does not insure or purport to insure the title to real property, or any interest therein." Violation of the provisions of the ordinance is made a misdemeanor punishable by a fine of not more than \$500 or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment.

"Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance."

The complaint further shows that the plaintiff is engaged solely in the business of issuing for a premium certain classes of documents (which are set forth as exhibits to the complaint) relating to the title of real property. The plaintiff does not issue any abstracts, statements, or certificates relating to the condition of title to any property, or purporting to show or certify to the condition or state of title to any property, excepting only the said documents. It is further alleged:

"That under and pursuant to the terms and provisions of art. 13, § 14, Constitution of the state of California and acts of the Legislature of the state of California passed pursuant thereto, plaintiff is compelled to pay to the state of California as a tax a certain percentage of its gross premiums. Plaintiff alleges upon its information and belief that by the terms and under the force and effect of said section 14, art. 13, of the Constitution of the state of California it is not subject to any taxation by

the defendant city of Los Angeles either in the form attempted by said purported Ordinance No. 39600 (New Series) or otherwise or at all, and that said city of Los Angeles has no jurisdiction to impose upon this plaintiff the tax or so-called license fee provided in said ordinance."

It is alleged that the city of Los Angeles threatens to, and will, unless restrained and enjoined therefrom, endeavor to enforce the terms of said purported ordinance against the plaintiff; that, if plaintiff fails or declines to secure a license and to pay therefor the fees as fixed and provided in the ordinance, the city will institute criminal proceedings against the plaintiff and its officers for alleged breach of the purported ordinance and will cause the plaintiff and its officers to be prosecuted therefor, and will endeavor to collect from the plaintiff the fees provided in said ordinance. Further facts are stated to the effect that such adverse proceedings against plaintiff will result in great and irreparable injury and damage to the plaintiff and its business; that plaintiff has no plain, speedy, and adequate remedy at law.

By reason of the facts so alleged, the plaintiff prayed for a judgment decreeing that said purported ordinance has no operation or effect as to the plaintiff, that the plaintiff has a right to conduct its business without procuring the license provided for in the purported ordinance and without paying the fees fixed therein, and that the defendant city, its officers and agents, be enjoined from attempting to enforce any of the provisions of said purported ordinance against the plaintiff.

The defendants demurred to the complaint upon the grounds that the court has no jurisdiction of the subject of the action, and that the complaint does not state facts sufficient to constitute a cause of action against the defendants or any of them. The demurrer having been overruled, defendants declined to answer, and a decree was entered in favor of the plaintiff in accordance with the prayer of the complaint. The defendants appeal from the judgment.

[1] Aside from the contention (which will be considered later herein) that the ordinance is void by reason of excessive penalties provided therein, no attack is made upon its validity. If it be true in fact that the plaintiff in the course of its business limits itself to the business of an insurance company, then it is not subject to the provisions of the ordinance, or, in other words, the ordinance does not apply to the plaintiff and its business. The ordinance does not in any way disregard the provisions of the Constitution to which reference has been made. This being so, the plaintiff's action is one wherein it seeks to enjoin certain officers of the defendant city, charged with the enforcement of its laws, from wrongfully prosecut-

ing the plaintiff by accusing it of the commission of a misdemeanor in that it has violated the provisions of a valid ordinance. The case is practically the same as it would be if these officers were threatening to prosecute the plaintiff for conducting a grocery business without obtaining a license required by the ordinance, when in fact the plaintiff was not conducting or proposing to conduct a grocery business in the city of Los Angeles. It seems very clear that an injunction will not be granted to protect any person from prosecution for the alleged commission of a criminal offense by proving to a court of equity that he is not guilty of such offense. The court having jurisdiction over criminal offenses is the forum in which such questions of fact must be determined.

"Courts of equity will, in proper cases, enjoin the attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment therefor, where the law or ordinance is invalid and its enforcement will injure or destroy the plaintiff's property or property rights. * * * These however, are all cases where the penal law was considered invalid. * * * We know of no principle of jurisprudence which authorizes a court of equity, on the ground that it will prevent a multiplicity of actions, or that it will prevent an injurious interference with plaintiff's business, to proceed to investigate as to the truth of criminal charges that have been or may be preferred against him, to hear the evidence in regard to his guilt or innocence, to determine, in advance of the decision of the lawfully constituted criminal courts, the question of his guilt or innocence of pending charges and his probable guilt or innocence of future charges, and, if found in his favor, to forestall the action of the law courts and enjoin the enforcement of a constitutional and valid law against him, on the sole ground that there is not, and never will be, sufficient evidence of his guilt." *Sullivan v. San Francisco Gas, etc., Co.*, 148 Cal. 368, 83 Pac. 156, 8 L. R. A. (N. S.) 401, 7 Ann. Cas. 574.

[2] Respondent, while conceding the validity of the ordinance in all other respects, contends that by reason of severe and rigorous penalties imposed thereby, its enforcement against the plaintiff will constitute a denial of due process of law and of the equal protection of the laws. The doctrine relied upon, in so far as it has the support of judicial authority, is declared in *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. This decision has

been approved in many later cases, some of which are mentioned in the brief of respondent herein. As stated by counsel for respondent:

It was determined in *Ex parte Young* "substantially as follows: That when the penalties for disobedience of a law are by fines or imprisonment so heavy and severe that the persons affected thereby are as a practical proposition prevented from resorting to the courts for the purpose of determining the validity of the statute, they are thereby denied the equal protection of the law and their property rendered liable to be taken without due process of law, and that such statute is therefore void as being in conflict with the Constitution of the United States."

We have underscored the clause in counsel's statement which differentiates that decision, and those which have followed it, from the case at bar. There is nothing in the present action evincing a purpose of, or necessity for, determining the validity of the provisions of the ordinance whereby license fees are imposed upon persons conducting the businesses specified therein. In *Ex parte Young*, supra, the Supreme Court of the United States quoted from its earlier decision in *Cotting v. Godard*, 183 U. S. 79, at page 102, 22 Sup. Ct. 30, at page 39, 46 L. Ed. at page 106, as follows:

"It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

This was very far from a declaration that one who is not challenging the validity of a statute upon any other ground will by reason of the severity of the penalties prescribed by the statute be entitled to a decree restraining the officers of the law from prosecuting him for alleged violation of such statute.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(52 Cal. App. 316)

FAVORITE et ux. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN BERNARDINO COUNTY et al. (Civ. 3524.)

(District Court of Appeal, Second District, Division 1, California. April 20, 1921.)

1. **Mandamus** \Rightarrow 154(2)—Petition, not showing what parties appeared or what objections were urged to order complained of, is insufficient for a peremptory writ.

In a proceeding for writ of mandate against the superior court to enforce contempt proceedings, where the petition merely showed that the matter was heard and the order dismissed, and not whether the adverse parties appeared, or what objections might have been urged against the order, if any, a peremptory writ was properly refused.

2. **Contempt** \Rightarrow 21—Court held without jurisdiction to order corporation to exhibit its books to plaintiff in action for damages.

It was the duty of plaintiffs, in an action against a corporation and others for damages caused through defendant's acts in obtaining contracts with plaintiffs, and because of frauds committed in connection therewith, to have secured all information essential to the designation of the parties, including the stockholders' names and shares held by each before commencing their action, so that the court was without jurisdiction to make an order requiring the corporation to exhibit its books to plaintiffs, so that a contempt order should not be enforced.

3. **Discovery** \Rightarrow 96—Order requiring corporation to exhibit books should not be granted upon ex parte application, but only after notice.

In an action against a corporation for damages in procuring contracts from plaintiffs and for fraud, held that an order that the corporation exhibit its books to the plaintiff to furnish information as to stockholders and the amount of stock held by each was not an order to be granted in the first instance upon ex parte application under Code Civ. Proc. § 166, declaring that such may be made at chambers by judges of the superior court, but could only be secured after notice to the opposite party, in the same manner as prescribed for securing of inspection of documents by the provisions of section 1000.

4. **Mandamus** \Rightarrow 181(4)—Peremptory writ to compel contempt proceedings denied, where order violated was erroneously made.

Where an order of the superior court that a corporation exhibit to plaintiffs certain books was improper, the court had authority to vacate it as having been inadvertently made, and to dismiss the proceeding, and where the facts were presented in answer to the order to show cause why the circuit court should not be compelled by mandamus to proceed against the officers of the corporation for contempt for violation of such order, the peremptory writ should be denied.

Petition by O. J. M. Favorite and wife for writ of mandate against the Superior Court

of the State of California in and for San Bernardino County and J. W. Curtis, Judge thereof. Alternative writ was issued. Peremptory writ denied.

D. B. Chapin, of Los Angeles, for petitioners.

Adair & Winder, of Riverside, for respondents.

JAMES, J. Petitioners prosecute this proceeding for the purpose of obtaining a writ of mandate to compel the respondent superior court to enforce contempt proceedings against the secretary of the Security Investment Company, a corporation, the alleged contempt consisting in the refusal of said secretary to obey an order requiring that he exhibit to the petitioners the stock books of the corporation in order that they might ascertain the names of the stockholders and the number of shares owned by each. Petitioners had insisted upon that right under the terms of section 378 of the Civil Code, as alleged creditors of the corporation. By the petition filed herein petitioners show that at the time of the commencement of this proceeding there was pending in the superior court of the county of San Bernardino an action wherein these petitioners were the plaintiffs and the Security Investment Company and others defendants, which action was one to secure judgment for a large amount of damages alleged to have been caused to the plaintiffs through certain acts of the defendant corporation in obtaining the contracts of the plaintiffs, and because of acts of fraud committed in connection therewith. The petition shows that in the action referred to there were named as defendants more than 100 persons and corporations fictitiously designated, whose connection with the action was shown by an allegation in the complaint that such fictitiously named parties were stockholders in the corporation defendant, and that the particular names and the amount of stock held by each were unknown to the plaintiffs. The petition herein further recites that the superior court in that action made its order requiring the plaintiffs to amend their complaint and show the true names and the number of shares of stock held by the various persons and corporations therein fictitiously designated; that in order to obtain that information plaintiffs made a written application, and filed the same in the court wherein the action was pending, which application set forth that plaintiffs were creditors of the defendant corporation; that they had demanded leave to inspect the books of the corporation for the purpose of obtaining the names and number of shares of the stockholders, and that such demand had been refused; further stating that in order to comply with the direction of the court requiring

an amendment to be made to the complaint it was necessary that the information be secured. The petition further shows that upon the filing of that application, which was presented *ex parte* and without notice to the corporation or its officers, the superior court made its order requiring the stock books of the Security Investment Company to be exhibited to the plaintiffs. The petition further shows that the order so made was served upon the secretary of the corporation, and that the secretary refused to comply therewith; that thereafter these petitioners applied to the superior court for an order requiring said secretary to appear and show cause why he should not be punished for contempt in disobeying the order of the court. In the petition it is then alleged.

"That on, to wit, the 14th day of February, 1921, said order to show cause came on for hearing before said court and judge, and said court and judge then and there made and entered an order dismissing the same, and refused and still refuses to enforce said order. That the said judge had no discretion to grant or refuse an order for an attachment for the contempt in said matter, but was bound in law to issue it."

Alternative writ was issued herein. In response thereto respondent demurred to the sufficiency of the facts stated in the petition, and upon the issue of law so raised the matter was submitted for final determination.

[1] In order to determine whether the action of the trial judge in dismissing the order to show cause was without justification, it is necessary that it be made to appear what particular matters were before the court upon the hearing of the order to show cause. The petition shows merely that the matter came on for hearing, and that the order was dismissed. Whether the adverse parties appeared, and as to what objections might have there been urged against the order as made, if any, we are not advised, and this condition of the petition affords sufficient reason in itself why peremptory writ should be withheld.

[2] However, several points are urged on behalf of respondent in opposition to the prayer for the writ, chief of which are: First, that the court in the action referred to had no jurisdiction to make an order requiring the corporation to exhibit its books to plaintiff; second, that if jurisdiction to make an order of that purport be conceded, that such order could not be granted upon an *ex parte* application, but could only be secured after notice to the opposite party, in the same manner as is prescribed for the securing of inspection of documents by the provisions of section 1000, Code of Civil Procedure. We are inclined to agree with re-

spondent as to both of these positions. It was the duty of plaintiffs in the action referred to, to have secured all information essential to the designation of the parties, to wit, the names of the stockholders and the number of shares held by each, before commencing their action. That suit in no way involved an issue to obtain a disclosure of the names and stock holdings of the fictitiously designated defendants. It was an action purely for damages and does not fall within the holding of *State ex rel. Watkins v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112, where the Missouri Court of Appeal said:

"When a proceeding in equity is pending between the same parties at the time of the application for mandamus, in which suit the relief sought by mandamus could be fully administered, it is entirely proper for the court to decline to issue the writ."

This authority was cited by petitioners in response to respondent's claim that the plaintiffs in the superior court action should have proceeded by mandamus to obtain the inspection desired, that remedy being declared a proper one in *Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156.

[3] Under respondent's second point we are of the opinion that the order made was not one to be classified as of the kind "usually granted in the first instance upon *ex parte* application," as section 166, Code of Civil Procedure, declares may be made at chambers by judges of the superior court. The corporation and its officers, had they been given notice, might have resisted the application for the order by a showing, for instance, that there were no stockholders in any number other than those particularly named in plaintiff's complaint, and that would have been a complete answer to the application.

[4] As before stated, we are unable to determine from the petition what, if anything, was presented to the trial court on the return day of the contempt order. If the order was improper to be made upon *ex parte* application, as we think it was, the court had authority to vacate it as having been inadvertently made, and to dismiss the proceeding. Section 937, Code Civ. Proc. If facts were presented in answer to the order to show cause, furnishing reason why the court should refrain from further proceeding against the officers of the corporation, the order of dismissal would again be fully justified. For these reasons we think that this court should decline to issue the writ.

Peremptory writ is denied, with costs to respondent.

We concur: CONREY, P. J.; SHAW, J.

(52 Cal. App. 452)

PORTER v. PORTER. (Civ. 2834.)

(District Court of Appeal, Second District, Division 1, California. May 2, 1921.)

Divorce §37(14)—**Facts insufficient to show "willful neglect of husband to provide wife the common necessities of life."**

Where, shortly after their marriage, the husband enlisted in the United States Army, the nation then being at war, and some months after enlistment arranged an allotment out of his army pay so that the wife received \$30 per month, and it did not appear that the husband was able to pay anything more, there was no "willful neglect to provide for the wife the common necessities of life" within Civ. Code, § 105, so as to warrant divorce.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action for divorce by L. Mae Porter against Ross O. Porter. From a judgment denying divorce, plaintiff appeals. Affirmed.

C. P. Johnson, of Los Angeles, for appellant.

CONREY, P. J. Appeal by the plaintiff from judgment denying her application for a divorce from the defendant. There were two causes of action set out in the complaint, one being on account of willful desertion and the second on account of willful neglect. The parties were married on April 11, 1917, at Los Angeles, California. On April 9th defendant had enlisted in the United States Army. On the 13th he was required to report for duty, and was still absent in that service on May 6, 1918, when the complaint in this action was filed. Personal service of the summons and complaint was made upon the defendant in the county of San Diego. His default on nonappearance was duly entered. Nevertheless, an attorney appointed by the court appeared to represent defendant at the trial.

Appellant contends that the court erred in denying a decree of divorce "for the reason that desertion is purely a matter of intent, and our contention is that the intent to desert was clearly shown in his case." The evidence consists of the testimony of the plaintiff and of her mother, together with a letter of the defendant to the plaintiff dated April 7, 1918. The testimony entirely fails to show any abandonment of the plaintiff by the defendant at the time when he responded to the call for service in the army. The letter shows that at the time of writing defendant had decided that he would not again live with the plaintiff, but it likewise indicated that he had very recently arrived at that decision.

The evidence is equally insufficient to prove willful neglect of the husband in failing to provide for his wife the common nec-

essaries of life, he having the ability to do so. Civ. Code, § 105. In November, 1917, the defendant arranged for an allotment to her out of his army pay, and from the time when that went into effect until the trial of this action, she was receiving that allotment, amounting to \$30 per month. There is no evidence that defendant was able to pay anything more. Willful desertion or willful neglect must continue for one year before either is a ground for divorce. The plaintiff failed to establish a case on either of the grounds stated. The appeal is entirely without merit.

The judgment is affirmed.

We concur: **SHAW, J.; JAMES, J.**

(52 Cal. App. 399)

HANNA v. DE KOCH. (Civ. 3275.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1921.)

1. Venue §56—**Petition for change of place of trial must be accompanied by written demand.**

In addition to petition for change of place of trial and moving papers, a demand must be made in writing as required by Code Civ. Proc. § 396.

2. Venue §66—**Affidavit of merits must state facts showing good defense.**

Affidavits of merits filed with a petition for change of place of trial was not sufficient, where it was to the effect that appellant had stated "her" case to her counsel and that he had advised her that she had a good defense; a statement of "her" case not being "the" case under Code Civ. Proc. § 396.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by W. H. Hanna, doing business under the firm name and style of the Santa Barbara Realty Company, against Serena De Koch. From an order denying motion for change of venue, defendant appeals. Affirmed.

J. W. Smith, of Santa Barbara, and J. Mack Love, of Los Angeles, for appellant.

Balaam & Balaam, of Santa Barbara, for respondent.

WORKS, J. This is an appeal from an order denying a motion for a change of place of trial. The motion was denied upon the grounds that appellant had failed to demand, in writing, that the trial of the cause be had in the proper county, and that she had filed no sufficient affidavit of merits, both as required by Code of Civil Procedure, § 396.

[1] The appellant concedes that she presented no "demand" in terms, but she con-

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tends that demand was substantially made in other papers filed in the proceeding. She refers to her petition for change and to a certain notice that the matter would be heard at a stated time. We discover nothing in these papers to differentiate them from others of their kind, and to determine that their contents obviated the necessity for a demand would be to hold that no demand is necessary in any proceeding for change. A petition, or motion, in such a proceeding will always acquaint the other party with the fact that a change is desired, but that is not sufficient. The statute specifically requires that, in addition to the moving papers, a demand be made (Code Civ. Proc., § 396; *Pennie v. Visser*, 94 Cal. 323, 29 Pac. 711), and we cannot legislate the provision out of existence.

[2] The affidavit of merits was to the effect that appellant had stated her case to her counsel and that he had advised her that she had a good defense. Such affidavits have been held insufficient, times almost without number. *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Martin v. Superior Court*, 176 Cal. 289, 168 Pac. 135, L. R. A. 1918B, 313. A statement of her case is not a statement of the case, but only a statement of her defense.

The order is affirmed

We concur: FINLAYSON, P. J.;
CRAIG, J.

(52 Cal. App. 385)

PEOPLE v. MARSIGLIA. (Cr. 750.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1921.)

1. Criminal law §1129(3)—Leading questions objected to must be pointed out in assignments of error.

Where, in assignments of error, accused asserts that the court erroneously permitted the prosecution to ask leading, suggestive, and impeaching questions, but the questions complained of are not pointed out, the appellate court is not required to consider such assignments.

2. Witnesses §380(5)—State's witness, unexpectedly failing to identify accused, could be questioned as to his testimony at preliminary examination.

Under Code Civ. Proc. § 2052, where witnesses for the prosecution failed at the trial to identify accused as the person who committed the crime, it was not error for the prosecuting attorney to read from the transcript of testimony given by such witnesses at the preliminary hearing, which identified accused, and to ask them if they so testified; no objection being made at the time on the ground that the transcript was not shown to the witnesses before they were questioned concerning it, nor that the prosecuting attorney did

not indicate surprise at their failure to identify accused.

3. Witnesses §380(5)—Whether party surprised at testimony of one witness a question for trial court's discretion.

Whether a party is so surprised at the testimony of his own witness at the trial as to justify allowing the party to show prior inconsistent statements or testimony of the witness *held* discretionary with the trial court.

4. Criminal law §1035(3)—Timely objection must be made to prejudicial remarks by court.

Upon objection to the admission of accused's written confession, the court's statement that it did not appear to him that the confession had been procured by force, threats, or promises *held* not reviewable, where no objection was made at the time, for misconduct on the part of the court is not considered on appeal unless the party complaining promptly made assignment of misconduct thereon so that the court was given opportunity to prevent prejudice, especially where the remark, as here, was not such that any prejudicial influence therefrom could not have been removed if timely objection had been made.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Gaspard M. Marsiglia was convicted of robbery and also of rape, and appeals. Affirmed.

Le Roy D. Barnett, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was convicted of the crime of robbery and also of the crime of rape. The cases were consolidated and tried together. The appeal is taken from the judgment and order denying motion for new trial. On the night of February 17, 1920, it was charged that Marsiglia and his two co-defendants, Mike B. Gonzales and Frank Macchiaroli, at the point of revolvers, held up and robbed Leon Esquerre and Marie Gracienne and committed the crime of rape against Marie Gracienne. On the trial Esquerre and Marie Gracienne testified to the facts constituting the offenses, and a written confession signed by all three of the defendants was introduced in evidence. The defendant Marsiglia alone appeals at this time.

[1] Appellant has made three assignments of error. In the first two it is asserted that the court erroneously permitted the prosecution to ask "leading, suggestive, and impeaching questions." The questions complained of are not pointed out, and under such a circumstance the record is not in such a condition as to justify a consideration of these assignments of error upon appeal. *People v. McLean*, 135 Cal. 306, 67 Pac. 770; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. Woon Tuck Wo*, 120 Cal. 297, 52 Pac. 833.

However, from the discussion in appel-

lant's brief and a careful perusal of the record we conclude that the rulings complained of were those permitting the prosecuting attorney to ask of certain witnesses for the prosecution questions concerning testimony given by them at the preliminary examination. This was done in connection with the witness Marie Gracienne and also the witness Esquerre. Section 2052 of the Code of Civil Procedure provides:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of time, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

Esquerre was called as a witness for the prosecution. He testified that he could not identify the defendant Macchiaroli as one of the men who committed the offenses charged. Whereupon the prosecuting attorney, over the objection that the question was "argumentative, leading, and suggestive" and "incompetent, irrelevant, and immaterial, and not proper direct examination, leading and suggestive," and also tending "to impeach his own witness," was permitted to read from the transcript of the testimony of Esquerre given at the preliminary hearing in the same case as follows:

"Q. Now, what two took her out of the machine and across the street? A. Those two over there. Q. Referring to Gonzales and Marsiglia? A. Yes, sir."

And the witness was asked if he so testified. Other similar excerpts were read from the transcript which clearly contradicted the testimony of the witness then on the stand to the effect that he could not identify Marsiglia as having been present and having taken part in the commission of the robbery and rape.

[2, 3] None of the objections made by counsel were meritorious. It was not objected that the witness was not shown the transcript of the testimony given by him at the preliminary examination before being questioned concerning it, nor that the prosecuting attorney did not indicate surprise at the testimony of the witness in failing to identify Marsiglia. Had these matters been called to the attention of the trial court by proper objections, no doubt the prosecuting attorney

would have been required to lay a more complete foundation before his impeaching questions would have been permitted. However, in so far as the preliminary question of surprise is concerned, that is a matter addressed to the sound discretion of the trial court. *Zipperlen v. So. Pac. Co.*, 7 Cal. App. 206, 93 Pac. 1049. In this instance the complete change in the witness' testimony was properly regarded by the trial court as sufficient indication of the prosecuting attorney's surprise.

It is claimed by respondent that the questions addressed to the witness Marie Gracienne were merely to refresh her memory. But construing them favorably to the defendant, the most that can be said is that this witness was impeached by the prosecuting attorney who had called her in the same way and on the same point and under the same circumstances as was Esquerre.

[4] The third ground of appeal is based upon a statement of the trial court made in the presence of the jury. Appellant contends that the court invaded the province of the jury. The statement made by the trial court of which complaint is made is as follows:

"It does not appear to me that the alleged confession or the so-called statement was procured by force or by threats or by promises."

Objection to the admission of the written confession had been made and the quotation from the court occurs in the transcript at the point where the objection was about to be passed upon. The court's language to which exception is taken was not objected to at the time. It is well settled that misconduct on the part of the court will not be considered on appeal unless the party complaining promptly made assignment of misconduct thereon, so that the court might be given an opportunity to correct the irregularity and prevent prejudicial ruling. It cannot be said that the remark complained of in this case was of such character that any influence which it might have had upon the minds of the jurors could not have been removed if timely objection had been made by counsel for the defendant. Under such circumstances it is well settled that the assignment of misconduct cannot be given consideration on appeal. *People v. Osborn*, 12 Cal. App. 148, 106 Pac. 891; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009; *People v. MacDonald*, 167 Cal. 545, 140 Pac. 256.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(52 Cal. App. 472)

ANGLO-AMERICAN LAND CO. v. HEINE
et ux. (Civ. 3734.)

(District Court of Appeal, First District, Division 1. California. May 3, 1921.)

1. Evidence §595—In case of conflicting evidence, trial court may indulge in inference from evidence.

Where the evidence was conflicting, it was proper for the court, having accepted the evidence of one party as true, to indulge the legitimate inferences and deductions arising from such evidence in arriving at a proper understanding of the facts considered directly approved.

2. Appeal and error §1012(2)—Finding of trial court supported by evidence not disturbed as against weight of evidence.

Where there is evidence sufficient to support the fact findings of the trial court, the appellate court cannot disturb the judgment on the ground of insufficiency of evidence, though it may be of the opinion that the weight of the evidence is against the finding.

3. Mortgages §319(3)—Evidence held to establish satisfaction of mortgage by payment.

In an action on a deficiency judgment where the property which was subject to several incumbrances had been conveyed to plaintiff's assignor, evidence held to show that the conveyance was pursuant to an arrangement between the parties whereby the note secured by the mortgage was discharged and paid.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Anglo-American Land Company, a corporation, against Frederick F. Heine and wife. From a judgment for defendants in an action on a deficiency judgment, plaintiff appeals. Affirmed.

Gerald C. Halsey, of San Francisco (Frederic T. Leo, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, for respondents.

WASTE, P. J. The plaintiff brought this action to recover from the defendants, husband and wife, the sum of \$6,000, alleged to be due as a deficiency after sale of real property under a deed of trust given to secure a promissory note. The trial court held that the note had been paid, satisfied, and discharged, and gave judgment for the defendants, from which the plaintiff appeals. Insufficiency of the evidence to support the above finding of the court, and errors in admitting evidence, are the grounds relied upon to secure a reversal of the judgment.

[1] In presenting the question of the sufficiency or insufficiency of the evidence to support the court's finding that the promissory note, on which was based the right of the plaintiff to recover, had been paid, satis-

fied, and discharged on May 28, 1914, counsel for the respective parties have each presented a careful analysis of the testimony. These discussions only serve to emphasize what clearly appears from the record; that there is an irreconcilable conflict in the testimony of the two real parties to the action. It was the province of the trial court, under such circumstances, to accept the evidence of one or the other as true, and, if satisfied therewith, to decide the issues in the light of such testimony. In doing so it was proper for the court to indulge the legitimate inference and deduction arising from the testimony in arriving at a proper understanding of the facts it considered directly proved. *Maxson v. Llewellyn*, 122 Cal. 195, 198, 54 Pac. 732.

[2] When there is evidence in the record which, if believed and accepted as true by the trial court, is sufficient to support its findings and judgment, the appellate court cannot disregard the lower court's decision and reverse the judgment on the ground of the insufficiency of the evidence. And this is so even though the appellate court may be of the opinion that the weight of the evidence is against the finding. *Lewis v. Covillaud*, 21 Cal. 179, 190. The motives which may have impelled the parties to testify as they did, the circumstance that certain lines of defense may have been drawn very late in the case, and the probability, or improbability, of the facts established, were matters for the consideration of the trial court, and not for this court on appeal.

The relations between J. W. Wright, whom the court found to be the real party plaintiff in the action, and the defendant, Frederick F. Heine, began in 1913, when Heine, through Wright, acting as his agent, purchased an unimproved lot in the city of San Francisco. In dealing with the property and making arrangements for erecting a building thereon, Heine mortgaged the easterly half of the lot to one Murdoch for \$18,000, and arranged with Wright to advance him certain additional sums of money, not exceeding \$6,000, as a building loan on the same property. He and his wife thereupon executed the promissory note which forms the basis of this suit for the sum of \$7,500 to the J. W. Wright & Sons Investment Company, and secured its payment by the execution and delivery of a deed of trust of the one-half of the real property. Heine erected a building on the half of the lot at a cost of \$31,000. In May, 1914, he gave to the J. W. Wright & Co., Inc., an option for the entire property agreeing to sell it, free of all incumbrances, for \$56,000. Within the time limited Heine and wife executed a deed to Walter J. Rowley, a clerk, who seems to have been working indiscriminately for Wright and the two companies bearing his name.

On September 1, 1917, alleging that only \$500 of the principal of the \$7,500 note had been paid, the substituted trustee under the deed of trust proceeded to sell the half of the property covered thereby to satisfy the indebtedness. At the trustee's sale, of which the defendants had no notice, Wright purchased the property for the sum of \$1,000, subject to the Murdoch mortgage, and received the trustee's deed therefor. After crediting this \$1,000 upon the note, Wright caused the J. W. Wright & Sons Investment Company, ostensibly the holders of the obligation, to transfer the note to this plaintiff, and thereupon commenced this action to recover from plaintiff \$6,000, alleged to be due by reason of the facts we have related.

Defendants base their defense to the action upon their contention that the note had been fully paid, satisfied and discharged by Wright at the time of the agreement and transfer of the property by defendants to Rowley. Incidental to the main issue there arose a controversy as to the amount received on the note by the defendants from Wright. The contract under which the note was executed specified that, notwithstanding the fact that the note was drawn for \$7,500, no more than \$6,000 should be advanced by J. W. Wright & Co. It was, and is, admitted that only two amounts, aggregating \$4,500 in cash, were actually paid by Wright during the erection of the building. Wright and the plaintiff sought to maintain in the court below that, in addition to the \$4,500 cash advanced, Heine was indebted to Wright at the time of the execution of the note on another promissory note for \$2,500, which was included in the new obligation, which increased Heine's indebtedness to \$7,000. Heine unequivocally denied the execution or the existence of any such note, and Wright was unable to produce it. The plaintiff further alleges that, prior to the commencement of the present action, defendants had paid the sum of \$500 on account of the principal of the \$7,500 note. This allegation was positively denied, and the court found that it was not true. On the issue thus presented, the trial court found that at no time was there ever more than \$4,500 due, owing, and unpaid on the note secured by the deed of trust.

[3] On the main issue raised by defendants' contention that their obligation to J. W. Wright & Sons was actually paid and discharged at the time of the transfer of the property to Rowley, and as a part of that transaction, the testimony was equally conflicting. By the terms of the three-day option given to J. W. Wright & Co., Inc., by the defendant Heine, the latter engaged to sell the entire property, free of all incumbrances, for \$56,000 and agreed to pay Wright & Co., as their compensation, all over that sum that might be obtained. As a matter of fact, Wright bought the property at the price men-

tioned for one of his companies. Defendant Heine testified that it was agreed between Wright and himself, as a part of the transaction, that the \$7,500 note executed by himself and wife was to be paid off immediately, and that he was to be relieved of any future financial responsibility in reference to the incumbrances on the property, of which there were three, including the Wright deed of trust securing that note.

While Wright strenuously denied that there was any such agreement, certain features of the transaction brought out by the evidence tend to support the defendants' contention and, no doubt, had the serious consideration of the trial court. When the deed passed from the defendants to Rowley under the agreement with Wright, it contained a stipulation that the conveyance was "subject to an indebtedness of \$34,000." The indebtedness on the property at that time included the trust deed to Murdoch, \$18,000; the trust deed to one Unna, \$9,000, and the trust deed to Wright & Sons, now claimed by Wright to have amounted to \$7,000 at that time, the total aggregating \$34,000. The trial court found, however, that the defendants were only indebted to Wright, or to his companies, at that time in the sum of \$4,500. Taking the determination of the trial court in that regard, the aggregate indebtedness on the property was but \$31,500. This amount subtracted from the net selling price of \$56,000, leaves remaining \$24,500 due to the defendants. The significant fact appears that that is the exact sum for which Wright & Co. accounted to the defendants in closing and settling the transaction. We cannot but think this fact sheds much light upon the position of the parties, and tends strongly to corroborate the contention of the defendants, and to support the finding of the trial court to the effect that the note of the defendants was in fact paid and discharged.

Basing its argument on a portion of the testimony of defendant Frederick F. Heine to the effect that, under his agreement with Wright, he was to be released from future financial responsibility on the various incumbrances, the appellant contends that such agreement, even though it were made, did not release the joint debtor, defendant Agnes Heine, the wife. But there is other testimony of the respondent to the effect that the agreement was that the amount due on the note "was to be paid off immediately by Mr. Wright." When that was done, as was found by the trial court, the obligation of both debtors was extinguished.

The deed from the defendants to Rowley recited that the property was conveyed subject to an indebtedness of \$34,000. Appellant contends that this aggregate amount was intended to include \$7,000 due from the defendants. It attempts to argue that the court was, therefore, in error in admitting evi-

dence to the effect that only \$4,500 was due as a matter of fact on the promissory note here sued on, asserting that such evidence tends to vary the terms of a written agreement, the deed. We do not think the contention merits consideration.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(52 Cal. App. 370)

LONGUY v. LA SOCIÉTÉ FRANÇAISE DE BIENFAISANCE MUTUELLE.
(Civ. 3787.)

(District Court of Appeal, First District, Division 1, California. April 27, 1921. Hearing Denied by Supreme Court June 23, 1921.)

1. Hospitals ⇨7—Student nurse, volunteering to look after patient at hospital, held within the scope of her employment.

In an action against a hospital for the death of a child burned while being treated, while cared for by student nurse, who had volunteered to do the work for that night, where the head nurse had given permission for student to care for the child, held that such student was directly engaged within the scope of her employment at time of the injury.

2. Witnesses ⇨386—In an action against hospital for death of a patient resident physician's certificate of death held not admissible to impeach undertaker.

In an action against a hospital for the death of a child patient from burns alleged to have been received through neglect, the certificate of the hospital's resident physician that the child died of pneumonia was not admissible to discredit testimony of the undertaker as to condition of child's body from burns, on the ground that he, as well as the attending physician, had signed such certificate, required by law, for the undertaker merely certified to the interment and place of burial, and not the cause of death.

3. Appeal and error ⇨1058(1)—Evidence ⇨157(8), 383(4)—In an action for death of hospital patient from burning it was error not to admit a certified copy of the death record, but error was harmless in view of other evidence.

In an action against hospital for the death of a child from negligent burning where the defendant claimed the child died from pneumonia, the certificate of death of resident physician is prima facie evidence of the cause of death under Deering's Gen. Laws, p. 2006, St. 1915, p. 575, but failure to admit certified copy of death record resulted in no harm to defendant, since the testimony of the physician, who was a witness, was the best evidence.

4. Hospitals ⇨8—In action for death of patient burned by inhalator, evidence of inhalators used in other hospitals held incompetent.

In an action against hospital for damages for the death of a patient, accidentally burned from an inhalator for vaporizing eucalyptus oil

while being treated for pneumonia, it was error to admit and refuse to strike evidence of the kind of inhalators used at two other institutions, admitted to show defendant's negligence, there being no testimony of the general custom as well as practice of well appointed and managed hospitals in the matter of inhalators.

5. Evidence ⇨110—Evidence of party's falsehood or fraud in attempting to procure witness to testify differently held admissible.

In an action against a hospital for damages for death of plaintiff's child from accidental burning, it was error to exclude proof that plaintiff attempted to procure defendant's resident physician to testify favorably as to death being caused from the burns, and not from pneumonia, since evidence of a party's falsehood or fraud in the preparation and presentation of the case is receivable.

6. Evidence ⇨544, 571(9)—Nurses held competent to state opinion, whether death was caused by burning or disease.

In an action against hospital for the death of plaintiff's minor child from being burned while being treated for pneumonia, the exclusion of evidence of graduate nurses with long and varied experience as experts as to whether in their opinion the child would have died of disease at about the time she did die if not burned, and also of undergraduate nurses, was error, since they were competent, and the fact that some were undergraduates was merely a matter going to the weight of testimony.

7. Trial ⇨252(8)—In action against hospital, an instruction that student nurses were not allowed to work more than 8 hours held properly refused.

In an action against hospital for damages for death of a child pneumonia patient from burning by fire set by an inhalator, where the child was being cared for by student nurses voluntarily working overtime, an instruction that the law does not allow a female student employed in hospital to work more than 8 hours during any day was properly refused.

8. Appeal and error ⇨843(2)—Where case must be reversed for error pointed out, other assignments need not be considered.

Where a case must be reversed for error pointed out, it becomes unnecessary to consider the contention of the appellant that the verdict for damages is excessive.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Frank Longuy against the La Société Française De Bienfaisance Mutuelle for damages for death of a child. Judgment for plaintiff, and defendant appeals. Reversed.

Chickering & Gregory, and Evan Williams, all of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

WASTE, P. J. The defendant, a corporation commonly known as the French Hospital

of San Francisco, appeals from a judgment after a verdict in favor of the plaintiff, rendered in an action brought by plaintiff to recover damages for the death of his infant child, caused, it is alleged, by being fatally burned while an inmate and under the care of the defendant. Liability of the defendant is predicated upon the alleged carelessness and negligence of one of the student nurses of the defendant placed in charge of the child by the hospital superintendent. Trial was by a jury, which rendered verdict in plaintiff's favor in the sum of \$5,134.

The little girl, 2½ years old, and her mother, were members of a mutual association, paying certain monthly dues for the privilege of membership, which entitled them to surgical and medical treatment gratis at the French Hospital. During the influenza epidemic in October, 1918, the child was very ill with bronchial pneumonia, probably induced by influenza. She was taken to the hospital by the mother and remained there until her death, which occurred about two weeks later. During the latter part of the period oxygen was administered on two occasions to keep the baby alive, and she was in a cyanotic, or blue, condition. The mother remained with the child, occupying the private room with her in the hospital, until the morning of October 26th, when she returned to her home. Before leaving the hospital the plaintiff and his wife endeavored to secure the services of a trained nurse, but, due to the epidemic, such service was not to be had. Thereupon two student nurses, who were then in training at the hospital, volunteered to take care of the baby during the night, dividing the time between them. As the state law forbade them working more than 8 hours, they went to Miss Murphy, head nurse of the hospital, and asked her permission to take care of the child, stating that it was purely a voluntary act on their part, but as the child was very ill and needed watching, they were willing to take care of the patient during their extra hours. Miss Murphy stated she did not want them to work all day and all night too, and that the rules of the hospital forbade their working overtime, but that under the circumstances it would be all right for them to do so.

One of these nurses took care of the patient until midnight when the other relieved her. The child had great difficulty in breathing, and an awning was constructed over its bed, within which was placed a lighted alcohol inhalator, containing eucalyptus oil, the purpose of which was to diffuse a vapor which would relieve the respiration. About 3:30 a. m. the nurse then in charge left the room where the baby was lying for a few minutes. When she returned she found the bedclothes on fire. She lifted the child from the bed; the fire was extinguished, and a doctor was immediately summoned, who administered first aid.

There is an irreconcilable conflict in the testimony as to the extent and nature of the burns the child received. Doctors and nurses who saw the baby after the fire testified that the burns were, for the most part, slight, first degree burns, limited to the face, one knee, and the arms. The parents of the child and the undertaker who prepared the body for burial testified that the burns were very deep, extending over more than one-third of the body. The child died some 16 hours after the fire. Whether or not her death was due to the effect of the burns, or to bronchial pneumonia induced by influenza, is one of the issues of the case.

[1] It is first contended by the appellant that the act of the nurse in caring for the child on the night of the fire was purely voluntary and an act of mercy, outside of her regular duties and did not come within the scope of her employment by the defendant, and was something which the hospital in no way could have required her to do, and from which it in no way profited. On this ground it disclaims any responsibility in the premises. We think, however, that there was no mere unwarranted assumption by the nurse of a duty not assigned to her, but that she was directly engaged within the scope of her employment in caring for the patient and ward of appellant, and with the authorization on the part of appellant as to amount to an assignment. Consequently, appellant is liable for all actual damage resulting from the nurse's negligence in the course of such employment. *Turner v. N. B. & M. R. R. Co.*, 34 Cal. 594, 599. The facts bring this case squarely within the construction of section 2338 of the Civil Code adopted by the Supreme Court in *Johnson v. Monson* (Sup.) 190 Pac. 635. The refusal of the trial court to instruct the jury contrary to this view was not error.

[2, 3] During the trial defendant offered in evidence a properly certified copy of the death certificate of the child, which the court refused to admit. The exhibit, among other things, contained the required medical certificate of death, signed by Dr. Juilly, resident physician of the hospital, that he attended the deceased, and that the cause of death was "bronchopneumonia, contributory influenza." Appellant contends that the certified copy should have been admitted, because it is by law made prima facie evidence in all courts of facts therein stated. *Stats. 1915, p. 575, Act 4302, Deering's Gen. Laws*. Among other reasons why the certificate should have been admitted, the defendant asserts, is that it tended to discredit the testimony of the witness Godeau, the undertaker who prepared the body of the child for burial. He testified that the burns of the infant were so serious as to expose the ribs, and covered about one-third of the body of the child. The statute provides that the undertaker, as well as the attending phys-

cian, shall sign the certificate, and shall file the same with the local registrar, and it is the contention of appellant that as Dr. Juilly had certified that the death was due to bronchopneumonia, Godeau either testified to an untruth when describing the gravity of the burns, or connived at an attempt by the attending physician to hide the real cause of death. In either case, argues the appellant, his credibility as a witness would have been destroyed. But the undertaker made no statement in the certificate as to the cause of death. He merely certified to the interment and the place of burial. As to him the certificate was properly excluded. Dr. Juilly was a witness at the trial. He testified that the child probably had influenza, and in substance and effect that her death was caused by bronchial pneumonia; that she did not suffer any shock from the burns, but would have died at about the time she did die. The failure to admit the certified copy of the death record in evidence to establish the cause of death, therefore, resulted in no harm to the appellant. At the most the certificate would only have been *prima facie* evidence of the facts therein stated. The best evidence was the testimony of the physician himself, the only inference from which was that the cause of death was as stated in the certificate.

[4] Certain rulings of the court on the admission and exclusion of evidence during the trial are specified as error by appellant. Respondent contended that appellant did not use ordinary care in the selection and use of an inhalator, in which eucalyptus oil was vaporized by means of an alcohol lamp. In support of his contention he called Dr. Margaret Bigby of the Children's Hospital, and Louis C. Levy, superintendent of Mt. Zion Hospital. Over the objection of the appellant, these witnesses were allowed to testify as to the kind of inhalators used at those institutions, neither of which was the kind used by the appellant, and neither of which was in common use in the community. Appellant objected to the introduction of the evidence in the first instance upon the ground that it was incompetent, irrelevant, and immaterial, and did not tend to prove any issue in the case, and upon the further ground that what one particular hospital used or did not use did not tend to prove in any way safety in the use of any other appliance. After further cross-examination of the witnesses, appellant moved to strike out their testimony upon substantially the same grounds. The court denied the motion. We think the action of the trial court in admitting the evidence over the objection of the defendant, and refusing to strike it out, was error. Testimony as to the general custom and practice of well appointed and managed hospitals in the matter of the use of inhalators, would have been competent on the question of care and diligence exercised in the premises by the

appellant. 6 Thompson on Negligence, § 7882; Burns v. Sennett & Miller, 99 Cal. 363, 373, 33 Pac. 916; Hennessey v. Bingham, 125 Cal. 627, 58 Pac. 200; Pederson v. Spreckles, 87 Fed. 938, 944, 31 C. C. A. 308. But such evidence, to be competent, must amount to something going to establish the general custom and practice in the business under investigation. Standard Oil Co. v. Swan, 89 Tenn. 434, 15 S. W. 1068, 10 L. R. A. 366; 29 Am. & Eng. Ency. of Law, 419. Consequently the evidence in this case did not satisfy the rule. Neither of the witnesses testified as to the general practice, usage, or custom of hospitals in San Francisco or elsewhere, but only as to the conduct of the particular institution with which she and he were connected. Their evidence should have been excluded. Barnes v. Zettlemoyer, 25 Tex. Civ. App. 468, 62 S. W. 111, 112; Blanchette v. Holyoke St. Ry., 175 Mass. 51, 54, 55 N. E. 481.

[5] While the witness Dr. Juilly was testifying on direct examination he stated that a conversation took place at his office shortly before the trial at which the plaintiff, another person, and the doctor were the only persons present. Counsel for appellant asked the witness to state the conversation. The question was objected to by respondent's counsel, and the court asked the purpose of the question, whereupon counsel for appellant offered to show by the witness that an attempt was made during the conversation to have Dr. Juilly testify that in his opinion the burns caused the death of plaintiff's daughter, and that Dr. Juilly said he did not "intend to commit perjury for anybody." The court sustained the objection, and refused to permit appellant to make its further offer of proof along the same lines. Whether the alleged attempt on the part of plaintiff to procure Dr. Juilly to testify favorably in plaintiff's behalf took the form of threat, bribery, or solicitation does not appear, but we think the trial court should have at least permitted the further offer of proof, for evidence of a party's falsehood or fraud in the preparation and presentation of his case is receivable against him. People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; Luhrs v. Kelly, 67 Cal. 289, 7 Pac. 696; People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833.

[6] Appellant sought to elicit from the nurses at the hospital, who were familiar with the condition of Emma Longuy during the time she was in the hospital, whether or not in their opinion the child would have died from disease at or about the time she did die if she had not been burned. The court sustained the plaintiff's objection to the testimony. Two of these witnesses were graduate nurses, with long and varied experience. The other two were student nurses at the hospital. We think the court was in error in rejecting this testimony. There can be no doubt that one who is shown to be a graduate nurse, and to have been constantly

engaged in the calling of a professional nurse for years, may properly be called upon as an expert to give evidence of the character of that sought to be elicited by appellant. *Kimic v. San Jose Ry.*, 156 Cal. 379, 391, 104 Pac. 986; *Barsi v. Simpson*, 31 Cal. App. 612, 614, 161 Pac. 127. The fact that two of the witnesses had not yet graduated would be a matter for the jury to consider in determining what weight should be given to their testimony. One of the vitally important issues in the case was whether the little girl died as a result of the burns, or from bronchial pneumonia, from which she was suffering. Evidence introduced on behalf of the plaintiff strongly tended to support the former theory, while the theory of the defense was that the child died as the result of the disease. In this view of the case the testimony sought to be elicited from the professional nurses who were familiar with the baby's condition became very material, and should have been admitted.

[7] Appellant requested the court to charge the jury that it is the law in this state that no female student nurse shall be employed in any hospital more than 8 hours during any day, and that the purpose of this law is for the protection of such female employee. We are unable to follow appellant in its argument, as to its competency and relevancy, and we think the instruction was properly refused.

[8] As the case must be reversed for the errors pointed out, it becomes unnecessary for us to consider the contention of the appellant that the verdict in this case was excessive.

Judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(52 Cal. App. 405)

IN RE ISER'S ESTATE.

BAKER et al. v. KELLER.

(Civ. 2202.)

(District Court of Appeal, Third District, California. April 30, 1921. Rehearing Denied May 28, 1921. Hearing Denied by Supreme Court June 27, 1921.)

1. Executors and administrators \Leftrightarrow 510(10)—Allowance of attorney's fees not error unless so disproportionate to value of services as to constitute abuse of discretion.

To constitute reversible error, an allowance of attorney's fees for services for an executor must be on its face so far out of proportion to the value thereof as to constitute a manifest abuse of judicial discretion.

2. Executors and administrators \Leftrightarrow 506(3)—Court not bound by opinions of professional witnesses as to value of attorney's services.

The court, in exercising its discretion in allowing attorney's fees for services in behalf

of a decedent's estate, is not bound by the opinions of professional witnesses.

3. Executors and administrators \Leftrightarrow 506(3)—Evidence held insufficient to show fee fixed by court inadequate.

On appeal from an order allowing attorneys for an executor insufficient fees, evidence held insufficient to show the compensation awarded so grossly inadequate as to indicate the court transcended its legal discretion, in the absence of a showing that the court was prejudiced; the divergence of views between the attorney's expert witnesses and the court affording no proof of bias.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

In the matter of the estate of Conrad Iser, deceased. Proceeding by C. W. Baker and another against Adam Keller, executor, for allowance of attorney's fees for extraordinary services for John Gerber, co-executor. From an order allowing a fee, plaintiffs appeals. Affirmed.

C. W. Baker and R. Platnauer, both of Sacramento, for appellants.

White, Miller, Needham & Harber and C. E. McLaughlin, all of Sacramento, for respondent.

HART, J. This is an appeal by C. W. Baker and Platnauer, attorneys for John Gerber, as one of the executors of the last will of Conrad Iser, deceased, from an order allowing said attorneys a fee "for extraordinary services" professionally rendered by them for said Gerber, as such executor.

It appears that Adam Keller, coexecutor with said Gerber of the last will of said Iser, deceased, brought an action in the superior court in and for the county of Sacramento, against said Gerber, as such executor, upon two claims against the estate of said deceased aggregating the sum of \$10,380, of which the sum of \$10,140 was for services for nursing the deceased during the last few years of his life, he being aged and an invalid during said years, and the sum of \$240 was for "looking after and attending to the business and financial affairs of the decedent." The appellants were employed by Gerber to represent him, as the executor of the will of the deceased, in said action.

The trial of the action resulted in a judgment in favor of Keller in the sum of \$5,070, or \$5,310 less than the amount for which he sued. A motion for a new trial was in due time made and the same was denied. An appeal from the judgment was prosecuted by appellants on behalf of said Gerber, as such executor, through the appellate and Supreme Courts, and the judgment was affirmed.

One of the appellants testified before the court in this proceeding respecting the amount of labor performed by them in the

defense of the action and in prosecuting the appeal to a finality through the appellate and Supreme Courts. Thus it was made to appear that, prior to the trial of said action, many important and "intricate" legal questions were raised by them preliminarily to the actual trial, that the preparation necessary to a proper presentation of said questions required much time and labor, that said legal questions having been decided by the court against their position, many persons were thereafter interviewed with a view to their introduction as witnesses at the trial on behalf of defendant, that the trial of the action consumed four days, that they (appellants) succeeded in securing a judgment therein reducing the amount sued for to approximately one-half thereof, and that an appeal, with the necessary incidental labor thereof, was taken and prosecuted by appellants, with the result as above stated. The record of the action on appeal was also received in evidence.

In addition to the above testimony, two attorneys, members of the Sacramento bar, and of high personal and professional character, were called by the appellants as witnesses, and testified that, having heard the statement before the court of one of the appellants, setting forth in detail the amount of labor which had been performed by them in the case, in their opinion the value of the services rendered by appellants in said action was from \$1,250 to \$1,500. There was no other testimony than this as to the value of the services of appellants offered or received before the court in this proceeding.

[1] The question which we are required to determine upon this appeal upon the record as made herein, and of which the above is in substance a recapitulation, is whether, in making the order from which this appeal is prosecuted, the court below abused its discretion. In other words, to justify us in holding that the court below erred to the prejudice of appellants in its allowance of attorneys' fees for professional services rendered by appellants in the action referred to, we must be prepared to say that such allowance is, upon its face, so far out of proportion to the value of the services rendered as to constitute the making of the order of allowance a clear or manifest abuse of judicial discretion. After a painstaking consideration of the question thus propounded, we have not been able to satisfy ourselves that it can justly be held that the order complained of involved an abuse of the discretion with which trial courts are invested in disposing of such matters as the one now before us. If the application for the allowance of attorneys' fees had been directly made before and the evidence directly heard by us, we might have ordered the payment of a fee in excess of that allowed. But we are here reviewing an order in the making of which,

as is declared by the Supreme Court in *Freese v. Pennie*, 110 Cal. 467, 42 Pac. 978, the trial court is clothed with a "large discretion," which is always regulated or controlled by a showing directly made before the court to which it is committed.

[2] It has repeatedly been held that the trial court, in exercising its discretion in the matter of the allowance of attorneys' fees for professional services rendered in behalf of estates of deceased persons, is not bound by the opinions of professional witnesses as to the value of such services. In *Estate of Dorland*, 63 Cal. 281, the court said:

"The [trial] court was authorized to compare its own judgment as to such value with the opinions of witnesses and make such allowance as should be just."

In *Spenser v. Collins*, 156 Cal. 298, 306, 307, 104 Pac. 320, 323, 20 Ann. Cas. 49, the court said:

"The position of the appellants is, apparently, that before a court can find the value of professional services it must have before it the testimony of experts to the effect that certain services are of a certain value. But this is not the law. The testimony of experts is, of course, admissible to prove the value of attorneys' services. *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408; *Louisville v. Wallace*, 136 Ill. 87, 26 N. E. 493. But the opinions of the experts in such cases are not binding upon the jury, who may apply to the testimony 'their own experience and knowledge' * * * of such services.' *Head v. Hargrave*, 105 U. S. 45; *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408; *Estate of Dorland*, 63 Cal. 281; *Schlesinger v. Dunne*, 38 Misc. 529, 73 N. Y. Supp. 1014. * * * If the jury may form a judgment as to the value of services in opposition to the opinions of experts, it necessarily follows that the testimony of experts is not essential. And so it has been held in cases tried before a jury (*Bourke v. Whiting*, 19 Colo. 1, 34 Pac. 172; *Gibbons v. Missouri Pac. R. R. Co.*, 40 Mo. App. 146), as well as with respect to issues determined by a court or referee (*Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670; *Dempsey v. Schawacker*, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100). If this doctrine is applicable to jury trials, there is much more reason for applying the doctrine in cases tried before a court. The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value."

In *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028 (erroneously cited in respondent's brief as in the 150 U. S. 45), was an action to recover the sum of \$2,000, alleged to be due the plaintiffs from defendants for professional services as attorneys. The action was tried by jury, who gave plaintiffs a verdict for \$1,800. There were several attorneys who testified at the trial and gave their opinions

as to the value of the services rendered by plaintiffs for defendants. The opinions of these witnesses upon the question of the value of the services were widely divergent, the highest estimate being \$5,440 and the lowest \$1,000. The trial court in effect instructed the jury that, in determining the question before them their judgment was to be controlled by the opinions of the attorneys testifying upon the question of the value of the services rendered by plaintiffs, thus foreclosing the right of the jury to exercise their own "knowledge or ideas" upon the value of such services. Upon appeal, the case was reversed because of the giving of said instruction, the higher court declaring that, while the jury in such a case, as in all cases, should be confined, in determining such an issue, to a consideration alone of the evidence adduced before them, at the same time they were not to be precluded from exercising their own judgment of the facts upon which the opinions of the experts were founded. In other words, it was therein, in effect, held that, while such expert testimony is admissible in the trial of such an issue, it was within the legal province of the jury to set up and act upon their own judgment, even in opposition to the opinions of the experts, upon the question of what the evidence showed would be the reasonable value of the services rendered.

The rule stated in the authorities referred to above has been so frequently applied in the cases and so definitely settled that further citation is unnecessary. Many of the cases are named in the briefs, both of the respondent and the appellants.

In the instant case, as we have seen, the facts relative to the nature and the extent of the services rendered by the appellants for the estate of the deceased, Iser, were given in detail before the court, and the latter, equally with the attorneys who gave their opinions as to the value of the services performed by appellants, had available to it an opportunity to consider and weigh those facts by means of the usual tests whereby the weight of testimony can alone well be determined and so form its own judgment upon the question of the value of such services as so shown. The court had the right, as the authorities conclusively establish, to form a judgment regarding the matter at variance with the opinions of the expert witnesses. Indeed, it was within its province to reject entirely the opinions of the experts as a determining factor of the issue before it, not arbitrarily, of course, but in the exercise of the ample discretion with which it is invested in disposing of such

questions. And here it is proper to observe that it is not to be assumed that the court, in fixing the value of appellants' services at a figure below those which the said attorneys were of the opinion were reasonable for the amount and the character of the services performed, intended to cast any reflection upon the integrity or question the good faith of the attorneys in the expression of their judgments as to such value. We assume, rather, that the court merely concluded, after due reflection upon the evidence addressed to the question of the nature and extent of the services performed, that the opinions of the lawyers were based upon a misconceived notion of the value of the services shown to have been rendered. In fact, with the knowledge which we know the trial judge must possess of the recognized enviable professional attainments and the known high personal character of said attorneys, we cannot and will not permit ourselves for a moment to encourage the belief that the judgment of the court below upon the value of the services was intended to carry with it the slightest imputation against the sincerity and honesty of the opinions ventured in this proceeding by the gentleman in question.

[3] As before stated, however, it is plain to our minds that, while this court has just reason to express the highest regard for the learning and the untiring industry of the appellants, and each of them, and are not ourselves prepared to say whether they were or were not actually paid enough for their labor, we cannot justly declare, upon the record before us, that the compensation awarded is so grossly inadequate, when compared to the services performed, as shown to and understood by the court below, as to justify us in holding that, in fixing the same, said court transcended the bounds of a sound or reasonable legal discretion in the matter. There is no showing, nor was there any attempt to show, that the court or the judge thereof, in arriving at the conclusion as to the value of said services, was influenced or motivated by bias or prejudice against the appellants; nor, it is clear from what has been said above, are we justified in declaring that the wide divergence of views as to the value of appellants' services between the experts and the court, as the views of the latter are evidenced by its finding of value, affords proof of such bias or prejudice.

We conceive it to be our duty to affirm the order, and it is so ordered.

We concur: BURNETT, J.; PREWETT,
Presiding Justice pro tem.

(52 Cal. App. 396)

WILLIAMS v. COSTA et al. (Civ. 2225.)

(District Court of Appeal, Third District, California. April 30, 1921.)

1. Waters and water courses ⇐130—No valid appropriation of water where land was not public land for purposes of entry for appropriation and diversion.

Title to certain riparian lands having passed from the government to defendants in 1875, there could be no valid appropriation by plaintiff in 1879; the land embracing the place of her diversion of the waters and for a considerable distance down the course of the ditch not being public land on which one might enter to make an appropriation and diversion of the water.

2. Waters and water courses ⇐130—Lower riparian owner may not acquire prescriptive rights against upper.

While the right to take water from a stream as against riparian owners may be acquired by prescription, no such right may be acquired either by prescription or by appropriation by a lower as against an upper riparian owner in the same stream.

3. Waters and water courses ⇐40—All riparian owners equally entitled.

The general rule is that all riparian owners are equally entitled to a reasonable use of the waters flowing along or through their lands.

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by Catherine J. Williams against Manuel Costa and others. From judgment for plaintiff, defendants appeal. Reversed.

Nilon & Nilon, of Nevada City (A. E. Cheney, of Reno, Nev., of counsel), for appellants.

Jerome L. Van Derwerker, of Reno, Nev., and W. I. Redding, of Downleville, for respondent.

BURNETT, J. This is an action to determine conflicting claims to the waters of Purdy creek, sometimes known as Long Valley creek, in Sierra county, Cal. Plaintiff also claims damages on account of defendants' alleged wrongful diversion of these waters. The trial court made its findings and rendered its decree giving to plaintiff the right to the use of two-fifths, and to defendant Catherine L. Lemmon three-fifths, of the waters of said creek, enjoining all the defendants from interfering with the right of plaintiff to the use of said two-fifths of said waters, awarding plaintiff damages against defendant Costa for \$1,654, and allowing plaintiff her costs and disbursements taxed at \$377.05 against all of the defendants. The appeal comes to this court upon the judgment roll and a bill of exceptions.

The facts relative to this litigation as found by the court are as follows:

"That the plaintiff now is and for more than 42 years last past she and her grantors and predecessors in interest have been the owners of all that certain ranch situated in Long Valley, county of Sierra, state of Cal., and more particularly described as follows: The W. ½ of N. E. ¼ of section 13; all that portion of the N. W. ¼ of the S. E. ¼ of said section 13, which lies north of the division fence between the Williams and Purdy ranches, and all that portion of the N. E. ¼ of the S. W. ¼ of said section 13, which lies north of the division fence between said Williams and Purdy ranches, in township 21 north of range 17 east, M. D. B. & M., and known as the Williams ranch; that Purdy creek is a natural water course with well-defined bed and banks, having its source on the western slope of the Sierra Nevada Mountains, in Ball's Canyon, in the county of Sierra, state of California, and flowing through said Ball's Canyon, to, upon and across the lands of plaintiff and the said defendant, Cathrine L. Lemmon; that during the winter and spring months a large and irregular amount of water flows down said stream; that the period of high water in said creek usually ends about the first of May when the quantity of water flowing in said stream greatly diminishes, and that the lowest stages are usually in August and September; that the said W. ½ of N. E. ¼ and all that portion of the N. W. ¼ of the S. E. ¼ which lies north of the division fence between the Williams and Purdy ranches, of section 13, in township 21 north of range 17 east, M. D. B. & M., aggregating not to exceed 100 acres, border on the said Purdy creek and are riparian thereto, and are the only lands in said Williams ranch riparian thereto; that plaintiff now is and continuously for more than 30 years last past she and her grantors and predecessors in interest have been entitled to the beneficial use of two-fifths of the waters of said Purdy creek for the irrigation of the said lands comprising said Williams ranch and for domestic, culinary and household purposes and watering live stock thereon; that continuously during all of said time, except since on or about the 8th day of July, 1916, the plaintiff and her grantors and predecessors in interest have used said two-fifths of the waters of said Purdy creek for said beneficial uses at and upon said Williams ranch, and in the irrigation of 88 acres of the said lands; that said two-fifths of the waters of said Purdy creek were appropriated by the grantors and predecessors in interest of plaintiff, by diverting the same from said Purdy creek by means of a certain ditch known as the Williams Ditch and having its head dam on said Purdy creek in the S. E. ¼ of the S. W. ¼ of section 13, township 21 north, range 17 east, M. D. B. & M., and conveying said waters to and upon said Williams ranch through said ditch and two other ditches known as the Williams East Ditch and the Williams West Ditch; that all of the waters of said Purdy creek are not necessary for the irrigation of the lands comprising said Williams ranch and for domestic, culinary and household purposes and watering live stock thereon; that two-fifths of the waters of said stream, but no greater amount, are necessary for said purpose.

"That on or about the 8th day of July, 1916, said defendant, Manuel Costa, diverted all of the waters of said Purdy creek, to the extent of the capacity of the flume crossing said creek, during the irrigating season, against the will and without the consent of the plaintiff, and continues so to divert the same during the whole of the irrigating seasons of the years 1917 and 1918, except about four miner's inches thereof, which he allowed to flow, during a portion of said time, into said Williams Ditch; and that during much of said time there was more than 50 miner's inches of water flowing in said Purdy creek; that neither of said defendants, A. Jensen, Russell Jensen nor Catherine L. Lemmon, counseled, aided, abetted, ordered or directed said defendant, Manuel Costa, to so divert the waters of said stream; that the lands comprising said Williams ranch are fertile and have been rendered very productive by plaintiff and her grantors and predecessors in interest, by irrigating the same with the waters of said Purdy creek by means of said ditches and the overflow, seepage and percolation of the waters of said creek; and that continuously for more than 30 years last past and until the year 1917, plaintiff and her grantors and predecessors in interest raised large crops of hay thereon; that the damage to plaintiff's hay crop in the year 1917 was the sum of \$450 caused by the said diversion of the said waters of Purdy creek by said defendant, Manuel Costa; that the damage to plaintiff's hay crop in the year 1918 was the sum of \$1,204 caused by the said diversion of the said waters of Purdy creek by said defendant, Manuel Costa; that there was no damage to plaintiff's hay crop in the year 1916, and she was not damaged by being deprived of water for domestic purposes, or for watering her garden, or fruit trees, or by being required to purchase feed for her stock, or in feeding or caring for the same, or by being required to procure pasturage therefor, or for injury or damage for inconvenience or loss or expense caused by said diversion of said waters of said Purdy creek by said defendant, Manuel Costa; that the defendant Catherine L. Lemmon is the owner of the legal title of the lands and premises described in defendants' cross-complaint, filed in this action on the 10th day of August, 1918, except those portions of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 13, township 21 north, range 17 east, M. D. B. & M., above expressly found to be owned by the plaintiff; that all of said lands are not upon or along the banks of said Purdy creek and are not riparian thereto; that the only portion of said lands which border on said Purdy creek and are riparian thereto are the following, viz.: The N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 24, and the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$; S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and all that portion of the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 13 which lies south of the division fence between the Williams and Purdy ranches, aggregating not to exceed 145 acres riparian to said stream.

"That said defendant, Catherine L. Lemmon, is the owner of the right to the use of three-fifths of the waters of said Purdy creek, and of the right to divert the same from said stream to and upon the lands owned by her and described in the cross-complaint of defendants filed herein on the 10th day of August,

1918; that the defendants, or each of them, are not and they, or their grantors or predecessors in interest, or each or any of them, have not been for more than 10 years last past, or for many years last past, or since December, 1862, the owners of the prior right during the irrigation season of each year, or from April 1st to November 1st, of each year, entitled to the use of 200 miners inches, or to the equivalent of 200 miners inches measured under a 4-inch pressure, or any other quantity, except as hereinafter stated, of the waters of said Purdy creek for the irrigation of their said lands or for stock or domestic purposes, and did not divert from said stream, or use for the irrigation of said lands, or the crops growing thereon, or for stock or domestic purposes, or under a claim of the exclusive right so to do, or openly, notoriously, continuously, or uninterruptedly, or adverse or hostile to everybody, or especially to all claims or rights of the plaintiff, said miners inches of the waters of said Purdy creek, except when three-fifths of the waters of said stream equalled said 200 miners inches; and that 200 miners inches of the waters of said stream were not necessary for the proper irrigation of said lands and the crops growing thereon and for stock and domestic purposes.

"That all of said lands of plaintiff and defendant, Catherine L. Lemmon, require irrigation in order to produce crops thereon; that the defendants and their grantors and predecessors in interest have paid all taxes, state, county and municipal, which have been assessed upon the lands and the water rights appurtenant thereto and described in their said cross-complaint; that the irrigation of the lands comprising said Williams ranch by the plaintiff and her grantors and predecessors in interest was not subsequent to the irrigation of the lands of the defendants by the grantors and predecessors in interest of the defendants, and any use made of the waters of Purdy creek by the plaintiff, or by her grantors or predecessors in interest, was and is not subject to the appropriation and use of the waters of said stream by the grantors or predecessors in interest of the defendants, or each or any of them, and is not inferior to the right of the defendants, or each or any of them, to divert or use the same upon their lands for irrigation, or for stock or domestic purposes; that as to the defendants John Doe, Jane Doe, Richard Roe and Sarah Roe, said action should be dismissed.

"As conclusions of law from the foregoing facts, the court finds: That the plaintiff is the owner of the right to the use of two-fifths of the waters of said Purdy creek, and of the right to divert the same from said stream at the head of the Williams Ditch thereon, in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 13, township 21 north, range 17 east, M. D. B. & M., and to convey the same to and upon said Williams ranch through said Williams Ditch and said two other ditches known as the Williams East Ditch and the Williams West Ditch, and that she is entitled to have said amount of said water flow down said stream to the head of said Williams Ditch; that said defendant, Catherine L. Lemmon, is the owner of the right to the use of three-fifths of the waters of said Purdy creek, and of the right to divert the same from said stream to and upon the lands

owned by her and described in the cross-complaint of defendants filed herein on the 10th day of August, 1918; that the plaintiff is entitled to a judgment for damages against said defendant, Manuel Costa, in the sum of \$1,654; that the plaintiff is entitled to an injunction against said defendants and each and all of them, their agents, servants and employees, restraining and enjoining said defendants and each and all of them, their agents, servants and employees, from in any manner interfering with the right of the plaintiff to the use of two-fifths of the waters of said Purdy creek, and from diverting from said creek more than three-fifths of the waters thereof, or from in any manner preventing two-fifths of the waters of said stream from flowing down said creek to the head of said Williams Ditch; that plaintiff have and recover from said defendants her costs and disbursements herein."

Various objections to the judgment are made by appellants, and many interesting questions relating to water rights are discussed in their briefs; but only a few of them require specific notice.

[1] It is to be observed that in the complaint reliance is had upon appropriation and also the status of a riparian owner. These appeared in separate counts, but there was no finding that plaintiff was entitled to the use of the water by reason of the location of her land upon the natural water course, but the judgment is based entirely upon appropriation by means of the Williams Ditch. This excludes the idea that respondent had any other appropriation. This ditch was constructed in 1879; therefore the finding is equivalent to a determination that plaintiff's right had its origin in an appropriation made in 1879. It is true that the complaint alleged that an appropriation was made 55 years before the action was begun, that is, in 1861; but the trial court rejected this theory and fixed the time of the appropriation and localized it as before stated. However, the evidence is clear that prior to 1879 the government's title to appellants' lands had become vested in their predecessors in interest who were beneficially using practically all the water of Purdy creek both as appropriators and riparian proprietors. This use began in 1862 and continued through subsequent years. Indeed, in 1875, Solomon Purdy, a predecessor in interest of appellants, posted and recorded a notice of appropriation of 200 inches of the waters of Purdy creek, measured under a 4-inch pressure, and publicly declared his uninterrupted possession and use of the waters for 12 years previously. This was followed by the construction of a ditch and flume, or measuring box, having a capacity of 200 inches, and an actual diversion and use of the water for beneficial purposes. The regularity of said appropriation and said beneficial use are both undisputed, and hence we pursue this branch of the inquiry no further. It would necessarily follow that respondent by her appropriation in 1879 could gain no water

right prior in time or superior in rank to the rights already vested in appellants. But the court's finding in effect is that respondent's said attempted appropriation must supersede and nullify the vested interest of appellants, there being no claim that anything like 200 inches will be left for them if respondent is awarded two-fifths of the flow.

In answer to this view respondent says:

"If respondent had made her original appropriation of the waters of Purdy creek through the so-called west ditch, which it is admitted was not constructed until 1879, there might be some merit in appellant's claim; but we have seen that Mrs. Williams and her husband, Enyart, made their original appropriation in 1861, and that respondent continued to use the waters of said stream, in the irrigation of the Williams ranch, to the time of the commencement of this action, except when prevented by the appellants."

It may be admitted that there is some evidence to support said claim of respondent, but we are dealing with the findings of the court, which are based upon the theory that respondent's right originated in 1879. If it may be claimed that some general language is used in said findings pointing to the position that respondent's title may be supported by some earlier proceeding, the answer is that it is too vague and indefinite to support the judgment and, besides, it is limited and controlled by the particular determination to which we have referred.

Moreover, there could be no valid appropriation by respondent in 1879. The land embracing the place of diversion and for a considerable distance down the course of the ditch was not public land upon which one might enter to make an appropriation and diversion of the water, the title having passed from the government to appellants, as we have seen, in 1875. In section 221 of *Well on Water Rights* (3d Ed.), it is said:

"Despite any difference under the Colorado and California doctrines as to rights in water, both agree to-day that an appropriator must have lawful access to the stream before he can exercise water rights. * * * An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the landowners whose land is trespassed upon, in any jurisdiction."

And in section 222 it is declared:

"The general principle was early established in California that the law of possessory rights (that is the law of appropriation) applied only to vacant, unoccupied public domain, and must infringe nothing to which private rights had already attached at the time of the appropriation."

[2] Again respondent is a lower riparian owner (at least as to a part of the water claimed), and as said by this court in *Pyramid Land & Stock Co. (a corporation) v. Scott*, 197 Pac. 393:

"It is settled law in California that, while the right to take water from a stream, as against riparian owners, may be acquired by prescription (Gallaher v. Montecito Valley Water Company, 101 Cal. 245, 35 Pac. 770; Bothgate v. Irvine, 128 Cal. 144, 58 Pac. 442, 77 Am. St. Rep. 158; Arroyo D. and W. Co. v. Baldwin, 155 Cal. 280, 285, 100 Pac. 874), no such right may be acquired either by prescription or by appropriation by a lower as against an upper riparian owner in the same stream."

From an examination of the whole record, we do not conclude that respondent is entitled to no use of any of the water that flows in said Purdy creek, but we are satisfied that the particular findings and judgment herein cannot be upheld. It is admitted, indeed, by appellants, that respondent has at least a co-ordinate right to four inches of water which has flowed to the Williams premises for household and domestic purposes and the watering of live stock, but it is claimed that her right to the use of the water for other purposes is subordinate to that of appellants.

[3] The determination of this question may properly be left to another trial, but we deem the suggestion not inappropriate that whatever rights plaintiff may have to the use of the water would seem to be measured and controlled by the law applicable to lower and upper riparian owners. Stated generally, the rule is that—

"All the riparian owners are equally entitled to a reasonable use of the waters flowing along or through their lands."

In Well's work, *supra*, in section 739, it is said:

"The water in the stream belongs to no one—it is not, and cannot be, while flowing in its natural course, the subject of ownership by any one. But each riparian owner has a right to the use of his own land, and since all riparian proprietors, by their natural situation in contact with the stream, have an equal right of access to the water they have an equal right of use for their own lands, which no one of them may unreasonably violate. * * * The rights of the riparian proprietors are correlative as contrasted with the exclusive right obtained by appropriation."

The subject, however, has been so often discussed by the courts of this state that further consideration herein would be futile.

It may be remarked, though, that considered as a practical question it must be manifest that the right of the lower riparian owner is somewhat subordinate to that of the upper, since the latter's use of the water may so diminish the flow of the stream as to prevent the former from receiving a supply commensurate with his wants.

But, as before suggested, the principles that govern riparian rights have been so thoroughly settled in this state that the par-

ties to the action will be fully advised as to what facts they must present if a new trial is had upon this theory.

We think the judgment must be reversed, and it is so ordered.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

(52 Cal. App. 438)

BOARDMAN v. CRITTENDEN. (Civ. 3714.)

(District Court of Appeal, First District, Division 2, California. May 2, 1921.)

1. Attorney and client §123(2)—Experienced client could deal with attorney without receiving other legal advice.

Where an attorney's client was an experienced business man, accustomed to drawing contracts and attending to many details of his business commonly intrusted only to attorneys, it was not an indispensable necessity to a contract between such client and his attorney, whereby the client transferred securities in settlement of the attorney's claim for fraud upon him in inducing an investment, that the client receive advice from another attorney.

2. Attorney and client §123(1)—Principles relative to dealings between attorney and client do not apply, where attorney assumes hostile attitude of pressing creditor.

Though it is true that in a transaction between attorney and client the burden is on the attorney to prove the transaction was fair, and that he made a reasonable use of the confidence reposed in him and gave honest advice to his client concerning himself, such principles are applicable only to cases in which the client was dealing with the attorney under the influence of the confidence which he had reposed in him, and do not apply to a case where the attorney assumes openly the hostile attitude of an urgent and pressing creditor, and where the parties are held at arm's length.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Wilbur F. Boardman against William C. Crittenden. From a judgment for defendant, plaintiff appeals. Affirmed.

Fitzgerald, Abbott & Beardsley of Oakland, and Chickering & Gregory, of San Francisco, for appellant.

Stanley Moore and Wm. A. Nunlist, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action in which he sought to rescind a certain agreement entered into between him and the defendant, and to have restored to him certain instruments, and to have other instruments canceled. Said instruments were delivered by plaintiff to defendant in pursuance of the terms of said agreement here-

in sought to be rescinded. The ground relied upon for rescission of said contract is that the defendant induced the plaintiff to make the agreement in question by means of duress, menace, fraud, and undue influence. The case was tried without a jury, and the findings and judgment were in favor of defendant.

Briefly, the facts show that the plaintiff and defendant had known each other since about 1908. Plaintiff was a business man, engaged in numerous enterprises, among which was the promotion and building of gas plants on the Pacific coast. Defendant was an attorney at law, and some 20 years younger than plaintiff. During the first few years of the acquaintance, defendant was engaged to attend to a few business matters for the plaintiff, but none of these seem to have been of much importance. Mr. Boardman, the plaintiff, had many diversified business interests, and they were conducted by corporations in which the W. F. Boardman Company held large amounts of stock. Mr. Boardman was the principal stockholder in the W. F. Boardman Company. In 1911 the Boardman Company owned all the stock in the Rogue River Valley Gas Company, a corporation. The principal asset of this last-mentioned company was a gas plant near Medford, Or., which plant had originally been constructed by the Boardman Company. In March, 1911, Mr. Boardman proposed to Mr. Crittenden, the defendant, that a new corporation be organized, and that all of the stock and bonds of the Rogue River Company be transferred to the newly organized company, which was to be known as the Oregon Gas & Electric Company. Payment was to be made to the Boardman Company in stock and bonds of the new company, and in the transaction the value to be given to the Boardman Company in exchange for its holdings in the Rogue River Company was agreed to be \$175,000. At the time Mr. Boardman submitted this proposition, he made certain statements to Mr. Crittenden regarding the character of the gas plant, its manner of construction, its actual cost, operating facilities, and future earning power. The particular representation out of which the real controversy arose was that the plant had been constructed by the Boardman Company at an actual cost of \$126,000, without any commissions, discounts, or engineering fees of any kind, and that all the materials used in the construction of said plant had been estimated at actual cost to the Boardman Company, which was in a position to secure such materials at a lower figure than contractors generally.

According to the findings, Mr. Boardman stated that, because no engineering fees or commissions or expenses of supervision, etc., had been included in the estimated cost of the plant, the Boardman Company should

receive a \$50,000 profit on the construction of the plant, and its selling price to the new company should be fixed, therefore, at \$175,000. It was also represented to Mr. Crittenden that it was necessary to procure a certain amount of capital for operating expenses and future extensions of the plant, and it was suggested that Mr. Crittenden invest in the securities of the new company. The new company was organized, Mr. Crittenden attending to the legal details, and thereafter, in reliance upon Mr. Boardman's representations as to the construction cost of the plant, Mr. Crittenden invested about \$50,000 in the bonds of the Oregon Gas & Electric Company. These bonds, of the par value of \$1,000, were sold at \$900, and there was a certain amount of stock given as a bonus with the bonds. Later, by reason of assessments levied upon the stock, Mr. Crittenden's investment was increased until it was something over \$67,000.

From the time of the formation of the Oregon Gas & Electric Company, in 1911, until the execution of the contract out of which this action arose (January 16, 1916), Mr. Crittenden was the secretary of the said company and was its attorney. He was also the attorney, in various matters, for other corporations in which either Mr. Boardman or the Boardman Company held controlling interests, and in some matters, during that period of time, he represented Mr. Boardman personally. The testimony and the correspondence between the parties show that a close business and social relation came to exist between them. Mr. Crittenden testified that it was not until some time in December, 1915, that he came to understand fully that Mr. Boardman had misrepresented to him the cost of the gas plant, which, at the trial of this action, he claimed was something between \$67,000 and \$80,000. At the time he realized that misrepresentations had been made to him, he was representing the Boardman Company as its attorney in certain litigation then pending in the Supreme Court of this state, entitled Boardman v. Petch, and in that case the question of the actual cost of his gas plant was one of the subjects of inquiry. It appears that it was through his examination of the documents and files in this case against Petch, and through his conversations with the defendant Petch, that he became aware of the alleged misrepresentations. Upon this discovery, he determined to bring an action against Mr. Boardman for damages sustained by reason of the false representations, and also to bring suits for accounting and for other relief the details of which are immaterial here.

On Saturday, January 15, 1916, Mr. Crittenden telephoned Mr. Boardman, who was then in Los Angeles. He told Mr. Board-

man that he desired to discuss some business matter with him and that he would come to Los Angeles for that purpose. Mr. Boardman stated that he was leaving that night for his home in Berkeley, and it was agreed that a meeting should be had on Sunday morning, at Mr. Boardman's office in San Francisco. Mr. Boardman went to his office to keep the appointment, but, upon discovering that he had forgotten his keys, telephoned to Mr. Crittenden and arranged to come to Crittenden's office. Upon his arrival there Crittenden immediately, according to the testimony of both parties, stated in effect, that all business and social relations between them were at an end; that he (Crittenden) was through with Boardman, and intended to act only for himself and protect himself; that he would deal with Mr. Boardman, not as his attorney, but as a coinvestor in Oregon Gas & Electric Company. The negotiations between the parties continued all day and late into the evening, and were finally consummated upon the following morning by the execution of the contract and delivery of the instruments now sought to be avoided.

There is a sharp conflict in the testimony as to the details of the interview and negotiations culminating in the contract. Mr. Crittenden and his associate, Mr. Nunlist, who was later called into the conference, and other witnesses testified in a manner which amply supports the findings. It is true the testimony of Mr. Boardman and his business associate, Mr. Eckert, who was also called into the negotiations, as well as that of other witnesses produced by the plaintiff, contradict the testimony of defendant's witnesses; but this conflict in the testimony makes it necessary for us to accept the findings upon all disputed matters. Therefore, although we have carefully read the voluminous record, the findings are set forth herein as a statement of the disputed facts. It was found:

"That there was no relationship of attorney and client existing between the plaintiff and the defendant upon January 16 or January 17, 1916 (the dates when the agreement was negotiated and concluded), with respect to the Oregon Gas & Electric Company, or the stock and bonds held by either the plaintiff or the defendant therein; that the relationship existing between the plaintiff and the defendant on said dates with respect to the Oregon Gas & Electric Company was that of coinvestors only; that the defendant had acted as the attorney for the plaintiff and the W. F. Boardman Company in some specific matters during the time of their acquaintance, and on said January 16 and January 17, 1916, all of said matters had not been finally terminated and closed, but that the services therein had been substantially rendered some time previous thereto, and that at no time was the defendant the general attorney for the plaintiff, except during a portion of the year 1914, nor authorized to represent the plaintiff, excepting with respect to matters forming the specific subject of his

employments; that at no time was the defendant employed as an attorney at law by the plaintiff to represent the plaintiff with respect to his interests in, or connection with, the Oregon Gas & Electric Company, either as a stockholder therein, or otherwise; and that the defendant never acted as a general legal adviser, either sole or otherwise, of the plaintiff."

The facts regarding the representations of Boardman to Crittenden are also found as recited hereinbefore, and it is found:

"That the defendant reasonably believed the said statements and representations of the said plaintiff. * * * That he was then ignorant of the falsity of said statements as to the cost of said plant and the condition thereof. That in entering into the transaction proposed by the plaintiff * * * he relied upon the truth of said statements, * * * and that but for them, and his belief in them, and in each of them, he would not have entered into this transaction. That acting in reliance upon the truth of the said representations, and of each of them, the defendant in the said month of March, 1911, agreed with the said W. F. Boardman, in effect, that the plaintiff, or the said W. F. Boardman Company, or both of them, would sell to a corporation to be formed the said property of the Rogue River Valley Gas Company, or all of their interest in that said property, at a price which would be equal to the cost of the construction of the said property, plus a profit of \$50,000, and take in payment therefor bonds of the new company at \$900 each and 15 shares of stock with each bond as a bonus, and the said defendant would purchase 55 of the bonds of the new company on the same terms, and pay for the said bonds the sum of \$49,500 cash. * * *

"That on January 16, 1916, the defendant stated to the plaintiff as follows: That all matters between them were at an end, and that he (the defendant) was 'through' with the plaintiff; that he had been requested by a certain banker to see the plaintiff before filing suit against the plaintiff, and to give the plaintiff an opportunity of settlement; that he (the defendant) had been informed and believed that the cost of the construction of the Rogue River Valley plant * * * was not the sum of \$125,000, or any other sum in excess of approximately \$80,000; that defendant then and there further stated that the plaintiff had, prior to and at the time of the investment by the defendant in the Oregon Gas & Electric Company, represented that the construction cost of said plant was \$125,000, exclusive of commissions, discounts, and engineering fees, and that said plant was a well-constructed plant, and that said representations were, and each of them was false; and defendant further stated that, at the time of the making of said representations by plaintiff, said plant was not in good condition, was not well constructed, but was poorly and improperly constructed; and defendant further stated that the true and actual cost of said plant was known to said plaintiff at the time of the making of said representations by him as aforesaid; and defendant then and there further stated that the true and actual cost of said plant was deliberately and intentionally misrepresented to the

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defendant by the plaintiff, with the purpose of fraudulently inducing the defendant to invest his money in the Oregon Gas & Electric Company and to join in paying a purchase price of \$175,000 for said Rogue River Valley plant; that defendant then and there further stated to plaintiff that he intended to bring suit against plaintiff on account of said misrepresentations and that he (the defendant) desired the plaintiff to read over the complaints which he (the defendant) had already prepared; and that he (the defendant) believed the plaintiff had been guilty of looting and mismanagement of the Oregon Gas & Electric Company, and that he (the defendant) proposed to see to it that the plaintiff was put out of the presidency and the management of said company; * * * that the defendant then handed to plaintiff the three complaints received in evidence; * * * that the plaintiff read over one of said complaints in its entirety and glanced through the other two; that thereafter plaintiff offered to pay the defendant the amount of the latter's investment and interest for the stock and bonds in the Oregon Gas & Electric Company owned by the defendant, providing the defendant would accept certain other securities in payment therefor; * * * that defendant believed that all of the allegations contained in said last-mentioned complaints were true, and that he would be able to make legal proof of the same, at the time he handed said complaints to the plaintiff to read, and that at that time the defendant intended to file said complaints and prosecute the same."

The court found:

"That the defendant stated he would not accept the securities offered by plaintiff in payment for the stock and bonds held by the defendant in the Oregon Gas & Electric Company, and acquired by the defendant as a result of the representations made to him by the plaintiff. That thereafter the plaintiff asked the defendant if the defendant had any objection to his (the plaintiff's) consulting with George H. Eckert, and that the defendant at once stated that he had no objection to such consultation, and that the defendant himself called up said George H. Eckert by telephone, and that the plaintiff thereupon asked said Eckert to come immediately to the defendant's office in San Francisco.

"That upon the arrival of said George H. Eckert, and after his refusal to answer questions relating to the construction cost of said Rogue River Valley plant, said George H. Eckert and the plaintiff retired to a room in the offices of Crittenden & Simmons, and remained in conference there, with no one else present, for a period of more than an hour; that said Eckert was the secretary of the W. F. Boardman Company, and was and has been associated with said plaintiff in various business enterprises for a number of years.

"That at the conclusion of said conference between the plaintiff and said George H. Eckert the plaintiff announced that he was willing to purchase the defendant's stock and bonds in the Oregon Gas & Electric Company by canceling the defendant's promissory note in favor of plaintiff, amounting to \$20,000, by delivering to the defendant the promissory note of

the plaintiff in the sum of \$30,000, and by executing his promissory note for the balance, payable in two years, and bearing interest at 5 per cent.; that after some discussion between the plaintiff and the defendant as to whether the time for the payment of said last-mentioned note should be one or two years, or whether the interest should be 5 or 6 per cent., it was agreed between them that the time for payment thereof should be two years, and the interest thereon at the rate of 6 per cent. per annum; that thereupon the plaintiff himself suggested that such agreement should be immediately put in writing and executed, and that thereafter, and at the plaintiff's request, the said agreement was put in writing and executed by the plaintiff and defendant, and also an agreement was likewise put in writing at the plaintiff's request, whereby the defendant and William A. Nunlist, on behalf of themselves and their associates, agreed not to participate in litigation against the plaintiff with respect to the Oregon Gas & Electric Company; and that after the execution of said agreements the plaintiff himself suggested that a further meeting should be had at 9 a. m. on January 17, 1916, for the purpose of finally consummating the transaction, and making delivery of the securities mentioned therein, and stated that in the meantime he (the plaintiff) would have the bookkeeper of the W. F. Boardman Company ascertain the exact amount of the defendant's investment, plus 6 per cent."

The court further found:

"That plaintiff voluntarily entered into the agreements with the defendant of January 16 and 17, 1916; that there was no fraud or duress exercised upon the plaintiff by the defendant upon either January 16 or January 17, 1916, or with respect to the agreements and transactions had between them upon those dates, or either thereof, and that the defendant did not advise, or attempt to advise, the plaintiff upon said dates, or either of them, either as an attorney at law or otherwise; that neither the written contract executed between the plaintiff and the defendant on January 16, 1916, nor any of the agreements or transactions entered into or carried out by the plaintiff and defendant upon January 16 or January 17, 1916, were consented to, or in any way entered into, or carried out by the plaintiff wholly, or in any way, due to any fraudulent misrepresentations on the part of the defendant, or other than as the voluntary act of the plaintiff; that no fraudulent misrepresentations were made to the plaintiff by the defendant, either on January 16 or January 17, 1916; * * * that there was no menace exercised over the plaintiff by the defendant on January 16, 1916, and January 17, 1916, or either thereof, and there was no undue influence exercised over the plaintiff by the defendant upon said dates, or either of them, and that the agreements and documents executed by the plaintiff on January 16 and January 17, 1916, were executed by the plaintiff without being overcome by, and without having been subjected to, any menace, duress, or undue influence; that on January 17, 1916, in order to carry out the agreement executed by the plaintiff and the defendant on January 16, 1916, and in order to adjust certain other matters

necessitated thereby, particularly the amount of the defendant's investment plus 6 per cent. plaintiff voluntarily, and without being subjected to duress, fraud, or undue influence, delivered to the defendant the documents, papers, and personal property described in plaintiff's complaint; * * * that plaintiff was familiar with the construction cost of the Rogue River Valley gas plant at the time of the sale of the capital stock of the Rogue River Valley Gas Company to the Oregon Gas & Electric Company, and the defendant was ignorant of the construction cost of said Rogue River Valley gas plant at that time, and that the plaintiff was aware on January 16 and January 17, 1916, of the facts in regard to said sale of the capital stock of the Rogue River Valley Gas Company, and was then familiar with, and had knowledge of, the construction cost of said Rogue River Valley gas plant; that no statements were fraudulently made by the defendant upon January 16, 1916, and January 17, 1916, or either thereof; that the defendant believed each and every statement and representation made by him during the course of the conversation between himself and the plaintiff upon January 16 and January 17, 1916, and that the written agreement executed by the plaintiff on January 16, 1916, was not signed by the plaintiff as a result of any misrepresentations made to the plaintiff by the defendant, nor because of any belief in the plaintiff that the defendant knew more of the facts in regard to the sale of the capital stock of the Rogue River Valley Gas Company and the construction cost of its plant than did the plaintiff himself.

"That the statement and representation made by the plaintiff to the defendant in March, 1911, and at the time the plaintiff induced the defendant to invest in the Oregon Gas & Electric Company, that the construction cost of the Rogue River Valley gas and electric plant, exclusive of interest, commissions, and engineering fees, was the sum of \$125,000, was false; that the construction cost of said plant at that time was not to exceed \$100,000; that at the time the plaintiff induced the defendant to invest in said Oregon Gas & Electric Company, no statement was made by the plaintiff to the defendant as to any moneys paid by the W. F. Boardman Company to J. R. Anderson, and no statement was made by the plaintiff to the defendant with respect to any refund or credit in favor of the W. F. Boardman Company by or from the Stacey Manufacturing Company; that said plant of said Rogue River Valley Gas Company was not a well-equipped plant at the time when said representations were made to the defendant by the plaintiff in March, 1911, and that at the time of the making of said representations and statements by the plaintiff to the defendant in March, 1911, the plaintiff misstated the construction cost of said plant and its equipment and condition, with the intent and purpose of thereby inducing the defendant to invest in said Oregon Gas & Electric Company; * * * that the transactions and agreements of January 16 and January 17, 1916, between the plaintiff and the defendant were fair, just, and equitable."

[1] This lengthy statement of the facts found by the trial court seemed necessary

because of their complexity; but the legal question involved is conceded by the appellant to be but single. As stated by appellant's counsel, if, under the facts here, the attorney could repudiate his relationship to his former client, and could thereupon deal "at arm's length" with him, without insisting, or at least suggesting to said client, that he secure another attorney to represent or advise him in the transaction, then the judgment should be affirmed. Our discussion of that question is expressly limited to the peculiar facts of the present case. It conclusively appears that Mr. Boardman was a most capable business man, accustomed to handling his affairs and making decisions. He did not request or suggest legal advice, according to the testimony of the witnesses for the defendant; also, according to such testimony, he was accustomed to drawing contracts and attending to many details of his business which are commonly entrusted only to attorneys. He did not rely upon Mr. Crittenden, for he himself states that Mr. Crittenden told him at the beginning of the interview that he was "through with him." He also testified that he mistrusted Crittenden, and expected most anything from him during the interview. Upon such a showing, we cannot hold that there was an indispensable necessity that he receive advice from another attorney. It was said in the case of *Kidd v. Williams*, 132 Ala. 140, at page 144, 31 South. 458, at page 459, 58 L. R. A. 879, at page 881 thereof:

"If the client is competent and capable, and with full knowledge of the transaction he proposes to settle with his attorney, acts deliberately, and voluntarily settles his account for services with his attorney, there would seem to be no indispensable necessity for independent advice on the subject. This would certainly be true, when shown that there had been no fraud, deceit, or unconscionable advantage practiced by the attorney on the client, which would rebut the presumption of a violation of confidence reposed, as much so as independent advice would do. All that is necessary is for the client to be placed in such a position as would enable him 'to form an entirely free and unfettered judgment, independent altogether of any sort of control.' If this does not appear, it would be necessary to show that the client had independent advice, in order to remove the presumption of unfairness. But when this presumption is otherwise removed, a rule that would, in addition, require independent advice would seem to be arbitrary and unnecessary. 'It is only when confidence is abused that courts of conscience interfere,' and this essential fact in such cases may be shown by any competent evidence. Independent advice is simply a means of proof to establish the fairness of the settlement, and that it was voluntarily entered into free from undue influence. This is made clear under the decisions of this court."

The abundant evidence in the record as to Mr. Boardman's business ability and keen

mentality, as well as of his large experience in complicated and varied business enterprises, makes peculiarly applicable the further language of the opinion in the last-cited case:

"Of course, the satisfaction necessary for a court of equity to have, in order to sustain or set aside a settlement of the kind, would vary according to the circumstances of, and the evidence presented in, each cause. The age and experience or inexperience of the client, his mental and physical strength, or the lack of it, and general capacity to know, appreciate, and understand the matter of a settlement with his attorney, should always be considered."

The briefs contain lengthy discussions of the finding with reference to the business relation between Boardman and Crittenden; the specific contention of appellant being that, in so far as Mr. Crittenden was attorney for companies in which Mr. Boardman was a stockholder, he was, in reality, Mr. Boardman's attorney, and was under the same obligation toward Mr. Boardman that would arise out of the fiduciary relationship toward the corporations. We do not find it necessary to decide this question here, because, if we concede appellant's position—that the relationship of attorney and client existed between Boardman and Crittenden with reference to the Oregon Gas & Electric Company—to be correct, nevertheless, under the facts here, we should be compelled to affirm the judgment.

[2] While it is true that in a transaction between attorney and client the onus is upon the attorney to prove the transaction was fair, and that he made a reasonable use of the confidence reposed in him and that he gave honest advice to his client concerning himself, these principles are applicable only to cases in which the client was dealing with the attorney under the influence of the confidence which he had reposed in him, and does not apply to a case where the attorney assumes openly the hostile attitude of an urgent and pressing creditor, and where the parties are held at arm's length. *Johnson v. Fesemeyer*, 3 De G. & J. 13, 22, 44 Reprint, 1174. The last-cited case has been followed in this state in the case of *Cooley v. Miller & Lux*, 156 Cal. 510, 523, et seq., 105 Pac. 981. In that case it was said:

"The rule is well established that the relation of attorney and client is confidential in character and that any contract entered into between them while the relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney. *Kisling v. Shaw*, 33 Cal. 440, 91 Am. Dec. 644; Civ. Code, § 2235; 1 Story's Equity Jurisprudence, §§ 310, 311; 2 Pomeroy's Equity Jurisprudence, § 390. In the section cited, Mr. Pomeroy says: 'The presumption always arises against the validity of a purchase or sale between the client and attor-

ney made during the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice. * * * If all these circumstances are proved, the contract will stand; if not, it will be defeated or set aside.' The presumption does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client. *Johnson v. Fesemeyer*, 3 De G. & J. 22. Nor is it applicable to a contract by which the relation is originally created and the compensation of the attorney fixed. The confidential relation does not exist until such contract is made and in agreeing upon its terms the parties deal at arm's length. *Elmore v. Johnson*, 143 Ill. 513, 38 Am. St. Rep. 401, 32 N. E. 413."

In the case of *Black v. Riley*, 20 Cal. App. 199, 128 Pac. 764, this rule of law was again recognized, the court saying:

"The court refused to give an instruction requested by defendant, as follows: 'You are instructed that an attorney, dealing with a person about to become a client as to his contract for payment for services, occupies no different position than any other two persons contracting for payment of services. No presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client, nor in case of the contract by which the relation of attorney and client is originally created and the compensation of the attorney fixed.' The court was justified in so doing. While the first and last propositions stated are correct statements of the law, it is not true that 'no presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client,' and the authority cited by appellant in support of such proposition does not sustain him. It is said in *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981, that 'the presumption does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client.' This is a very different proposition from the one that 'no presumption of undue influence applies to a transaction where an attorney is in a hostile attitude to his client.' Whenever an attorney, for his own benefit, deals with his client, in regard to property that is the subject of his employment, he is in a hostile attitude to his client, but is still bound to the exercise of the utmost good faith toward his client in such transaction, and the burden is upon him to rebut the presumption of undue influence. It is only when he openly assumes a hostile attitude that his transactions with his client will be free from the presumption of undue influence on the part of the attorney."

It is admitted by the appellant that in the transaction here the attorney assumed an attitude which was openly and vigorously hostile to the client, and that it was so expressly stated and not left to inference. It also appears that Mr. Boardman did not trust the defendant and did not rely upon

him, and that Mr. Boardman was in every way a person fully competent to manage his own affairs and to decide upon his course of conduct. He had independent advice from his associate, Eckert, and spent considerable time in a private conference with Eckert before reaching his decision and concluding the agreement to purchase Crittenden's holdings. He suggested the settlement, insisted upon its immediate consummation and negotiated at some length about the details thereof. He also went to his home Sunday evening and was away from Mr. Crittenden during that night and until about noon the next day, when he voluntarily executed and consummated the agreement. It was found by the court that the actuating motive of Mr. Boardman was his knowledge of his own misrepresentations, and that the contract between the parties was fair, just, and equitable.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(52 Cal. App. 469)

COTTON-MACAULEY CO. v. DESHIELDS,
County Auditor (LUTEN, Intervener).
(Civ. 2298.)

(District Court of Appeal, Third District,
California. May 8, 1921.)

1. Mandamus \Leftrightarrow 176—Intervener not entitled to affirmative judgment against defendant.

In an action for writ of mandate to compel a county auditor to issue warrants, where the intervener, who had served stop notice on the auditor, did not ask any affirmative relief against the auditor, he cannot, in such proceedings, be granted any rights against the auditor, who was contesting the proceeding.

2. Mandamus \Leftrightarrow 187(8)—Defendant against whom intervener requested no relief entitled to dismiss his appeal.

Where a writ of mandate was rendered against county auditor, and both the auditor and the intervener who had served stop notice, appealed, held that, as no relief was requested by the intervener against the auditor, and as he could issue warrants at his own risk, the auditor was entitled to dismiss his appeal from the judgment.

3. Bridges \Leftrightarrow 20(4)—Payment after stop notice is at officer's risk.

Where defendant, pursuant to Code Civ. Proc. §§ 1183, 1184, served stop notice to prevent the county auditor from issuing warrants to plaintiff for payment for the construction of a bridge, the auditor, in issuing warrants regardless of the notice, acts on his own responsibility, and, if the notice be held good and plaintiff found not entitled to payment, the auditor is liable.

4. Mandamus \Leftrightarrow 187(8)—Whether clerk of trial court should be restrained from issuing writ unnecessary for decision on dismissal of appeal.

Where the application of the county auditor to dismiss his appeal from a judgment directing the issuance of a writ of mandate to compel the delivery of warrants to plaintiff was, on motion of the auditor, dismissed, the intervener, who had served stop notices in the action, is not, in proceedings for dismissal, entitled to have a determination of the question whether the clerk of the lower court should be forbidden to issue a writ of mandate until determination of the intervener's appeal, for the matter was not raised by any petition or application, and ample time would be given, before remittitur sent down, for such application to be made.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Petition by the Cotton-Macauley Company, a copartnership, for a writ of mandate against George M. Deshields, Auditor of the County of Tehama, State of California, in which Daniel B. Luten intervened. From a judgment for plaintiff, defendant and intervener appeal. Appeal of the Auditor dismissed.

M. J. Cheatham, of Red Bluff, for appellant Deshields.

V. L. Hatfield and W. H. Hatfield, both of Sacramento, and James T. Matlock, of Red Bluff, for appellant Luten.

A. E. Bolton and Arthur W. Bolton, both of San Francisco, for respondent.

PLUMMER, Presiding Justice pro tem. On the 3d day of December, 1920, a judgment was entered in the superior court of Tehama county for the issuance of a peremptory writ of mandate, to be directed to the defendant Deshields, auditor of the county of Tehama, commanding him to forthwith draw and deliver to plaintiff a warrant for the payment of a claim against said county, in favor of the plaintiff, theretofore allowed by the board of supervisors, for building a certain bridge in said county. On the same day, the defendant Deshields and the intervener, Daniel B. Luten, who had been allowed to intervene in said action, claiming said moneys as due him from plaintiff, and who had served a stop notice on the defendant Deshields under the provisions of sections 1183 and 1184 of the Code of Civil Procedure, served and filed their notice of appeal from the judgment and order of said court entered as above stated. Pursuant to the Constitution of this state, the hearing and determination of said appeal has been transferred to this court. The matter is now before this court upon motion of the defendant Deshields to dismiss the appeal so far as it relates to himself. This mo-

tion is contested by the intervener, who is also an appellant.

[1] An examination of the record discloses the fact that the intervener in his complaint in intervention asks for no relief against the appellant Deshields; his contention therein being that the Cotton-Macauley Company should take nothing by reason of its action. Not having made the appellant Deshields a party defendant in his complaint in intervention, it is apparent that no judgment can be entered in this court in favor of the intervener, as against the defendant Deshields as auditor of the county of Tehama, adjudging and determining the right of the intervener to any part of the funds in the treasury of the county of Tehama, irrespective of any judgment that may be entered as between the plaintiff respondent and the intervener appellant.

[2, 3] The right of an appellant to have his appeal dismissed has been passed upon and confirmed in the following cases: *Estate of Wells*, 148 Cal. 659, 84 Pac. 37; *Guardianship of Degnan*, 132 Cal. 260, 64 Pac. 485.

The case of the *People v. Perris Irrigation District*, 132 Cal. 289, 64 Pac. 399, 773, is not in conflict with the authorities just cited. In that case the motion was made by a nonappealing defendant to dismiss the appeal of intervening bondholders.

If the appellant Deshields were moving to dismiss the appeal of the intervener appellant, then and in that case the same right or principle would be involved, and if the intervener's appeal be well taken, the motion, of course, would be denied.

In the case at bar the defendant and appellant Deshields, against whom the intervener asks no relief, is moving, not to dismiss the intervener's appeal, as was the case in *People v. Perris Irrigation District*, supra, but to dismiss his own appeal and to discontinue the further prosecution thereof.

That the defendant Deshields will increase or decrease his liability to the other parties to this action by reason of his motion to dismiss is not material to this case. It does not appear from the pleadings that he came into court and asked, by way of interpleader or otherwise, that the right of the contending parties to the funds over which he had control be determined. Hence the extent or measure of liability to either of the parties are matters not to be considered.

The attention of the court is also called to the case of *Slayden v. O'Dea*, reported in 189 Pac. 1066, upon which the right of the plaintiff in this action was decided in the court below, and it is urged that the ruling in that

case is not applicable here by reason of the fact that the words "public road or highway" do not appear in section 1183 of the Code of Civil Procedure, whereas the word "bridge" does, and therefore that the stop notice provided for by section 1184 of the Code of Civil Procedure is applicable to the case at bar, and was not in the *Slayden-O'Dea* Case.

We do not see what bearing this contention can have upon the right of the appellant Deshields to have his appeal dismissed. If this court should ultimately decide that the intervener's contention in this respect is true, and reverse the decision of the trial court in its holding that the plaintiff was entitled to a writ of mandate, it could enter no judgment in favor of the intervener as against the defendant and appellant Deshields, for the reasons heretofore stated.

As we examine the pleadings and judgment in the record before us, there appears nothing to prevent the appellant Deshields issuing a warrant in favor of the plaintiff at any time, notwithstanding the appeals now pending in this court. It is simply a matter of whether the auditor does or does not wish to assume such responsibility. There being nothing to prevent the auditor at the present time from issuing such warrant, we cannot very well see how any action of this court on the motion of appellant Deshields to have his appeal dismissed will in any way imperil the rights of the intervener. If the stop notices referred to as given by the intervener are ultimately held good, the intervener has his remedy, as payment made by any officer having proper notice thereof would be at his peril.

[4] Request is made in the intervener's brief that this court issue its order forbidding the clerk of the trial court to issue a writ of mandate herein until the appeal of the intervener is determined. As this matter is not before us upon any petition or application as to which the plaintiff would necessarily have a right to be heard and make reply, and as ample time will be given before this decision can become final and a remittitur sent down, for such application to be made and hearing had, if right to such an order exists, we do not deem it necessary to consider that question upon the present motion, and therefore express no opinion as to the existence or nonexistence of such right, or make any order in relation thereto.

Being of the opinion that the appellant Deshields is entitled to have his appeal herein dismissed, it is so ordered.

We concur: BURNETT, J.; HART, J.

(52 Cal. App. 390)

NATHAN v. O'DONNELL et al. (Civ. 3757.)

(District Court of Appeal, First District, Division 1, California. April 29, 1921. Hearing Denied by Supreme Court June 27, 1921.)

1. Assignments ⇐119—Plaintiff suing bank under assignments for refusal to honor checks not intermeddler in making the amount good.

Where the department commander of certain war veterans appointed the chairman of a committee to arrange transportation for state delegates to the national meeting of the organization, and the chairman collected from the delegates an amount of money to cover the cost of their transportation, and deposited the amount in his personal checking account, which was garnisheed, so that the bank refused to honor his checks to the railroad for the transportation, threatening to cancel the tickets, and the department commander gave his personal check to the bank to cover the chairman's checks to the railroad, in so doing the department commander was not an intermeddler without right to recover from the bank under assignments from the chairman and the delegates who had paid moneys to the chairman.

2. Banks and banking ⇐131—Bank depositor without title to moneys collected by him and deposited in his account to subject them to garnishment.

The chairman of a committee to arrange transportation for state delegates of certain war veterans to their national meeting had no title to funds collected by him from the delegates to cover their transportation and deposited by him in his personal checking account sufficient to subject such funds to garnishment or attachment against him.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Milton A. Nathan against H. M. O'Donnell and another. From judgment for plaintiff, defendants appeal. Affirmed.

Aitken, Glensor, Clewe & Van Dine and John T. Williams, all of San Francisco, for appellants.

Milton Nathan and John D. Rutledge, both of San Francisco, for respondent.

KERRIGAN, J. This action was brought by plaintiff to recover a certain sum of money held under attachment. Plaintiff recovered judgment, and defendants appeal.

The facts are as follows: In August, 1918, plaintiff, as the California department commander of the United Spanish War Veterans, appointed one John H. Simmons chairman of a committee for the purpose of arranging transportation for the California delegates to the national meeting of that organization to be held in Baltimore, Md. As such chairman Simmons collected from seven delegates the sum of \$538.67 to cover the cost of railroad and Pullman tickets to be purchased by him entitling these delegates to transportation

from San Francisco to Baltimore. The money so collected was deposited by Simmons in his personal account with the Bank of California National Association in San Francisco. Immediately thereafter Simmons purchased the tickets from the Southern Pacific Company, giving in payment thereof seven checks drawn upon said bank, the aggregate amount of which was the precise sum he had collected, viz. \$538.67. Two days thereafter, and before these checks were presented to the bank for payment, defendant O'Donnell commenced an action against Simmons, in which an attachment was issued, pursuant to which defendant Finn, as sheriff, garnisheed all sums in the Bank of California standing in the name of Simmons. Thereafter the checks were presented by the railroad company for payment, but by reason of the garnishment the bank refused to honor the same. The railroad company thereupon notified Simmons that the tickets would be canceled. These facts were immediately reported by Simmons to plaintiff, who, to remedy this urgent situation, voluntarily drew a check on his personal account with the First National Bank in favor of the Bank of California for \$538.67, and sent it to the latter, with the statement that the remittance was made for the express purpose of having the bank meet and honor the above-mentioned checks drawn by Simmons in favor of the railroad company, and this arrangement was carried out. Plaintiff thereafter took assignments from Simmons and from each of the persons who had paid Simmons for transportation of their interest in such sums, and thereupon instituted this action against the bank to recover the amount. The bank paid the sum in dispute under order of the court to the Savings Union Bank to be held by it as a savings account subject to the order of the court; the Bank of California was discharged from further liability, and Thomas F. Finn, as sheriff, was substituted in its place and stead as defendant.

[1] In support of their appeal from the judgment in plaintiff's favor defendants have furnished us with an elaborate argument to the effect that plaintiff never acquired an equitable assignment to the fund in question, or ever acquired any rights thereto under the principles of subrogation, their claim being that he is a mere stranger and intermeddler, who has no interest in the fund whatever. We do not so consider him. Plaintiff having appointed Simmons to collect the funds, he undoubtedly concluded that he was under a moral obligation to relieve the situation. Under such circumstances he cannot be said to be an intermeddler. 37 Cyc. 371.

[2] Irrespective of this question, however, from a mere reading of the facts it is manifestly apparent that Simmons had no title whatever to the fund that was sought to be subjected to the attachment. Whatever re-

lation he bore to the parties who had intrusted him with the funds for the indicated purpose, whether as trustee, bailee, or agent, is a matter of no consequence, for certain it is that he had no such title in the fund as would subject it to attachment proceedings instituted by strangers to the arrangement. The transaction shows that his position was little different, if any, from that of a mere messenger intrusted with funds to make a particular purchase.

The fact that the money so collected was by him deposited in his bank as a matter of convenience in no manner alters the situation, for the money did not belong to him when attached.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(52 Cal. App. 454)

Ex parte KASTER. (Cr. 556.)

(District Court of Appeal, Third District, California. May 2, 1921.)

1. Habeas corpus \S 30(2)—Lies only when complaint against accused wholly fails to state cause of action.

When the complaint wholly fails to state a cause of action, the writ of habeas corpus will lie, but the proceeding may not be made to subvert the office of a demurrer; and, if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie.

2. Habeas corpus \S 30(2)—Complaint held to give justice jurisdiction.

In habeas corpus by one convicted in justice's court of violating the Vehicle Act, held that the complaint against accused charged an offense known to the law under section 22, subd. "A" of the act so as to give the justice's court jurisdiction under Pen. Code, \S 1425, although there was not inserted in the complaint the name of the township wherein it is claimed the offense was committed, as the statute does not limit the trial of violations of the statute to the township where the offense was committed.

3. Criminal law \S 90(4)—Jurisdiction in criminal cases runs throughout the entire county.

In the absence of express statutory limitation, the general jurisdiction of a justice's court runs to the entire county in criminal cases, and is not confined to the township wherein the court is situated.

4. Habeas corpus \S 3—Objection to form of complaint not available in habeas corpus.

Even if good pleading under the Vehicle Act required the insertion in the complaint of the name of the township where the offense under the act was committed, yet this objection

could not avail accused, when made for the first time in the Court of Appeals in habeas corpus proceeding, as the objection should have been made in some appropriate form before the trial.

5. Habeas corpus \S 30(1)—Defect in process not ground for discharge after trial and conviction.

After trial and conviction, any defect in the process of bringing accused before the court for trial, such as written notice and accused's promise to appear or a warrant for accused's arrest, is not ground for his discharge on habeas corpus for, after final judgment, the jurisdiction of the court cannot be questioned by inquiry as to the manner in which he was brought before it.

6. Habeas corpus \S 4—Admissibility or weight of evidence not reviewable.

The question of the sufficiency or admissibility of the evidence on accused's trial cannot be reviewed on his application for habeas corpus, being determinable on appeal.

In the matter of the application of Edward M. Kaster for writ of habeas corpus. Writ dismissed.

See, also, 198 Pac. 1031.

Thomas B. Leeper, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and Clifford Russell, Deputy Dist. Atty., both of Sacramento, for respondent.

ANDERSON, Presiding Judge pro tem. Petitioner was convicted in the justice's court of American township of Sacramento county by a jury of a misdemeanor arising under the "Vehicle Act" (Laws 1915, p. 397), in that the defendant did "unlawfully drive and operate an automobile upon the public highway at an excessive rate of speed, to wit, in excess of 35 miles per hour," etc. The defendant was thereupon sentenced to be confined in the Sacramento county jail for a period of 60 days with no alternative.

Petitioner contends that the justice's court did not have jurisdiction of the person of defendant. In order to understand the contentions made by petitioner it will be necessary to set forth a brief statement of the evidence.

From the evidence it appears that in the month of September, 1920, the defendant was driving an automobile, known as a Deussenberg racing car, along a paved highway, which highway traversed the territory embraced within two adjoining townships, known as "American" and "Center," in the county of Sacramento. In the course of his travel petitioner passed through American township, and at a certain point therein, while passing several buildings, the constable of American township made an effort to stop petitioner, but was unsuccessful, defendant continuing on into Center township, wherein he was arrested by a traffic officer,

who gave the defendant the notice provided in subdivision "C" of section 22 of the Vehicle Act, which notice directed petitioner to appear before the magistrate of American township, and which the defendant promised in writing to do. (No proof was offered to show that petitioner demanded to be taken before the "most accessible magistrate," as provided in subdivision "C" of said act.)

Thereafter the complaint herein was sworn to by said traffic officer in said American township, charging petitioner, as aforesaid, with violating the Vehicle Act in the county of Sacramento, without designating the township in which the violation was committed. The transcript does not show that a warrant of arrest was issued thereupon. Upon the hearing of the petition herein it was admitted that the verdict of the jury had been affirmed upon appeal by the superior court in and for the county of Sacramento, and petitioner also admitted at the hearing herein, and an examination of the transcript of the evidence shows, that the verdict was sustained by the evidence upon the charge that the Vehicle Act was violated by petitioner within the said American township, as charged in the complaint.

Before the trial of said cause the defendant, petitioner herein, moved the said justice's court to "quash the complaint," as follows:

"Comes now the defendant in the above-named proceeding, and moves the court to quash or dismiss the complaint in said proceeding upon the ground that the above-entitled justice's court and the magistrate thereof has no jurisdiction of the alleged offense charged in said complaint, in this, that said alleged offense was not committed in the above-entitled township, but said alleged offense was committed in Center township, Sacramento county, state of California, and that the traffic officer should have notified this defendant to appear before the justice or magistrate of said Center township, whereas in fact said traffic officer apprehended this defendant in said Center township, and served a notice upon this defendant to appear before the justice or magistrate of the above-entitled township, which justice or magistrate and township is outside of the township where said alleged offense was given, and outside the township where defendant was apprehended, and outside the township in which said notice was served upon defendant."

The motion was thereafter heard upon affidavits and counter affidavits, and duly denied by the court, and thereupon and thereafter the defendant was duly arraigned and entered a plea of "not guilty," whereupon a trial by jury was regularly had, resulting in a verdict of "guilty," as aforesaid.

The main contentions advanced by petitioner are: First, that the complaint fails to state a cause of action by reason of the omission therefrom to state the township in which the offense was committed; and, secondly, that by reason of the traffic officer having

served notice upon petitioner to appear before a magistrate outside of the township in which the notice was served, and the appearance of petitioner in said township in response to said notice so served, petitioner could not be prosecuted for an offense committed in said township, and which was outside the township in which the notice was served. Both contentions are so intermingled that they may properly be considered together.

[1] Upon the first point urged it may be said that the law is clear that when the complaint wholly fails to state a cause of action the writ of habeas corpus will lie (*Ex parte Williams*, 121 Cal. 328, 53 Pac. 706; *Ex parte Kearny*, 55 Cal. 228; *Ex parte Sullivan*, 17 Cal. App. 278, 119 Pac. 526); but " * * * the proceeding may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. (*Ex parte Whitaker*, 43 Ala. 323; *Matter of Prime*, 1 Barb. 340)." *Ex parte Williams*, 121 Cal. 330, 331, 53 Pac. 706. To same effect, *Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605; *In re Avdalas*, 10 Cal. App. 507, 102 Pac. 674. In the case last cited Mr. Justice Hart exhaustively reviews the question and distinguishes the authorities.

Viewing the complaint in the light of the foregoing authorities, we must hold that the complaint, "charges an offense known to the law." Subdivision "A," § 22, Vehicle Act.

The offense having been committed in Sacramento county, and being punishable by fine not exceeding \$500 or by imprisonment in the county jail not exceeding six months, or both, the justice's court had jurisdiction of the subject-matter of the offense. Section 1425. Pen. Code.

If anything further need be added to complete the jurisdiction, it is supplied by the fact that the defendant was charged with the commission of the offense in American township, the complaint was laid in said township, the trial was had in said township, and the defendant was present with his counsel and participated in the trial of said offense in said township; and it is admitted that the evidence was sufficient to sustain the charge made in the complaint against the petitioner.

[2, 3] In answer to the first point made, it should be said that we are unable to find anything in the statute making it mandatory to insert in the complaint the name of the township wherein it is claimed the offense was committed, nor do we find language in the statute limiting the trial of violations of the statute to the respective township wherein the offense is committed. In the absence of

such express statutory limitation, the general jurisdiction of a justice's court runs to the entire county in criminal cases.

[4] Even if good pleading under the statute required the insertion of the name of the township wherein it is claimed the offense was committed, yet objection could not avail petitioner when made for the first time in this court in this character of proceeding; objection should have been made in some appropriate form before the trial.

Upon the contention made by petitioner that he was not convicted by due process of law for the reason that every form of law was not complied with, it is sufficient to say that, so far as the record reveals, after the petitioner appeared before the magistrate of American township in response to the notice given, the notice had served its purpose, and the defendant had fully complied with his written promise to appear. In order to compel his attendance further it was necessary to serve a warrant of arrest upon defendant, founded upon a proper complaint. It seems that this was not done. This not having been done, and it not appearing that a waiver by the defendant was made, it would appear that he was no longer held under the process of the court. In this situation he was not under duress, under restraint, nor in custody. Thus being free of the restraint of the law at this time, he entered a plea of "not guilty," announced that he was ready for trial and demanded a jury trial.

[5] But aside from the action of the defendant and his counsel, as herein recited, in proceeding to trial, we think the defendant cannot be released from the judgment by reason of any defect in the process of bringing him before the court for trial. We think no greater effect, if as much, can be given to the written notice and promise to appear than could be given to a warrant of arrest, and it has been held that even a void warrant cannot operate to discharge a prisoner after trial and conviction.

"The court had jurisdiction of the subject-matter, and however irregular the proceedings taken to obtain jurisdiction of the person, its judgment is final and conclusive. * * * The fact that the process has not been served by the proper person, or at the proper place or time, or that the warrant or order upon which a prisoner has been arrested is void, and the arrest unlawful, will not render the judgment void and subject to a collateral attack. Ex parte McGill, 6 Tex. App. 498; Dorente v. Sullivan, 7 Cal. 279; Peck v. Strauss, 33 Cal. 685; Owens v. Gotzian, 4 Dill. 438; Ex parte Kellogg, 6 Vt. 511; Freeman on Judgments, § 126. After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it; and this is true, even though the prisoner has been kidnapped

and forcibly brought before the court from a foreign jurisdiction. *People v. Rowe*, 4 Park. Cr. 253; *United States v. Lawrence*, 13 Blatchf. 308; *Ex parte Scott*, 4 Barn. & C. 440; *State v. Smith*, 1 Bail. 283; *State v. Brewster*, 7 Vt. 118; *State v. Ross*, 41 Iowa, 467. In the last-named case it was said: 'The liability of the parties arresting them [the defendants] without legal warrant for false imprisonment or otherwise, and their violation of the Penal Statutes of Missouri, may be ever so clear, and yet the prisoners not be entitled to their discharge.' See, also, *Mahon v. Justice*, 127 U. S. 700, where the cases bearing upon this question are thoroughly reviewed by Mr. Justice Field." *Ex parte Ah Men*, 77 Cal. 201, 202, 19 Pac. 380, 381, 11 Am. St. Rep. 263. To the same effect are *People v. Pratt*, 78 Cal. 345, 20 Pac. 731; *Ex parte Clark*, 85 Cal. 204, 24 Pac. 726; *People v. Staples*, 91 Cal. 23, 27 Pac. 523; *Crocker on Sheriffs* [3d Ed.] p. 35.

[6] Petitioner also complains that evidence of the offense committed in Center township was also introduced at the trial, but with this contention we have nothing to do, as the reviewing court, on appeal, must determine this, for the question of the sufficiency or admissibility of the evidence cannot be reviewed on habeas corpus. *Roberts v. Police Court (Sup.)* 195 Pac. 1053; *In re Kennedy*, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840; *In re Jacobs*, 175 Cal. 661, 166 Pac. 801; *In re Leonardino*, 9 Cal. App. 690, 100 Pac. 708; *Ex parte Clark*, 110 Cal. 405, 42 Pac. 906.

The writ is dismissed, and the petitioner remanded.

We concur: BURNETT, J.; HART, J.

(185 Cal. 647)

Ex parte KASTER.

(Supreme Court of California. May 11, 1921.)

In Bank.

In the matter of the application of Edward M. Kaster for a writ of habeas corpus. Writ denied.

PER CURIAM. The petitioner heretofore sought his discharge on habeas corpus on account of the matters alleged in his petition filed herein, at the hands of the District Court of Appeal of the Third Appellate District. After a hearing that court, on May 2, 1921, discharged the writ, and remanded the petitioner. The court in so doing filed a written opinion. *In re Kaster on Habeas Corpus*, No. 556, filed May 2, 1921, 198 Pac. 1029. All points available to petitioner on habeas corpus are considered in that opinion, which, to our minds, correctly states the law in regard thereto.

The application for a writ is denied.

All concur.

(186 Cal. 196)

CHAMBERS, State Controller, v. GIBB.
(S. F. 9488.)

(Supreme Court of California. June 16, 1921.)

1. Taxation §862—Transfer in contemplation of death held taxable under statute at time of transfer.

A transfer of community property by a husband to his wife, made in contemplation of death, is taxable under the Inheritance Tax Act 1913, which gave an exemption of \$24,000, though the transfer did not take effect in possession, and the tax was not payable until the death of the transferor, at which time the inheritance tax act of May 23, 1917, allowing an exemption of half the property transferred, had been enacted, since the repealing clause of the act of 1917 (section 25), provided that the repeal should not affect any right which the state might have at the time the act took effect to claim a tax on any property under the provisions of the repealed acts.

2. Taxation §861—Exemption in subsequent statute held not applicable to transfer before its enactment taking effect thereafter.

Inheritance Tax Act 1917, § 1, subd. 2, providing that in the case of transfer of community property from a husband to a wife, within the meaning of section 2, subds. 3 or 5 of that act, one-half of the property so transferred shall be exempt, refers only to transfers taxable under that act, and not to a transfer made before the act took effect, but which was taxable on the death of the transferor thereafter.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Proceedings by John S. Chambers, as Controller of the State of California, against Sarah Oliver Gibb, to have fixed the inheritance tax to be paid by the defendant. From judgment fixing the tax, defendant appeals. Affirmed.

Frank E. Powers, of San Francisco, for appellant.

H. C. Lucas and A. W. Brouillet, both of San Francisco, for respondent.

WILBUR, J. This is an appeal from an order and judgment fixing the inheritance tax to be paid by the defendant. On September, 15, 1913, James Gibb transferred to his wife, Sarah Oliver Gibb, the defendant, certain real estate in the city and county of San Francisco, state of California. The real estate was community property, and the transfer was made in contemplation of death. No consideration was paid for the transfer, and the husband reserved a life estate to himself, giving him the right to the full enjoyment and possession of the same, and the rents, issues, and profits thereof for and during the term of his natural life. The conveyance was intended to take effect in possession

and enjoyment upon his death. At the time of the transfer the inheritance tax act of 1913 (Stats. 1913, p. 1066) was in effect. By that statute community property, transferred in contemplation of death or devised or bequeathed to the wife, was taxable with an exemption to her of \$24,000. This inheritance tax act was repealed by the inheritance tax act approved May 23, 1917 (Stats. 1917, p. 880). Thereafter on July 2, 1919, James Gibb died. It is conceded that the estate transferred was taxable to its full value, less an exemption of \$24,000 under the statute of 1913.

[1] Appellant, however, contends: First, that the statute of 1913 was repealed, and that for that reason no tax at all was payable upon said property so transferred; and, second, that if this point is not well taken, at least the exemption of one-half of the community property granted in the statute of 1917 is applicable. It has been repeatedly held by this court that the inheritance tax law in effect at the time of the transfer is the one which controls (Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Felton, 176 Cal. 663, 169 Pac. 392; Estate of Gurnsey, 177 Cal. 211, 170 Pac. 402; Estate of Murphy, 190 Pac. 46). The tax is imposed upon the transfer, and relates back to the time of transfer, but is not payable until the time of death. The repealing clause of the act of 1917 contained the following saving clause:

"Sec. 25. * * * provided, however, that such repeal shall in no wise affect any suit, prosecution or proceeding pending at the time this act shall take effect, or any right which the state of California may have at the time of the taking effect of this act, to claim a tax upon any property under the provisions of the act or acts hereby repealed. * * *

It is difficult to understand how the saving clause contained in the act of 1917 could have been more definite as to the taxation of the transfer in question. Under the law of 1913 the transfer was taxable. The tax was payable at death. This right to collect a tax at the death of the donor was specifically reserved in the proviso to the repealing section of the act of 1917.

[2] Section 1, subdivision 2, of the act of 1917 provides that in the case of a transfer of community property from husband to wife within the meaning of subdivisions 3 or 5 of section 2 of this act, one-half of the community property so transferred shall not be subject to the provisions of this act. This provision in regard to the exemption of one-half of the community property from the tax is specifically made with reference to the transfer taxable under that act. In other words, it was prospective in character, and by its terms had no relation to a transfer made before the enactment of the statute, which was

taxable under the terms of the prior statute. The statute should not be given a retrospective effect unless the language demands such a construction. *Matter of Van Kleeck*, 121 N. Y. 701, 25 N. E. 50; *Matter of Seaman*, 147 N. Y. 69, 41 N. E. 401; *Matter of Miller*, 110 N. Y. 216, 18 N. E. 139. The right to the tax having been definitely fixed by the law of 1913, the Legislature would have no power by subsequent act to remit the tax. *Estate of Martin*, 153 Cal. 225, 94 Pac. 1053.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; SLOANE, J.; OLNEY, J.; LAWLOR, J.

(186 Cal. 68)

TRAIL et al. v. FIRTH et al. (L. A. 6434.)

(Supreme Court of California. June 6, 1921.)

1. Limitation of actions § 13, 175—Promises of defendant held not waiver of limitations not estoppel to set up limitations.

Where purchaser of land discovered falsity of representations that water was sufficient to irrigate the land, the fact that sellers, after the discovery, promised and agreed to furnish sufficient water the next year, and each year thereafter made the same promise, did not under Code Civ. Proc. § 338, subd. 4, extend the period of limitations on a cause of action for damages for deceit by reason of the original representations; such subsequent representations not constituting a waiver of the statute, nor estopping the sellers from setting up the statute.

2. Equity § 67—"Laches" and "limitations" distinguished.

There is a decided difference between the defense of laches and that of the statute of limitations, laches being a defense which may be interposed to a suit in equity whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of limitation, and an action not brought within the statutory period is barred unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches; Limitation.]

Department 1.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by John W. Trail and another against Emil Firth and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants. Sheldon Borden and George H. Moore, both of Los Angeles, for respondents.

OLNEY, J. This is an appeal from a judgment for the defendants in an action to recover damages for alleged fraudulent representations made by the defendants to the plaintiffs. With other defenses which need not be stated, the defendants interposed that of the statute of limitations. If the complaint shows on its face a barred cause of action, the judgment for the defendants must necessarily be sustained. That it does show a barred cause of action is beyond reasonable question.

[1] The alleged misrepresentations were made, according to the complaint, in 1913 as the inducement for the plaintiffs to purchase certain land from the defendants, and consisted in representations that sufficient water was obtainable to irrigate the land. It is also alleged that the purchase was made, and that the plaintiffs went into possession, prepared the land for irrigation, and then in 1914 found that the water was not obtainable. Of necessity, the falsity of the representations was then discovered. That such discovery was then made is in fact conceded. The present action was not brought until 1919, five years later, while the period of limitation prescribed by the statute for actions for fraud is three years from the discovery of the fraud. Section 338, subd. 4, Code Civ. Proc.

To escape from the situation so presented, the plaintiffs rely upon certain further allegations of the complaint to the effect that upon failing to obtain sufficient water in 1914, the plaintiffs complained to the defendants, and the latter promised and agreed to furnish the water the next year, and that each year thereafter the same insufficiency of water developed, the same complaint was made, and the same promise given. But these facts, if they existed, were wholly insufficient to extend the period of limitation on a cause of action for damages for deceit by reason of the original representations. They are neither a waiver of the statute, nor would they estop the defendants from setting up the defense of the statute, and, unless there was either a waiver or an estoppel, it was open to the defendants to make the defense.

[2] The plaintiffs rely in support of their position upon authorities holding that facts such as those under discussion negative the defense of laches. But there is a most decided difference between the defense of laches and that of the statute of limitations. Laches is a defense which may be interposed to a suit in equity, whereby the plaintiff will be refused equitable relief because of his delay in bringing his suit, although the suit is commenced within the statutory period of limitation. But it would, indeed, be somewhat remarkable that the absence of this defense—for laches is a matter of defense—should have the affirmative effect of extending the period which a statute prescribes for

the bringing of the action. Laches or no laches, an action not brought within the statutory period is barred, unless the case falls within some exception which the statute itself makes, or because of waiver or estoppel it is not open to the defendant to make the defense. The present action was not brought within the statutory period, it does not come within any exception provided by the statute, it was open to the defendants to make the defense, and they made it. The judgment in their favor was therefore correct.

We would add that while we have discussed the case upon the sufficiency of the allegations of the complaint, the case is not one of insufficiencies in a complaint which are not found in the evidence. The evidence, or rather the evidence plus the facts which plaintiffs' counsel offered to prove, went no further than the allegations of the complaint. Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

(186 Cal. 70)

PACIFIC COAST S. S. CO. v. RICHARDSON,
State Treasurer. (S. F. 9375.)

(Supreme Court of California. June 6, 1921.)

1. Taxation \S 40(8)—Unequal assessment is excessive assessment.

An assessment of a corporation's franchise for taxation which is grossly disproportionate as compared with other assessments is an excessive assessment, as the final object of the assessment is to distribute the tax ratably, and an unequal assessment results in an excessive portion of the tax falling on one parcel.

2. Taxation \S 376(1)—That assessment is excessive if without fraud does not make it invalid.

That an assessment of a corporate franchise is excessive or even grossly so does not itself make the assessment invalid, in the absence of fraud in the sense of a conscious failure to exercise that fair and impartial judgment which the law requires.

3. Taxation \S 543(6)—Allegation held not to support finding that assessment was based on computation not authorized by law.

In a suit to recover back a so-called franchise tax paid under protest, an allegation that the board of equalization in making the assessment did not pursue a method authorized by law, in that it disregarded certain facts shown by the franchise tax return, which should have been considered, does not support a finding that the assessment was based upon a computation not authorized by law, as there is no method prescribed for ascertaining the total net value of the assets for the purpose of determining the value of the so-called franchise.

4. Taxation \S 490—Conclusion as to value of corporation's assets can be attacked only for fraud or mistake.

The conclusion of the board of equalization as to the total net value of a corporation's assets for the purpose of determining the value of its so-called franchise can be attacked only for fraud or mistake.

In Bank.

Appeal from Superior Court, City, and County of San Francisco; George H. Cabaniss, Judge.

Action by the Pacific Coast Steamship Company against Friend W. Richardson, as treasurer of the State of California. From a judgment for plaintiff, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Frank L. Guereña, Deputy Atty. Gen., for appellant.

Geo. W. Towle, of San Francisco, for respondent.

OLNEY, J. This is an action to recover the amount paid under protest by the plaintiff, a California corporation, to the state as the so-called "franchise" tax assessed against the plaintiff for the year 1917. The ground on which a recovery is sought is the alleged invalidity of the assessment on which the tax was based. The plaintiff recovered judgment in the lower court, and the state appeals.

A question which immediately presents itself upon the record is, Are the findings of the trial court sufficient to sustain the judgment in favor of the plaintiff? The sole finding of grounds by reason of which the alleged invalidity of the assessment appears is this:

"The court hereby finds that the assessment of plaintiff's corporate franchise by the State Board of Equalization as of the first Monday in March, 1917, was grossly excessive; was grossly unequal as compared with the assessment by the said board of all other like franchises as of the first Monday in March, 1917, and that the assessment by the said board of plaintiff's said franchise as of the first Monday in March, 1917, was based upon a computation that was not authorized by law."

It will be noted that the grounds so found are three, to wit: (1) That the assessment was grossly excessive; (2) that it was grossly unequal as compared with the assessments of other like franchises; and (3) that it was based upon a computation not authorized by law.

[1.2] The first and second grounds are in reality the same. An assessment grossly disproportionate as compared with other assessments is an excessive assessment, since the final object of the assessment is to distribute the tax ratably on the various parcels of property subject to it, and an unequal assess-

ment on one parcel as compared with others means that an excessive portion of the tax falls on that parcel. But the fact that an assessment is excessive, even though grossly so, does not itself make the assessment invalid. This is the rule generally followed in other jurisdictions, and has been declared by at least three decisions of this court, namely *Los Angeles v. Western, etc., Co.*, 161 Cal. 204, 118 Pac. 720; *Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277; *Miller & Lux v. Richardson*, 187 Pac. 411. In the first of these cases, the finding of the trial court was, as here, that the assessment "was grossly excessive," and it was held, nevertheless, that it was insufficient as a ground for invalidating the assessment. In the last of the cases mentioned, the point is disposed of thus (187 Pac. 416):

"The plaintiff complains bitterly of the assessments as excessive and arbitrary. But this is a matter that cannot be gone into by the courts, provided the method pursued in making the assessment is that prescribed by law, except where there is fraud or mistake. If the method pursued is not that prescribed by law, or, what is much the same thing, if the thing ostensibly valued and required by law to be valued is not really the thing valued, as in this case if the thing valued as franchise be not franchise as meant by the Constitution, the matter can be gone into by the courts and the taxpayer relieved of the assessment. *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429; *Louisville, etc., Co. v. Bosworth* (D. C.) 230 Fed. 191; *Hager v. American Surety Co.*, supra. But in the present case, as we have held, the method pursued of assessing the plaintiff's franchise on the basis of valuing its corporate excess was the correct one, and the thing assessed as franchise was the thing which was required to be so assessed by law as expressed in the Constitution. This being the case, the discretion of the assessing officials as to the valuation to be fixed is final, in the absence of fraud or mistake. In the present case neither fraud nor mistake is alleged. It is alleged that the assessments are excessive and arbitrary. The character of the assessment in this respect may be cogent evidence of fraud, but of itself does not constitute fraud. In order that there be fraud, there must exist, on the part of the assessing official, a conscious failure to exercise that fair and impartial judgment which the law requires of him. This is both the general rule and the settled law of this state."

It must be held, then, that the judgment is without support as to the first two grounds.

[3,4] As to the third ground found, that the assessment "was based upon a computation not authorized by law," it is exceedingly doubtful if the finding is anything more than a conclusion of law. It is not found what method of computation was or was not pursued, and so far as the finding shows, the method pursued may have been one

which in the opinion of the trial court was not authorized in law, when in truth it was. But passing this, and assuming that the finding states a sufficient ground for invalidating the assessment, it is wholly without support, either in the pleadings or in the evidence. There is no allegation in the pleadings nor is there a particle of evidence as to the method pursued by the board of equalization. All that is alleged is that the board did not pursue a method authorized by law in that it disregarded certain facts shown to it by the plaintiff's franchise tax return. It is unnecessary to state these facts. Suffice it to say that some of them were undoubtedly entitled to consideration as factors entering into the total net value of the plaintiff's assets, and, if not considered in that connection, should have been in all fairness. But their bearing in that respect would be only on the good faith of the board, and as to that, as we have said, there is no finding other than the insufficient one that the valuation fixed was grossly excessive. The point in connection with the allegation that the board followed an unauthorized method in determining the assessment is that the disregarding of these facts, if they were disregarded, something as to which there is no evidence, would not involve a departure from the method prescribed by law for the making of the assessment. There is no method prescribed for ascertaining the total net value of the assets of a corporation such as the plaintiff for the purpose of determining the value of its so-called "franchise," and the conclusion of the board as to such total net value can be attacked only for fraud or mistake. This in effect was likewise held in *Miller & Lux v. Richardson*. The allegation therefore that the board disregarded the facts mentioned, although some of those facts were material in determining value, is not the equivalent of an allegation that the method prescribed by law was not pursued.

As to the evidence, it was confined to a showing that the facts mentioned did in truth exist. There was not even an attempt to show that the method prescribed by law was not followed. This would not have been shown even if it had been made to appear that the facts mentioned had been disregarded by the board, but in justice to the board we think we should say that no attempt was made to show that they were disregarded, and that the allegation of the complaint in that respect was flatly denied by the answer.

The case, then, may be summed up by saying that of the three grounds found to exist for invalidating the assessment, the first two, which are both to the effect that the assessment was grossly excessive, are not sufficient as legal grounds, and that the third, to the effect that the method prescribed by

law was not followed, is not supported either by the pleadings or by the evidence.
Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWOR, J.

(186 Cal. 102)

In re WATTS' ESTATE. (Sac. 3138.)

(Supreme Court of California. June 7, 1921.)

1. Wills §489(4)—Declarations of testators as to intent held properly excluded.

In a suit for partial distribution of the estate of a testatrix where the will gave the remainder of the estate "to my heirs," evidence of declarations by testatrix at the time the will was drawn to show that the quoted words were intended to refer only to her own kin held properly excluded in view of Civ. Code, §§ 1318, 1340.

2. Wills §489(2)—Oral declarations to interpret will cannot be given except in cases of latent ambiguity.

In view of Civ. Code, § 1318, providing that testator's intention must be ascertained from the words of the will in view of the circumstances under which it was made, and of section 1340, relating to the correction of mistakes, evidence of oral declarations to aid in the interpretation of a will cannot be given at all except in cases of latent ambiguity.

3. Wills §489(2)—Oral declarations of testator not admissible to show intent even when uncertainty or imperfect description exists.

In view of Civ. Code, § 1318, providing that testator's intention must be ascertained from the words of the will in view of circumstances under which made, and of section 1340, relating to the correction of mistakes, when uncertainty or imperfect description appears in the will oral declarations of testator are not admissible to show intent with respect thereto.

4. Evidence §69—Allowances for support of widow under statute presumed to be so used by her.

An allowance for a widow's support under Code Civ. Proc. §§ 1464 and 1466, will be presumed, in the absence of evidence to the contrary, to have been all used by her for the purpose for which she received it and that none of it remains as part of her estate at her death.

5. Husband and wife §274(4)—Evidence sustaining finding that widow's estate was community property.

In a suit for partial distribution of a widow's estate, evidence held to require a finding that notes purchased by her from other heirs were paid out of the proceeds of the community estate inherited by her from her deceased husband and not out of her separate property, so that it was not error to refuse to set aside a stipulation that all the property of which she died seized was property distributed to her from her husband's estate.

6. Wills §525—Claim as to proportions in partial distribution in widow's estate at variance with statute held not tenable.

In a suit to partially distribute the estate of a deceased widow to whom had been distributed three-fourths of the community property owned by her and her deceased husband, under a will in effect providing for distribution to her heirs as if she had died intestate, a claim for distribution in proportions different from those prescribed by Civ. Code, § 1386, subd. 8, held not tenable.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Proceeding for partial distribution of the estate of Lydia M. Watts, deceased. From a decree of partial distribution, Ella Gray, A. V. Watts, and others appeal. Affirmed.

W. H. Carlin, of Marysville, and D. Hadsell, of San Francisco, for appellants.

Bond & Deirup and Samuel J. Nunn, all of Chico, for respondents.

SHAW, J. This is an appeal from a decree of partial distribution.

The decedent was the widow of one Nelson Watts, who died intestate in June, 1900, leaving a large estate consisting entirely of community property. There were no children of the marriage, and neither husband nor wife left issue surviving. Upon the final settlement of the estate of Nelson Watts, three-fourths of the property remaining for distribution was assigned to Lydia M. Watts as his widow, and one-fourth thereof to A. V. Watts and others as brothers and sisters of Nelson Watts, or their descendants. Lydia M. Watts died on August 5, 1916. By her will she gave the residue of her property by the following clause:

"I hereby give, devise and bequeath all the rest, residue and remainder of my estate wheresoever situate to my heirs and to be distributed to them according to law."

Her estate was appraised at \$356,344.65. Ella Gray and the other persons who were the next of kin of Lydia M. Watts petitioned the court for partial distribution of \$81,000 of the estate. The superior court decided that the words "my heirs" in the will meant the next of kin of Lydia M. Watts alone and did not include the next of kin of Nelson Watts. On appeal to the Supreme Court the order was reversed, and it was held that the effect of the above-quoted provision was to give the property to the persons who would have inherited it under the statute of descent, had she died intestate, and therefore that it should go in equal parts, one-half to the relatives of Nelson Watts and one-half to the relatives of Lydia M. Watts, as provided in subdivision 8 of section 1386 of the Civil Code. The decision was made on September

24, 1918. Est. of Watts, 179 Cal. 20, 175 Pac. 415.

After that decision each of the contending sets of claimants filed a petition for distribution of a part of the estate. The Nelson Watts claimants asked distribution to them of one-half of \$30,000 in money and one-half of 3,960 acres of land. The petition of the Lydia M. Watts claimants asked distribution to themselves of \$45,000 in money out of the estate, claiming to be entitled to it all. After the filing of these petitions a large part of the real property was sold and amended petitions were filed asking distribution of the proceeds, with the other money on hand, and of the remaining land. After a trial of these conflicting claims the court below made findings declaring that money on hand amounting to \$267,506.56 belonging to the estate and something over 1,600 acres of land remaining unsold was ready for distribution, and thereupon it entered a decree sustaining the contention of the Nelson Watts claimants and distributing said property accordingly, one-half to each set of claimants, setting out particularly the share of each person interested. From this decree the Lydia M. Watts claimants appeal.

[1] 1. Upon the trial the appellants offered to prove certain declarations made by the testatrix, Lydia M. Watts, at the time the will was drawn to the person who drew it, concerning her intention. This evidence was offered to show that by the words "to my heirs" in the above residuary clause she intended to refer only to her own kin; that her desire was for them to have the entire residue. This evidence was excluded and the ruling is assigned as error.

We think the ruling was correct. Section 1318 of the Civil Code provides as follows:

"In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations."

And section 1340 provides that—

"When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received."

[2, 3] It will be seen from these provisions, first, that evidence of oral declarations to aid in the interpretation of a will cannot be given at all except in cases of latent ambiguity, which does not appear here, and, second, that even when uncertainty or imperfect description so appears, oral declarations of the testatrix are not admissible to show her intent with respect thereto. This is

the uniform rule of this court. Estate of Walkery, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Young, 123 Cal. 344, 55 Pac. 1011; Estate of Tompkins, 132 Cal. 176, 64 Pac. 268; Estate of Blake, 157 Cal. 469, 108 Pac. 287; Estate of Willson, 171 Cal. 456, 153 Pac. 927. The same rule is stated by all the text-writers. 1 Redf. on Wills, p. 496; 1 Jarman on Wills (6th Ed.) top p. 412, *p. 379; Wharton on Ev. § 992; 4 Wigmore on Ev. § 2471; 3 Jones on Ev. § 480. Furthermore, the decision on the former appeal is to the same effect with regard to the meaning of these particular words, the court saying (179 Cal. 23, 175 Pac. 417):

"We must determine her intent from the language of her will, and where that language is clear and unambiguous, it 'must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby.'"

The decision also establishes the proposition that in view of the express provisions of the Civil Code, in section 1327, relating to technical words in a will, and in section 1334, defining the meaning of the word "heirs" when used in a will, there is no uncertainty on that subject arising on the face of this will. The rule excluding oral declarations is therefore strictly applicable to this case and the court properly excluded the evidence thereof.

It is suggested that the decision of the Supreme Court on the former appeal is not applicable to the question of the admissibility of evidence of oral declarations, because at the trial there under review no such evidence was offered; also, that the proof of the existence of the two opposing sets of claimants showed a latent ambiguity, upon which evidence of extrinsic facts was admissible. The Code sections quoted and the decisions we have cited dispose of the first suggested point without aid from our previous decision. Upon the former trial the extrinsic facts which it is now claimed produce a latent ambiguity were fully shown, as appears in the previous opinion. These facts were that the property to be distributed was community property of the marriage between Lydia M. Watts and Nelson Watts; that neither of them left children or lineal descendants surviving; and that both left collateral relatives entitled to inherit from them as such, respectively. To that extent the former decision is strictly applicable here and is decisive to the effect that no latent ambiguity arose from the existence of said facts.

2. Upon the hearing in the trial court of the petition for partial distribution under review on the former appeal, the parties filed a stipulation to the effect that all the property of which Nelson Watts died seized was community property of said Nelson Watts and Lydia M. Watts, his wife; that upon the

final settlement of his estate on July 5, 1901, three-fourths thereof was distributed to her and one-fourth to his relatives; that all the property of which she died seized is property so distributed to her as aforesaid and the rents, issues, and profits thereof; and that said stipulation might be used upon any subsequent petition for distribution of said estate or any part thereof.

Upon the hearing of the petitions now under review the appellants offered to prove that Lydia M. Watts, as administratrix of her husband's estate, had, on the final settlement thereof, received from the estate \$4,100 as commissions for her services; that during the administration she received from the estate a family allowance amounting to about \$4,550; that within two months after the final settlement of said estate she purchased from the next of kin of Nelson Watts their one-fourth interest in certain mortgages and notes belonging to said estate which had been distributed to them by the decree of distribution; and that during the administration of said estate there was set apart to her as a homestead two lots in Chico, which she still owned at her death. Objections to said offer on the ground that the appellants were bound by said stipulation were sustained by the court. Thereupon appellants, upon notice and affidavits, moved the court to be relieved from the effect of such stipulation, on the ground that the same was made through inadvertence and in ignorance of the facts which they then offered to prove. Counter affidavits were filed, and the court denied the motion.

The showing of inadvertence and excusable neglect in signing the stipulation was not strong. But conceding that it was sufficient in that respect, we think the motion was properly denied for other reasons.

[4, 5] The two petitions then on hearing were each for partial distribution and asked only for distribution of a specific sum of money and specific parcels of land. The appellants did not even attempt to allege or to show that the money received for commissions and family allowance, or the proceeds thereof, constituted any part of the money of which distribution was asked. The family allowance was received by her in 1900 and 1901, 15 years before her death. As the statute allows it for her support during the progress of the settlement of her husband's estate on the ground that it is necessary for that purpose (Code Civ. Proc. §§ 1464, 1466), it is to be presumed, in the absence of evidence to the contrary, that it was all used by her for the purpose for which she received it and that none of it remained as part of her estate at her death in 1916. The lots set off to her as a homestead are not included in the real property of which distribution was asked or made and they remain on hand as part of her undistributed estate. The question whether or not those lots are now to be

classed as her separate estate is not now involved and may not appropriately be decided. The evidence offered in regard to the purchase of the one-fourth interest of the relatives of Nelson Watts in the mortgage notes shows that on August 2, 1901, she did buy said interest and paid therefor the sum of \$12,891. Appellants claim that this alone raised a presumption that the payments were made to them by her out of her separate estate, and that this presumption is so conclusive that the court was without discretion to refuse to set aside the stipulation if it was inadvertently made in ignorance of that fact. There was, however, before the court at that time many other facts which almost conclusively rebut any presumption of that kind. The stipulation was to the effect that there was no separate property of either husband or wife in existence at the time of the death of Nelson Watts. There was no attempt to show that his widow had engaged in any independent business of her own after his death, or had received any property as her separate estate, except the family allowance and commissions. The inference is almost conclusive that she had no funds with which to buy said mortgage notes except what she received from the estate of her husband, aside from the commissions. It appeared that the annual rents of said estate at the time of his death were from \$15,000 to \$20,000. Of this she would be entitled to three-fourths. It also appears that he left notes amounting to over \$60,000 in value, of which the interest she so purchased was a part. Furthermore, there is some evidence indicating that the subsequent purchase of these notes was in reality a partition thereof. The assignments thereof were all dated August 2, 1901, and were all recorded on September 24, 1901. On the same day there were recorded assignments by said widow to the next of kin of Nelson Watts of her three-fourths interest in certain other mortgage notes belonging to said estate, which assignments were dated July 24, 1901, in consideration of which she received from them \$1,898.43. It may further be observed that if they transferred their interest in notes not secured by mortgage, as was not improbable, in the same transaction, the assignment of the notes could not be matters of record. There was no attempt to prove that the commissions were used to pay for the notes purchased by her from the other heirs. All the circumstances taken together furnish almost conclusive proof that instead of there being a purchase there was a mere partition of their interests in the notes. In any event, there was ample proof to show that whatever money she paid to them was more probably paid out of the proceeds of the community estate than out of her separate property, inasmuch as it is not claimed that she had separate property before the death of her husband. For these reasons we think that on

the merits of the proposition the court was justified in refusing to enter upon the inquiry which must inevitably have resulted in proving that the stipulation so far as it affected the case then before the court was true.

[8] 3. The remaining point of the appellants is stated in their opening brief as follows:

Since it appears that "Lydia M. Watts received only three-fourths of the common property at the time of the distribution of the estate of her predeceased spouse Nelson Watts, the other one-fourth going to the blood relatives, then in any event appellants are entitled to one-half of the common property which would be two-thirds of the three-fourths distributed to her. Therefore, appellants are clearly entitled to two-thirds of the estate distributed instead of the one-half which the lower court awarded."

We are unable to follow the somewhat abstruse reasoning by which this conclusion is reached. The Code plainly declares that upon the death of a widow leaving no issue and leaving estate which was common property of herself and her deceased spouse while such spouse was living, if there were no children of the former spouse nor any father or mother of either living at the time of the widow's death, such estate shall go in equal shares, one half "to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes * * * to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation." Civ. Code, § 1386, subd. 8. By the will of Lydia M. Watts, as has been seen, her property was to go to her heirs. In the former decision in this estate it was expressly held that this meant that it should go to her heirs as they were defined in subdivision 8 aforesaid in the same manner as if she had died intestate. We have no disposition now to revise that opinion and hold that it goes in some other proportions, especially in view of the precise language of the Code just quoted. We perceive no ground upon which to found the conclusion that the fact that she received only three-fourths of the common property at the distribution of her husband's estate made that three-fourths anything else than common property of the previous community, or pointed to a course of descent different from that specified in subdivision 8 aforesaid. The point appears to be without merit in itself and no authority is cited which approaches to a support of it.

The decree of distribution is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

In re DOL'S ESTATE. (L. A. 6068.)

(Supreme Court of California. June 6, 1921.)

Wills 614—Pioneer society held a "charitable corporation."

An incorporated society of pioneers, whose objects included not only the cultivation of social intercourse among its members, but also the collection and preservation of data and articles of historical interest, and whose membership might embrace a large and indefinite portion of the public, is a charitable corporation, which is one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class from a part of it indefinite as to number of individuals, and therefore a bequest to such corporation, in a will executed less than 30 days before the death of testator, is void under Civ. Code, § 1313.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Charitable Corporation.]

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Victor Dol, deceased. From a decree ordering the payment of a bequest to the Los Angeles County Pioneer Society, Frank P. Flint and another, as executors and the residuary legatees, appeal. Reversed.

See, also, 187 Pac. 428.

Frank P. Flint and Donald Barker, in pro. per.

Flint & Mackay and Donald Barker, all of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for appellants Oberly and Ingram.

Will D. Gould, of Los Angeles, for respondent.

SHAW, J. The executors of the will and the residuary legatees appeal from a decree distributing and ordering paid a bequest of \$2,000 made by the will of the decedent to the respondent, an incorporated society, known as "Los Angeles County Pioneer Society."

The will was executed less than 30 days prior to the death of the testator. If the respondent is a "charitable or benevolent" corporation, the bequest is void under the provisions of section 1313 of the Civil Code, declaring that—

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator."

If this point is good, the other points made by appellant need not be considered.

The articles of incorporation of the respondent state the purposes for which it was formed, as follows:

"That the purpose for which this corporation is formed is to cultivate social intercourse and friendship among its members, to collect and preserve data touching the early history of Los Angeles county and state of California, to collect and preserve articles, specimens and material things illustrative or demonstrative of the customs, modes and habits of the aforesaid times in said state; to perpetuate the memory of those who, by their labors and heroism, contributed to make the history of said county and state; and in furtherance of said purpose to receive, purchase, sell, hold, convey, lease, rent and maintain all kinds of property, both real and personal, to build clubhouses, and to do any and all acts necessary and convenient for the promotion of said purpose; and to exist as a social corporation under the provisions of the laws of the state of California, covering such corporations, and not for pecuniary profit."

The corporation has no capital stock, and it is stated in the bill of exceptions that the paragraph above quoted is the only part of its articles material to be considered upon the issues presented in the case.

We are of the opinion that the respondent is a charitable and benevolent corporation. If its only object were to cultivate social intercourse and friendship among its members, it would be for the benefit of the members alone, and it would not come within that class. But it is apparent from a reading of the part of the articles above quoted that this was but a minor part of its purposes. A charitable corporation is one organized for the purpose, among other things, of promoting the welfare of mankind at large, or of a community, or of some class forming a part of it indefinite as to numbers and individuals. It is impossible to enumerate specifically all purposes which characterize such corporations as charitable. "The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper objects of an eleemosynary trust." *People v. Cogswell*, 113 Cal. 138, 45 Pac. 271, 35 L. R. A. 269. In *Estate of Winchester*, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281, the status of a society known as the Santa Barbara Natural History Society was under consideration. It was an unincorporated society "having for its object to advance the study and promote knowledge of the various branches of natural history, by holding meetings, providing for lectures, and establishing a museum of natural history specimens." It was held to be a charitable society. Its purposes are not materially different from those of the respondent. The case seems to be decisive of the case at bar. The collection

and preservation of data touching the early history of the state and the collection and preservation of articles, specimens, and material things illustrative of the customs, modes, and habits of the early times in California and the perpetuation of the memory of those who contributed to make the history of the state are obviously purposes tending to the benefit of the public at large, by furnishing means of information and knowledge of the history of the state. A case almost exactly parallel to the present one is *Molly Varnum Chapter, D. A. R., v. Lowell*, 204 Mass. 487, 90 N. E. 893, 26 L. R. A. (N. S.) 707. The plaintiff corporation in that case was organized—

"for the purpose of perpetuating the memory of the men and women who achieved American independence, of acquiring and protecting historical spots, encouraging historical research and the publication of its results, preserving documents and relics and individual records of revolutionary soldiers and patriots, and promoting the celebration of patriotic anniversaries, or cherishing, maintaining and extending the institutions of American freedom, and fostering true patriotism and love of country."

It was held to be a charitable corporation. The court said:

"If the sole object * * * had been the gratuitous collection and publication of facts connected with our revolutionary history, this certainly would have been educational and of great value to the community. * * * The foundation upon which such an institution rests would be in aid of letters and charitable by indentment of law."

It was also said that the encouragement and promotion of historical research and the publication of results in the form of books, pamphlets or periodicals without profit "is within the statutory category," and that property held for that purpose was exempt from taxation as a charitable and benevolent institution under the exemption statute of that state. There is no material distinction between these cases and that here presented.

It may be urged that the articles contain no provision whereby any person not a member thereof may receive any benefit from the carrying out of its corporate purposes. This may be true as to the cultivation of social intercourse and friendship among its members, although as there is no limit as to the number of members, or as to conditions of admission, the membership may embrace a large and indefinite portion of the public. But a reading of the article on the subject shows that the carrying out of the purposes defined will in the main benefit the general public as much as the members.

In view of the foregoing authorities and upon general principles it seems clear that the respondent corporation was a charitable and benevolent corporation within the mean-

ing of section 1313 of the Civil Code, and, the bequest having been made within 30 days prior to the death of the testator, it is void under the provisions of that section.

The order is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; SLOANE, J.; LAWLOR, J.

(188 Cal. 53)

H. HACKFELD & CO., Limited, v. CASTLE et al. (S. F. 8884.)

(Supreme Court of California. June 6, 1921.
Rehearing Denied July 5, 1921.)

1. Sales ⇨83—Question as to whether buyer or seller should furnish transportation held one of intention; "f. o. b." defined.

The question of whether the buyer or the seller of Hawaiian honey should secure the necessary transportation held one of intention of the parties as to what they contemplated, and the expression "f. o. b." throws no light upon the question; such expression merely making it the seller's duty to load at his own expense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

2. Sales ⇨172—Shipping route provided for by contract held material.

A contract provision calling for shipment of Hawaiian honey by a certain route held one material to the contract, so that it could not be performed according to its terms except by shipment by such route, and the continued existence of such route was, in absence of warranty that it would continue in existence, a condition of the contract, so that the parties would be excused in case before breach performance became impossible by reason of the prescribed route ceasing to exist.

3. Sales ⇨83—Option as to shipping route construed.

A contract of sale prescribing a certain shipping route, or at buyer's option another route in case the first route was discontinued, meant that the contract was conditional upon the first route remaining open, but that in case it were discontinued the buyers might waive the condition if the goods could go forward by the other route; and was not merely an option between routes.

4. Sales ⇨177—Discontinuation of shipping route on account of war excuses buyer from acceptance.

Assuming that it was the duty of the buyers of Hawaiian honey to secure transportation, that duty was conditional upon the necessary instrumentality continuing in existence, and where, owing to war, the route specified in the contract was discontinued, the buyer was justified in refusal to accept the honey.

5. Sales ⇨180(1)—Acceptance of part of goods purchased held not to waive contract requirements as to transportation.

The fact that a buyer of Hawaiian honey accepted a part of the purchase shipped by

another route than that provided for by contract held no waiver by the purchaser of contract requirements as to subsequent shipments.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by H. Hackfeld & Co., Limited, against Walter M. Castle, Albert E. Castle, and Arthur H. Castle, doing business under the firm name and style of Castle Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

Andros & Hengstler, Louis T. Hengstler, and Golden W. Bell, all of San Francisco, for appellant.

Walter Perry Johnson and Nathan H. Frank, both of San Francisco, for respondents.

OLNEY, J. The plaintiff, an exporting firm of the Hawaiian Islands, sold to the defendants, a jobbing firm of San Francisco, the output of honey of a certain Hawaiian brand, for the season of 1914. The output amounted to 1,946 cases, of which 800 were delivered and paid for. The defendants refused to accept the remaining 1,146 cases, and the plaintiff sold them at public auction for the account of the defendants for a figure less than the contract price and brought the present action for the difference. Judgment went against the plaintiff, and it appeals.

At the time the contract of sale was made, March, 1914, a regular line of steamers was running between Honolulu and the Isthmus of Tehuantepec, there connecting with the railroad across the Isthmus and by means of the railroad with vessels on the Atlantic side sailing between the Isthmus and Atlantic ports. By means of this line, shipments could be made in regular course from Honolulu direct to European ports, including that of Hamburg. Such being the means of shipment from Honolulu to Hamburg, the contract between the parties provided that the price was net f. o. b. Honolulu, payable on sight draft with shipping documents attached, and provided also:

"Goods to be shipped direct shipment from Honolulu via Tehuantepec to Hamburg (or at our [buyers'] option, via Panama Canal, in case the Tehuantepec route is discontinued)."

Upon the provision just quoted the cause turns. Before the time arrived for the shipment of the honey, the Tehuantepec route was discontinued because of unsettled political conditions in Mexico, and was not reopened. The Panama Canal was not yet open, and was not opened until the middle of August, 1914. In the meantime, the recent World War had broken out, the port of Hamburg had been blockaded, and shipment to

that port by any route had become a practical impossibility. In this situation, and because of it, the defendants refused to accept the honey, and the final question in the case is, were they justified in so doing?

The question is largely discussed before us as if it were to be determined according as it was the duty of the seller or the duty of the buyers under the contract to secure the necessary transportation. The contention on behalf of the plaintiff is that under *f. o. b.* contracts it is the rule, in case of shipments by sea as distinguished from shipments by rail, that it is the duty of the buyer to secure the transportation, and that since the defendants in this case failed to do so they are responsible. On behalf of the defendants, on the other hand, it is asserted that the prevailing American, as distinguished from the English, rule is that under an *f. o. b.* contract it is the business of the seller to secure transportation, and in support of their contention counsel cite a number of decisions by courts of this country so holding as to shipments by rail. We doubt if either of these contentions is strictly correct; that is, if it can be truly said either that there is one rule for shipments by sea and another for shipments by rail, or that there is one rule followed in America for the most part and another followed in Great Britain.

[1] The question is one as to the intention of the parties, as to what they contemplated. The expression "*f. o. b.*" in and of itself throws no light upon it. The expression merely makes it the duty of the seller to load at his own expense. But whether the means of conveyance on which the goods are to be loaded are to be furnished by him or by the buyer is not indicated by the requirement. It would seem that in the absence of any express provision on the point (and usually there is none), what the parties contemplated must be determined by what was reasonable under the particular circumstances of each case. When the buyer is not at the point of shipment, and when between that point and the point of destination there is a regular and customary method of transportation with fixed rates and uniform conditions, so that it is practically immaterial to the buyer whether he or the seller arrange for the transportation, and there is no difficulty and no substantial burden in arranging for it, the fact that the seller is on the ground and it is convenient for him to arrange for it, when it is not convenient for the buyer, would seem to make it reasonable that the seller should attend to the matter. This is generally the situation in the case of shipments by rail. It is, however, not the situation, as a rule, in the case of shipments by sea. For one thing, there is usually no uniformity of freight rates, so that the buyer, who, of course, must pay the freight under an *f. o. b.* contract, is immediately concerned with what arrangement may be made for

transportation. On the other hand, the arrangement is a matter of indifference to the seller. Under these circumstances it would seem to be reasonable to conclude that the parties contemplated that, since the buyer is the party interested, he should attend to arranging for the transportation, either directly or by instructions to the seller. Of the decisions cited to us by counsel, most of those in this country were concerned with shipments by rail, and most of those in England with shipments by sea, and the above is, we believe the probable explanation of whatever differences may exist between them. But if this view be correct, it follows that where the conditions of transportation by sea are substantially the same as those of transportation by rail, as where the contract of sale contemplates transportation by a regular line of steamers with fixed rates and uniform conditions, and the seller is at the point of shipment and the buyer is not, it might well be concluded that the parties contemplated that the matter of arranging for transportation would be attended to by the seller. The present case closely approximates at least that situation. But we need not determine finally whether it was the duty of the seller or of the buyers in the case before us to secure the transportation. We are of the opinion that, even accepting the view that it was the duty of the buyers, it yet does not follow that they were not justified in refusing to accept the goods when shipment by the prescribed route became impossible.

[2] That the contract called for shipment via Tehuantepec hardly admits of question. There is a suggestion by plaintiff's counsel that the provision we have quoted was in the nature merely of shipping instructions by the buyers to the seller, and was not intended as truly a part of the contract between them. But the mere presence of the provision in the writing which constitutes the contract would alone indicate *prima facie* that the provision was a part of the contract itself, and when, in addition to this, we consider the circumstances under which the contract was made there can be no doubt upon the point. Neither can there be any doubt upon the further point that the provision was one inserted for the benefit and protection of the buyers. It seems that prior to the making of the contract the plaintiff had given the defendants a firm option on the honey, and that, while holding this option and before accepting it and closing the contract, the defendants contracted with a Hamburg firm for a resale of the honey to it; the contract specifying that the honey should go forward via Tehuantepec. These facts were known to the plaintiff when the defendants closed the contract with it, and there is but one possible inference from them, and that is that the provision under consideration was inserted in the contract in order to insure to the defendants that the honey would be

shipped to Hamburg via Tehuantepec as their contract with the Hamburg firm required.

The provision calling for shipment via Tehuantepec was, then one material to the contract, so that the contract could not be performed according to its terms except by shipment by that route. This means that that route was a necessary instrumentality for the performance of the contract. Its continued existence was therefore, in the absence of any warranty by either party that it would continue in existence, a condition of the contract, within the rule thus stated by Prof. Williston (3 Williston on Contracts, § 1948):

"Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence. A contract to manufacture goods in a particular factory is discharged by the destruction of the factory (*Stewart v. Stone*, 127 N. Y. 500); a contract to do work on a specific building is discharged by the destruction of that building (*Keeling v. Schastey*, 18 Cal. App. 764); a contract to carry goods by a particular ship is discharged by the loss of the ship (*Furness, etc., Co. v. Randall*, 124 Md. 101), or by such an injury to it as prevents its use within the time permitted by the contract (*Nicholl v. Ashton* [1901] 2 K. B. 126); and a contract to serve or to employ another on a particular ship is subject to the same defense (*The Dawn*, 2 Ware, 121). A contract to move a building is excused by its destruction (*Jones-Gray Const. Co. v. Stephens*, 167 Ky. 765); a contract to furnish water from a spring by the failure of the spring (*Ward v. Vance*, 93 Pa. 499); a contract to drive logs down a stream by a fall in the water in the stream, owing to which performance becomes impossible (*Clarksville Land Co. v. Harriman*, 68 N. H. 374)."

A case substantially parallel to the present is that of *The Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747. There the owners of certain cotton and the owners of a certain ship had contracted for the carriage of the cotton by the ship from New Orleans to Liverpool. Before the ship commenced her voyage she was injured by fire so that she was rendered unseaworthy and incapable of earning freight unless repaired at a cost which would exceed her value when repaired. It was held that both parties to the contract for carriage were excused, the court saying (108 U. S. 351, 2 Sup. Ct. 752, 27 L. Ed. 747):

"In *Taylor v. Caldwell*, 3 Best & Smith, 826, it is laid down as a rule that 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' The reason given for the rule is that without any express stipulation that the destruction

of the person or thing shall excuse the performance, 'that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.' The rule was there applied to excuse the owner of a music hall which had been burned from fulfilling a contract to let the use of it. The principle was extended further in *Appleby v. Myers*, L. R. 2 C. P. 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the plaintiffs were not entitled to sue in respect of those portions of work which had been completed, whether the materials used had become the property of the defendant or not."

See, also, for other cases involving the same principle and closely parallel to the present on the facts, *Furness, etc., Co. v. Randall*, 124 Md. 101, 91 Atl. 797; *Scottish, etc., Co. v. Souter*, [1917] 1 K. B. 222; *Horlock v. Beal*, [1916] 1 A. C. 486; *Nickoll v. Ashton*, [1901] 2 K. B. 126; *Lovering v. Buck, etc., Co.*, 54 Pa. 291.

In the leading English case of *Taylor v. Caldwell*, mentioned in the quotation just made from *The Tornado*, Lord Blackburn states the underlying principle as follows:

"There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to *Walton v. Waterhouse*, 2 Wms. Saund. 421a (6th Ed.), and is recognized as the general rule by all the judges in the much-discussed case of *Hall v. Wright, E. B. & E.* 746. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

This language is directly applicable to the present case. The parties here must from the beginning have known that the contract could not be fulfilled unless the Tehuantepec route continued to exist, so that when entering into the contract they must have contemplated its continuing existence as the foundation of what was to be done. There was no express or implied warranty by either party that it would continue to exist, and the contract is therefore to be construed as subject to an implied condition that the parties be excused in case, before breach, performance became impossible by reason of the prescribed route ceasing to exist.

The only substantial difference between these cases and the present is that in them it did not appear that the parties contemplated, when the contract was made, the contingency which subsequently arose, namely, the loss of the instrumentality by which alone the contract could be performed, while in the present case it does appear that the parties did contemplate it. This appears from the provision that at the buyers' option the honey might go by Panama in case the Tehuantepec route were discontinued. But the effect of this difference is only to strengthen the implication that the contract was conditional upon the Tehuantepec route remaining open. It was only at the buyers' option that the honey could go forward otherwise than by Tehuantepec, even if that route were closed and performance thereby made impossible. The reasonable implication is that if the buyers did not choose to exercise this option (and they did not), the condition inserted for their benefit that the honey should go by Tehuantepec would operate and they would be excused because of noncompliance with it. Otherwise the option would be valueless.

[3] In this connection we would note a contention made by plaintiffs' counsel as to the construction of the option provision. It is that the option given the buyers in case the Tehuantepec route was closed was one of choosing the Panama route in preference to any other; in other words, was merely an option between routes. The answer to this, however, is that the granting of such an option would amount to nothing. The plaintiff's fundamental contention is that the defendants were obligated to accept the honey, whether the Tehuantepec route was open or not. If this be true, the buyers necessarily would have the right, in case the Tehuantepec route were closed, to select any route they pleased, so that, without any express grant of an option to that effect, they could select the Panama route. It must be taken that the express grant of an option meant something and was intended to do more than give the buyers a right they would plainly have without it. The reasonable construction of the whole provision would seem to be that the contract was conditional upon

the Tehuantepec route remaining open, but that in case it were discontinued the buyers might, at their option, waive the condition if the goods could go forward via Panama.

[4] It is no answer to the proposition that the contract required the honey to go via Tehuantepec; and that therefore the continued existence of that route was a condition of the contract, to say that it was the duty of the buyers to secure the transportation necessary according to the contract, and that they cannot rely upon their own failure to secure transportation as any reason why they should not carry out the contract. We may assume that it was the duty of the buyers to secure the transportation, but that duty, like their other obligations under the contract, was conditional upon the necessary instrumentality continuing in existence. If this be not so, the provision of the contract, plainly inserted for their benefit, that the honey go forward via Tehuantepec, means nothing. The provision that it should go forward is at once negatived as to the buyers by the fact that they are under an unconditional obligation to provide for its so going forward, so that, whether the honey move by the prescribed route or not, they are responsible. In other words, such a construction of the contract would wholly frustrate the object for which unmistakably the provision under discussion was inserted—the protection of the buyers. Furthermore, the fact that the provision was inserted for that purpose strongly supports the view that the parties contemplated that the seller would attend to the matter of transportation. It is rather difficult to see why the buyers should insist upon a provision that the honey be shipped via Tehuantepec if it were contemplated that they themselves should attend to the matter of transportation, so that whether the transportation arranged for was via Tehuantepec or some other route would be entirely in their own hands. But even if it does not appear that it was the seller who was to arrange for transportation, the facts that the contract required the goods to go via Tehuantepec unless at the buyers' option they went via Panama in case the Tehuantepec route were closed, and that this requirement was for the benefit of buyers plainly indicate that the whole contract was conditional, so far, at least, as the buyers were concerned, upon its being possible to ship the honey by that route. As it turned out, this was not possible, and the buyers were therefore justified in their refusal to accept the honey.

[5] There are some further points of minor character advanced on behalf of the plaintiff, but of these there is but one which either is not disposed of by what has already been said or is of such importance as to justify discussion. It is contended on behalf of the plaintiff that the parties themselves, by their dealings with respect to the 800 cases which were delivered and paid for, have construed

the contract as one obligating the defendants unconditionally to accept the honey. These cases were shipped after the Tehuantepec route was closed, and were shipped to the defendants at San Francisco because they could not be shipped via Tehuantepec, and were accepted by the defendants at San Francisco. But the trial court found, and its finding is not attacked, that the shipment was made only after the defendants had been notified that a portion of the honey was ready, and had taken up with their Hamburg buyer the question of routing the honey via San Francisco and the Panama Railroad, and had secured his consent to such routing, and that upon securing such consent the defendants notified the plaintiff to that effect and authorized the shipment via San Francisco on a through bill of lading to Hamburg. The shipment was not, in fact, made on a through bill of lading, but was consigned to the plaintiff itself on a local bill of lading. But the trial court also found in this connection that the defendants did not accept the shipment and pay for it until they had been assured by the steamship company, which had a line from San Francisco to Panama as well as one from Honolulu to San Francisco, that it would take up the local bill of lading and issue in place of it a through bill from Honolulu to Hamburg via Panama. All of this occurred before the outbreak of the war and when shipment to Hamburg was possible. When the transaction is considered as an entirety, it is evident that there is nothing in it inconsistent with a position on the part of the defendants that they had the right to insist on shipment via Tehuantepec unless they chose, in accordance with their option, to have the shipment by Panama. There being nothing inconsistent with that position, the transaction cannot be taken as one whereby a contrary construction was put upon the contract. Much less can it be said to be a waiver by the defendants of any requirement of the contract as to subsequent shipments.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

(186 Cal. 169)

PRYOR et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 9637.)

(Supreme Court of California. June 15, 1921.)

1. Master and servant §367—Members of contracting firm, pumping sand from well, held "independent contractors," and not "employés," within Compensation Act.

Members of a contracting firm conducting a sand-pumping business as an incident to their well-boring business, who furnished their

own appliances and paid their own expenses, and who were not subject to control while doing their work, for which they received a specified price per foot for boring and a per diem compensation for pumping sand, held "independent contractors," and not "employés" within the Workmen's Compensation Act while pumping sand from a well completed under a prior contract, though they were subject to discharge at any time and were willing to follow directions of the owner's representative.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

2. Evidence §471(30), 568(1)—Statement of compensation claimant that he was employé mere conclusion, and of no weight.

Statements of a claimant under the Workmen's Compensation Act and an associate engaged with him in pumping out sand from a well that they considered themselves employés of the well owner were mere legal conclusions, and of no weight, in view of evidence showing that they were working under an independent contractor.

In Bank.

Proceeding under the Workmen's Compensation Act by Thurman Crane, employee, opposed by John F. Pryor, employer, and the Globe Indemnity Company, insurer. Award of compensation by Industrial Accident Commission and Employer and Indemnity Company bring certiorari. Award annulled.

Howard L. Phillips and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review a decree of the Industrial Accident Commission awarding compensation to Thurman Crane, the applicant below, for an injury sustained while pumping sand from a well on a ranch belonging to John F. Pryor. The award is resisted upon the ground that the injured man was working under an independent contract, and not as an employee of petitioner John F. Pryor.

The said Thurman Crane and his two brothers-in-law, Warren and Albert Martin, were engaged in the business of well-boring, and possessed two complete outfits for use in that work. They also engaged in the business of pumping sand from wells. The usual price charged for the boring of wells was \$2.50 per foot; expenses were deducted, and the three shared equally the profits of the business. They had completed a contract for the boring and sinking of a well for petitioner John F. Pryor, and were at work elsewhere when Pryor's well filled with sand. Thereupon Pryor arranged with Warren Martin, the business man of the firm, that the two Martin brothers and Crane should return and pump out the sand; Pryor agreeing to pay

\$25 per day on condition that the three start work on the following day, which was Sunday. They took their pumping apparatus to the well and were at work there when Crane was struck by the handle of a windlass.

[1] Applying the accepted tests to the relationship of the parties at the time the injury was sustained, we are convinced that the work was pursuant to independent contract. It is conceded that when boring the well the firm was engaged in the performance of an independent contract. There is undisputed evidence that sand-pumping was in the same general line of work as well-boring; that in about one-third of the cases where contracts for the boring and sinking of wells had been completely performed the firm was recalled for the purpose of pumping out the sand which had subsequently filled in; and that considerable equipment, such as sand pipes, windlasses, and other apparatus, was required in this work. Both the contract for the boring of Pryor's well and the agreement for the removing of the sand were oral, Warren Martin arranging the terms on behalf of the firm, and in both instances the contracting firm furnished its own equipment. In short, the business of sand-pumping was conducted as an incident of the well-boring business, and it was carried on in practically the same manner.

The method of payment was the only item wherein the arrangements for the boring of the well differed from those for the sand-pumping. In neither branch of their business did the men contract for payment by the job. Boring was paid for by the foot, but clearly this could not be adopted as the basis for the charge for sand-pumping. There was uncontradicted testimony that the difficulty of estimating the length of time it would take to sand-pump a well was the reason for charging by the day; the amount depending somewhat on the number of men at work. Owing to the conditions, it was impracticable to set a price for the work as a whole, or a time for its completion; but the fact that no definite price was agreed upon for the completed work and that the work was performed by the day would not, in and of itself, render the contract one of employment. *Flickenger v. Ind. Acc. Com.*, 181 Cal. 425, 184 Pac. 851, 8 A. L. R. 468. Nor was it material that the firm performing the pumping work might have been discharged at any time. *Western Indemnity Co. v. Pillsbury*,

172 Cal. 807, 159 Pac. 721; *Donlon Bros. v. Ind. Acc. Com.*, 173 Cal. 250, 159 Pac. 715.

It is important that, as in the case of *Flickenger v. Ind. Acc. Com.*, supra, the men were engaged to accomplish a particular result, in the performance of which they were not subject to the immediate authoritative control of those for whom the work was being done and that they were expected to furnish their own appliances and pay their own expenses. In applying the test of control we must differentiate between an order and a suggestion. *Western Indemnity Co. v. Pillsbury*, supra; *Fidelity & Deposit Co. v. Brush*, 176 Cal. 448, 168 Pac. 890. It appears that the men were not subject to the actual control or direction of any one while performing their work. According to the testimony, Mr. Pryor's representative "butted in," and the men were "willing to try" his suggestions. Had the men been subject to actual control, it would have been obligatory for them to follow directions. The men were not laborers, nor did they work as such. They carried on an extensive business, employing their own workmen. Warren Martin, who arranged for most of the work, in this case made all of the financial arrangements, and the claimant for compensation was not even cognizant of the terms of the contract until after the accident. The firm was engaged in this case, and the injured man was never personally employed by, nor did he ever personally make any contract with, Pryor or Pryor's representative.

[2] The statements of Crane and Warren Martin that they considered themselves employees are mere legal conclusions, and of no weight, in view of the uncontradicted evidence of facts which demonstrate that they were working under independent contract. *Winslow v. Glendale Light & Power Co.*, 164 Cal. 688, 130 Pac. 427.

The determination that the injured man was working under an independent contract eliminates any discussion of the additional point of petitioners, namely, that if the contract were one of employment it was casual employment and therefore not within the terms of the Compensation Act. *Stats.* 1917, pp. 831, 835.

The award is annulled.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; SLOANE, J.

(188 Cal. 42)

(198 P.)

KAYE v. METZ et al. (L. A. 6439.)(Supreme Court of California. June 6, 1921.
Rehearing Denied July 5, 1921.)**1. Limitation of actions §66(4) — Action by trustee in bankruptcy against stockholders held not barred.**

An action by the trustee of a bankrupt corporation to recover unpaid purchase price of stock held not barred by the two-year statute (Code Civ. Proc. § 339), on the theory that the cause of action accrued as soon as the corporation was adjudged bankrupt, where the call for the enforcement of which the action was begun was made by the trustee under direction of the court less than two years prior to filing of complaint.

2. Bankruptcy §250(1) — Call for unpaid stock subscription held not invalid.

Where a bankruptcy court in pursuance of petition ordered the trustee to call in the entire unpaid subscription if necessary for the payment of corporate debts, the objection that the call was invalid, because the trustee did not make the assessment in the manner provided by Civ. Code, §§ 331-349, providing for assessments upon corporate stock and for collection by sale of the stock or action at law was untenable; the provisions for sale being useless in a case of a bankrupt corporation.

3. Bankruptcy §250(1) — In trustee's action for unpaid stock subscription, stockholders held liable for whole amount unpaid.

In a bankruptcy trustee's action to recover unpaid stock subscriptions, a judgment rendered against each stockholder for the whole amount unpaid upon his stock was proper as against objection that the judgment against each stockholder should have been for no more than his ratable proportion of the total indebtedness.

4. Bankruptcy §305 — Judgment in trustee's action held not to charge interest on unpaid stock subscriptions.

In a bankruptcy trustee's action to recover unpaid stock subscriptions, a judgment determining the amount of interest which had accrued on the debts and giving judgment against certain stockholders for no more than the amount of their unpaid subscriptions, and in no case more than the debts and accrued interest thereon, held not objectionable as charging interest on the amount of the stockholders' unpaid subscriptions.

5. Bankruptcy §154 — Stockholders' claims cannot be set off against amounts unpaid on stock subscriptions.

In a bankruptcy trustee's action to recover unpaid stock subscriptions, the court did not err in refusing to offset claims of respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings, the unpaid amounts being assets of the corporation, and as such constituting a trust fund to be applied to payment of its debts in general, since by allowing such a set-off a creditor stockholder would obtain a preference.

6. Set-off and counterclaim §46(1) — Debts must be mutual.

In order to warrant a set-off the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity.

7. Corporations §232(3) — Rule as to valuation of property taken in payment for stock as affecting fraud as to creditors stated.

Where fully paid up stock has been issued in consideration of a transfer of certain property to the corporation, the rule is that, where the corporation and stockholders have agreed on a given valuation for the property transferred, such value is conclusive unless fraudulent in purpose or effect, but, if the parties set a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property.

8. Bankruptcy §303(3) — Finding as to value of property transferred in payment of stock held supported by evidence.

A finding in a bankruptcy trustee's action to recover unpaid stock subscriptions that certain property transferred in consideration for the issuance of such stock was worth no more than one-quarter of the par value, and that such fact was known by the parties, and hence constituted payment for such stock only to that extent, held supported by evidence.

9. Evidence §352(5), 383(6) — Books kept by assistant secretary showing issuance of stock held admissible and prima facie evidence.

The fact that books of a corporation showing the issuance of stock were kept by the assistant secretary, and the entries made by him rather than the secretary was immaterial and such books were competent and prima facie evidence of the facts shown by the entries therein.

Department 1.

Appeal from Superior Court, Kern County;
Howard A. Peairs, Judge.

Action by W. W. Kaye, as trustee of the J. M. S. Oil Company, bankrupt, against T. J. Metz, J. W. Jameson, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Black & Black, D. S. Hammack, and Alfred L. Black, all of Los Angeles, E. W. Owen, C. L. Claffin and Anderson & Borton, all of Bakersfield, and Black, Hammack & Black, of Los Angeles, for appellants.

Stutsman & Stutsman, Flint & Mackay, and Flint & Jutten, all of Los Angeles, and W. W. Kaye, of Bakersfield, for respondent.

SHAW, J. This is an action by W. W. Kaye, as trustee in bankruptcy of the J. M. S. Oil Company, a bankrupt corporation, against alleged stockholders of said corporation to recover of each the balance alleged to be unpaid to the corporation for the

stock thereof belonging to him. The court found in favor of the plaintiff and gave judgment accordingly. The appeal is from the judgment. We take up the points presented in the order in which they appear in the appellants' brief.

[1] 1. The appellants contend that the action is barred by section 339 of the Code of Civil Procedure, the two-year statute of limitations. Appellants' theory is that the cause of action accrued and the period of limitation began to run as soon as the corporation was adjudged a bankrupt, if not before. The adjudication occurred more than two years before the action was begun.

This proposition is settled against the appellants by the decision in *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441. In that case the bank had been adjudged insolvent under the bankrupt act of 1878, as amended in 1887 and 1895 (Stats. 1895, p. 172), and, as provided in that act, the directors proceeded to settle its affairs. The proceeding under the act was, in effect, a proceeding in insolvency, and the result was that ordinary actions could not thereafter be maintained against the bank, except as provided in the act. It was in legal effect the same as an adjudication in bankruptcy. *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492; *Long v. Superior Court*, 102 Cal. 457, 36 Pac. 807; *Crane v. Pacific Bank*, 106 Cal. 69, 39 Pac. 215, 27 L. R. A. 562; *Argues v. Union Savings Bank*, 133 Cal. 139, 65 Pac. 307. The directors, in pursuance of their duties under the act, made a call for payment upon the stock subscriptions for the purpose of obtaining funds to pay the corporate debts. Upon the failure of Leiter to pay the amount called the action was begun. It was held (145 Cal. 705, 79 Pac. 441) that the statute of limitations did not begin to run against such action at the time of the adjudication that the bank was insolvent, nor until such time as the directors, acting as trustees in liquidation under the act, had duly made a call for payment by stockholders upon their subscription liability, and that the action was not barred until two years from the time of making such call. This case cannot be distinguished from the case at bar. In the present case the call for the enforcement of which this action was begun was made by the trustee in bankruptcy under the direction of the court less than two years prior to the filing of the complaint. Consequently it is not barred.

[2] 2. The next objection is that the call was invalid because the trustee did not make the assessment in the manner provided by sections 331 to 349 of the Civil Code, providing for assessments upon corporate stock and for the collection thereof by sale of the stock, or, at the option of the directors, by an ordinary action at law. It has been held that these provisions of the Code are so far a part of the contract of subscription that

the corporate directors in the ordinary course of its business cannot enforce the payment of the price, except by proceedings in the mode prescribed by those sections, unless the subscription contract itself dispenses therewith. *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 Pac. 298. This rule, however, has no application to a suit in the nature of a creditors' bill to reach the unpaid subscription as assets of the corporation for the payment of its debts. The Code provisions contemplate that the directors may create a lien upon the stock for the amount of the assessment and enforce payment by a sale of the stock, or by a suit. The provisions for a sale would, of course, be wholly useless in the case of bankrupt corporation, or one having no property subject to execution. The enforcement of a call by suit would be no greater burden upon the stockholders when begun by a trustee in bankruptcy than if begun by the corporation itself. Consequently it is held that—

"When the corporation is insolvent, and the directors neglect or refuse to make a call, courts of equity will disregard the formality of a call and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors." *Welch v. Sargent*, 127 Cal. 83, 59 Pac. 319; 1 *Cook on Corp.* §§ 108, 207; *In re Minnehaha, etc., Ass'n*, 53 Minn. 423, 55 N. W. 598; *Baines v. Babcock*, 95 Cal. 591, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; *Daggett v. Southwest Packing Co.*, 155 Cal. 765, 103 Pac. 204; *Edwards v. Schillinger*, 245 Ill. 244, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308.

In the present case the bankruptcy court, in pursuance of a petition filed therein, ordered the trustee to call in the entire unpaid assessment if necessary for the payment of the debts. This order was made upon a contest in the bankruptcy court. We think the objection is without merit.

[3] 3. Appellants also claim that judgment should have been rendered against each stockholder for no more than his ratable proportion of the total indebtedness instead of the whole amount unpaid upon his stock. *Hunt v. Sharkey*, 20 Cal. App. 690, 130 Pac. 21, is relied upon in support of this proposition. In that case the trustee in bankruptcy, under the order of the court, had sold the corporate assets at public auction, including the agreements of the several stockholders to buy and pay for their stock. The total subscriptions unpaid amounted to \$30,050, and the plaintiff purchased all of them for \$650. The debts of the corporation were less than half of the aforesaid balances. The plaintiff sued Sharkey for the entire balance due on his subscription. A judgment of nonsuit in the court below was affirmed on the ground that it was neither alleged nor proven that any assessment or call had ever been made upon the stockholders, either by the proper court or under its direction. The re-

mark in the opinion that an assessment in such a case should be for an amount against each stockholder that would "ratably distribute the liability of the bankrupt estate among the subscribers to the stock" was, of course, wholly unnecessary to the decision, since no assessment had been made. The real point decided was that the bankruptcy court could not by such sale subject the stockholder to a liability for his full subscription by selling the same outright to a purchaser at public auction and allow the purchaser to sue for the whole sum regardless of the amount realized by the sale to the benefit of creditors. The case is not authority on the point here presented, and the remark above quoted is contrary to the authorities.

"Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made by the stockholders are proportionately equal. A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other stockholders." 1 Cook on Corp. § 211.

"The mere fact, however, that the whole amount of the balance due upon the complainant's stock may not ultimately be wanted, to pay the debts of the corporation, if all the other solvent stockholders should pay their ratable proportions of what still remains due upon their stock, does not necessarily render it inequitable that the receiver should compel the several stockholders to pay the balances due from them respectively, in the first instance. For, if any balance should remain in the hands of the receiver, after satisfying the debts of the corporation and the necessary expenses of executing the trust, it will be distributed among the several stockholders who shall have paid in full for their stock, so as to produce perfect equality among them. And it might do great injustice to the creditors of an insolvent corporation, to compel them to wait for the whole amount of their respective debts, until it could be ascertained, by a protracted litigation with all of the stockholders, how much each of such stockholders was liable and able to pay." *Pentz v. Hawley*, 1 Barb. Ch. (N. Y.) 123.

It is also held that a creditor suing in equity may pursue one stockholder alone. *Edwards v. Schillinger*, 245 Ill. 244, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308. In giving its judgment the court below provided, so far as possible, for a just distribution of the liability by requiring that the plaintiff should collect from the defendants in the aggregate a sum not to exceed the total amount of indebtedness and interest of the bankrupt corporation. The objection is not well taken.

[4] 4. The objection of appellants that the court erred in allowing interest on the amount adjudged against J. W. Jameson and I. M. Jameson is based on a misunderstanding of the terms of the judgment. The court

found that the corporate debts amounted to \$31,307.82 on January 28, 1913, the date of the adjudication in bankruptcy. The judgment was rendered on July 9, 1918. It declares that interest amounting to \$14,129.38 had then accrued on said debts, making a total of \$45,437.20. J. W. Jameson owned 96,800 shares of the stock, on which three-fourths of the par value was unpaid, amounting to \$72,600. I. M. Jameson owned 52,150 shares, on which \$39,112.50 was unpaid. The judgment did not charge any interest on either of these amounts. J. W. Jameson, it will be noted, owed more on his stock than the total amount of the debts and interest. The judgment against him was only for that amount, to wit, \$45,437.20. A similar judgment was given against Smith, another stockholder, who owed more than the total debts and interest. I. M. Jameson owed only \$39,112.50 on her stock, which was less than the debts and interest. The judgment against her was for \$31,307.82 (being the amount of the debts without interest), together with interest thereon from January 28, 1913, but in no event to exceed \$39,112.50, the amount unpaid on her stock. The other defendants owed less than the principal of the debts, and the judgment against them was for the unpaid amount without mention of interest on the debts. The appellants are in no way injured by this method of stating the amounts adjudged against them, and it is not true that they were charged interest on the amount of their unpaid subscriptions.

[5] 5. The court did not err in refusing to offset the claims of the respective stockholders as creditors of the corporation against the amounts unpaid on their respective holdings. The unpaid amounts were assets of the corporation, and as such they constituted a trust fund to be applied to the payment of its debts in general. *Sawyer v. Hoag*, 84 U. S. (17 Wall.) 622, 21 L. Ed. 731; *Scovill v. Thayer*, 105 U. S. 152, 26 L. Ed. 968; *Scammon v. Kimball*, 92 U. S. 366, 23 L. Ed. 483; *Sanger v. Upton*, 91 U. S. 60, 23 L. Ed. 220. It is always possible in the liquidation of an insolvent estate, in contemplation of law, that the assets may not be sufficient to pay the debts. If a creditor stockholder were allowed to set off his debt against his unpaid stock liability, he would receive payment in full of his debt, while other creditors would receive a pro rata share only, if the assets would not pay the debts in full, and even their pro rata shares would be less because of the set-off.

[6] A creditor stockholder would thus obtain a preference. In order to warrant a set-off, "the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity." 19 Cyc. 894. The trustee in bankruptcy held these stock liabilities, as above stated, as trust funds for the benefit of creditors. They are

not held by him in the same capacity as would be the case if the corporation was not insolvent and had itself sued the stockholder for his subscription, hence a set-off is not permitted. This is expressly decided in the four cases last above cited.

[7] 6. The J. M. S. Oil Company was organized on April 30, 1910, with a capital stock of \$500,000, divided into 500,000 shares of the par value of \$1 each. Five shares were subscribed for by each of the incorporators, namely, J. W. Jameson, J. M. Smith, William Jenkins, F. E. Borton, and T. Metz, all of whom were made directors. Thereafter, in July, 1910, the company purchased of the two directors Smith and Metz a 40-year lease held by them on 40 acres of land in the oil region, in consideration of the issuance to Smith and Metz of 400,000 shares of stock of the company to be issued as fully paid-up stock. The lease was transferred and the stock issued in accordance with this agreement. The appellants claim that this constituted full payment for the said shares, and that nothing is unpaid upon the stock so issued.

The rule applicable to such transactions is thus stated in *Harrison v. Armour*, 169 Cal. 790, 147 Pac. 1167:

"In such cases the rule is that, where the corporation and stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose or effect. But, if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors, and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it."

The same doctrine was stated in *Herron Co. v. Shaw*, 165 Cal. 674, 133 Pac. 491, Ann. Cas. 1915A, 1265, and the court added:

"It is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties and as they honestly believe it to be, that determines the liability, at least where there is no subsequent increase in value nor any intentional fraud. The parties may believe that the property will eventually rise to a value far above that at which it is exchanged, and they may willingly accept the hazard in view of the expected gain, but they have no right to demand that the creditor shall share the risk with them; in effect become their partner with no share in the profits, and lose his recourse on them if their speculation proves a bad one."

In the last case the court had found that the directors believed that the property could and would be developed so that eventually its value would exceed the amount at which it was taken in exchange for stock, although they did not believe that it was worth at the time of the exchange more than one-tenth of that amount. See, also, *Hasson v. Koebler*, 180 Cal. 363, 131 Pac. 387.

[8] On this point the court found the making of the exchange as above stated, and that "at all of said times the said corporation and the officers and directors thereof knew and believed that said leasehold interest and said appurtenances above described * * * was actually worth no more than the sum of \$100,000; * * * that at none of said times did said corporation, its officers or directors, have any reasonable ground for believing that said leasehold interest above referred to and appurtenances were worth or had a value, actual or otherwise, of \$400,000, or any sum in excess of \$100,000." The appellants claim that these findings are without support in the evidence. It must be conceded that the evidence on the subject is not as full and complete as might have been desired; but, on the other hand it is to be said that full and complete evidence on a subject of this character can seldom be obtained. The only one of the directors who was examined as a witness was J. W. Jameson. He testified that at the time of the transaction he believed the leasehold property was worth the sum of \$400,000 and even more, but he based his belief on his opinion that by development it would produce a profit from the pumping of oil therefrom in excess of \$400,000. Testimony of other witnesses familiar with the locality and with the business of oil production was given to the effect that the property was worth no more than \$100,000, and probably less than that amount under the circumstances then existing in that vicinity and in the oil business. It was also shown that all of the directors, including Smith and Metz, the holders of said lease, were present at the meeting of the directors at which the transaction was closed, and that immediately after the passage of the resolution authorizing the purchase of said lease by the corporation for said amount of stock the same directors passed another resolution that the remaining 100,000 shares of stock of the company should be placed on the market at 25 cents a share. This was done accordingly, and a large part of the 100,000 shares was sold at that price. The greater part of the stock in question here was the stock originally transferred to Smith and Metz in exchange for said lease. It had been acquired afterwards by the appellants with knowledge of all the circumstances. The conduct of these parties in immediately putting the remaining stock on the market at 25 cents a share was a clear indication that they then believed that the stock already disposed of to Smith and Metz had no real value above that amount. It is true that Jameson testified that it was necessary to sell at that price in order to raise the money with which to develop the property, and that this proceeding was not an unusual one in the oil business. It still remains true,

however, that the court may well have inferred from this circumstance that the directors, all of whom consented to this sale at the reduced price, did not believe that the stock had a greater value. We are, therefore, of the opinion that the finding is sustained by the evidence, and that under the doctrine above stated it must be deemed paid up only to the extent of \$100,000, or one-fourth of the par value.

[9] 7. It is contended that the findings that I. M. Jameson held 52,150 shares of the stock of the corporation is not sustained by the evidence. The books kept by the company were introduced in evidence. It appears that she had an office in which she carried on business, that this office was also used as the office of the corporation in which its books were kept, and that she was somewhat familiar with its affairs. These books show the issuance to her of more than that number of shares of the so-called "treasury stock" at the price of 25 cents a share, and a payment by her of a part of the price. The principal objection as to the effect of this evidence seems to be that the books were kept by one Rose, who was not the secretary of the corporation and that therefore the entries in the books were not competent evidence. The evidence shows, however, that he was the assistant secretary and acted in that capacity in keeping the books and making the entries therein. It is obvious that they have the same sanction as if the secretary had personally made the entries. They were competent evidence and sufficient prima facie evidence of the facts shown by the entries therein. 1 Cook on Corp. § 55.

No other points are presented. No brief has been filed on behalf of the appellant Hubbard. We find no sufficient ground for a reversal.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

(186 Cal. 119)

STRATTON et al. v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 9579.)

(Supreme Court of California. June 8, 1921.
Rehearing Denied July 7, 1921.)

1. Waters and water courses §217—Water taken by mutual company for distribution to stockholders not taken for public use.

As respects the power of the Railroad Commission to fix rates, water taken by a mutual water company and distributed to its stockholders is not taken for a public use; the corporation being but a joint instrumentality of its stockholders, by means of which each diverts and has brought to him the water to which he in his own private right is entitled.

2. Waters and water courses §217—Water diverted by company authorized by riparian owner and distributed to land formerly owned by such owner not taken for public use.

Where a land company owning riparian lands, before subdividing and selling them, organized a water company and authorized it to divert the water to which the land company was entitled and supply it to the land for a specified price per acre, reserving the riparian rights, however, as appurtenant to the land, the water was not taken by the water company for a public use, as respected the power of the Railroad Commission to increase the annual rate fixed by the contract.

3. Waters and water courses §217—Water company diverting and supplying water to riparian lands under contract with former owner held not "public utility."

Where a land company owning riparian lands and also owning stock in a mutual water company, before subdividing and selling the lands with their pro rata share of the water, created a water company and authorized it, as agent of the owners of the land, to divert the water to which the land company was entitled and supply it to the land for \$1 an acre, but reserved the riparian rights as appurtenant to the land, the water company was not a "public utility," and the Railroad Commission was without jurisdiction to increase the rate authorized by the contract.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

4. Waters and water courses §217—Views of parties or intention of company of weight in determining whether services public or private.

In determining whether a water company which is performing a service for a number of people of a certain class, and obligates itself to serve those who come within that class, is rendering a public service to a limited public or purely private services to each of a number of persons, the views of the parties themselves, or the intention with which the company undertook the service, may be of weight.

5. Public service commissions §19(1)—Findings of Railroad Commission not res judicata.

The Railroad Commission is essentially an administrative and legislative tribunal, and not a judicial tribunal in a strict sense, though many of its functions are quasi judicial, so that its orders are not judgments, and its findings of fact are not adjudications, and the facts found by it are not res judicata and as such finally and conclusively established between the parties for all purposes.

6. Waters and water courses §217—Finding of Railroad Commission that company was public utility not conclusive in another proceeding.

Under Public Utilities Act, § 65, providing that the orders and decisions of the Railroad Commission which have become final shall be conclusive in all collateral proceedings, a decision by the Commission that a water company was a public utility, in a proceeding by landowners claiming to be entitled to water under

a contract to compel distribution to them of their pro rata proportion, even if necessary to its order in such proceeding, was not conclusive in a subsequent proceeding to increase the company's water rates, since the statute only makes the orders and decisions of the Commission conclusive for the purposes for which they are made.

7. Waters and water courses **§217—Acquiescence of consumers in decision that water company was public utility held not to create relation.**

Where a proceeding by landowners, claiming to be entitled to water from a water company, to compel distribution to them of their pro rata proportion, in which the Railroad Commission decided that the company was a public utility, resulted in a denial of the relief asked, so that the company and the consumers proceeded as before under the previously existing arrangement between them without change in their rights or in the relation between them, the consumers' acquiescence in the decision that the company was a public utility did not have the effect of bringing into existence the relation of public utility and consumers, when not previously existing.

In Bank.

Original application by W. N. Stratton and others for a writ of review directed to the Railroad Commission of the State of California to annul its order increasing water rates. Order annulled.

Harris, Johnson, Willey & Griffith, and Johnston & Jones, all of Fresno, James E. Kelby, of Los Angeles, and M. B. Harris and E. M. Harris, both of Fresno, for petitioners.

Scarborough & Bowen, of Los Angeles, for Empire Water Co.

Hugh Gordon, of Los Angeles, for respondent.

OLNEY, J. A corporation known as the Empire Water Company had been serving the landowners in a certain tract with water for irrigation at the price of \$1 per acre per annum. The company applied to the Railroad Commission for an increased rate, the application was granted over the objection of some of the landowners, and the latter have applied to this court for a writ of review annulling the order of the Commission. The ground on which the writ is asked is that the relation between the water company and the landowners is not that of a public utility and consumers, so that the matter of rates between them is not within the jurisdiction of the Commission. The question in the case therefore is as to the character of that relation.

It seems that in 1905 a corporation known as the Empire Investment Company, and which we will hereafter refer to as the land company, was the owner of a large tract of land lying on both sides of the Kings river and riparian to it. As such owner the com-

pany possessed the right to the use of the water of the river on the land. The company also owned certain shares of stock in a mutual water company, entitling it to receive from that company certain water for its land. The land company desired to subdivide and sell the tract, and to facilitate the doing of this desired to put water upon the land. To accomplish this latter object it organized the water company, transferred to it what irrigation works had been constructed, agreed to finance it in the completion and extension of those works, and, without transferring its riparian right to water from the Kings river, authorized and empowered the water company as its agent to divert the water to which it was entitled and supply the same to its land for an annual charge of \$1 per acre. The water company, on its part, issued all of its capital stock to the land company, and agreed to assume the burden of distributing to the land the water which it was authorized to divert as the agent of the land company. The land company also transferred to the water company its water stock in the mutual company, the water deliverable by reason of such stock to be distributed in like manner and under the same arrangement as the water diverted from the river under the riparian right.

The arrangement so outlined was made by a deed and written contract between the parties. The deed expressly states that it is not the intention to convey to the water company any riparian right, but that such right shall remain a part of and appurtenant to the land, and the contract recites that it is the desire of the parties to make a binding and permanent arrangement, whereby the system for supplying the land with water may be maintained and water be delivered perpetually to all of the lands of the land company for use thereon by it and by persons succeeding to its title.

The foregoing arrangement having been made, the land company proceeded to subdivide and sell its lands, and succeeded in selling substantially all, or at least substantially all that were irrigable. In making sales, it represented to purchasers that every acre had a perpetual water right attached to it, for which no charge in addition to the price of the land was made, and for whose enjoyment an annual charge of \$1 an acre, for the purpose only of maintaining the irrigation system, was payable. In the sales contracts and deeds the contract between the land and water companies was referred to, and it was provided that with each acre went the riparian right to its pro rata of the water to which the entire tract was entitled. A number of years after the land had been sold, the water company applied to the Railroad Commission for an order increasing the annual rate of \$1 fixed by its contract, and the

Commission made the order now under attack.

[1, 2] Such being the facts of the case, it will be noted at once that the water which the water company is engaged in distributing is not water devoted to a public use. The water taken is of two sorts; that taken under the right given by the ownership of the stock in the mutual water company, and that taken under the riparian right incident to the ownership of the land. It is settled in this state that water taken by a mutual water company and distributed to its stockholders is not taken for a public use, but that such a corporation is but the joint instrumentality of its stockholders, by means of which each diverts and has brought to him the water to which he in his own private right is entitled. See *Thayer v. California Development Co.*, 164 Cal. 117, 135, 128 Pac. 21. As to the water taken by the company under the riparian right, the case is even clearer. The water company did not have even the legal title to such right. It was expressly reserved to the land company and its successors in interest in the ownership of the land, and the water company was avowedly only an agent for making the diversion for the landowners under the riparian right which was carefully preserved to each. This right, of course, is of a purely private nature. We might add that it is expressly admitted by counsel in the case before us that none of the water received or taken by the water company and by it distributed to the landowners is water dedicated to a public use.

[3] The fact, then, being that all of the water distributed by the water company is water received or taken by it, under private rights, the case comes directly within the authority of *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249 (the *Lake Hemet Case*), and is controlled by it. There, as here, the owner of a large tract of land, which he desired to subdivide and sell, organized a water company, transferred to it certain water rights, and proceeded, through the corporation, to divert the water and bring it to the land. He then sold the land, and each purchaser desiring water thereon was required to purchase a "water certificate" from the water company, whereby he was entitled to receive a certain amount of water upon the payment of a certain annual rate. The sole question in the case was whether or not the water company, in serving the landowners under these circumstances, was serving them as a public utility company. It was held that it was not. We see no possible distinction between that case and this. The only differences pointed out are two. The first is that there the water company itself had the legal title to the water rights under which the water was diverted, while here it has not the title to the rights—the riparian rights—under which most of the water is taken. But this difference would

seem only to emphasize the private nature of the arrangement. There would seem to be less reason for the view that the service performed by the company is a public service where it consists in taking water for the benefit of a landowner under a private right possessed by him and conveying the water to his land, than where it consists in taking the water under a right possessed by the company itself and distributing that water to the landowner.

The second point of difference pointed out is that in the *Lake Hemet Case* the water company issued to each purchaser of land a water certificate. But this certificate, as the opinion states, merely represented the contract between the water company and the purchasers, and the same function exactly is served in this case by the contract of the water company with the land company which was made for the express benefit of purchasers from the latter.

[4] The affirmative point advanced to sustain the position of the water company is that the service performed by it is merely that of carrying the water, and that, since it carries the water for all the landowners within a certain district, the service is of a public character. But this very point was likewise advanced in the *Lake Hemet Case* and there denied. 179 Cal. 73, 175 Pac. 466, 8 A. L. R. 249. It might be that under some circumstances, possibly under circumstances closely resembling those of the present case, the carriage of water would be a public service. Where a company is performing a service for a number of people of a certain class, and obligates itself to serve those who come within that class, as is the case here, it is not always easy to determine whether the service is rendered as service to a limited public and therefore a public service, although the class served is but a limited one, or is merely an aggregate of purely private services rendered to each of a number of persons. In such a case the view of the parties themselves, or the intention with which the company undertook the service, may well be of weight in determining the true nature of the service. In the present case it is fairly plain that the water company was not organized and did not enter upon its task of serving the landowners with any intent of doing so as a public utility, but just the contrary. The company, as we have said, was organized in 1905, and in the arrangement which it made with the land company the riparian rights of the landowners were expressly reserved to them, and it was provided that the water company should act only as their agent in diverting the water from the Kings river. Just two years before, this court had decided the case of *Hildreth v. Montecito, etc., Co.*, 139 Cal. 22, 72 Pac. 395, and the language of the opinion so exactly covers the arrangement made by the water company here, and is so closely followed by the language of the ar-

rangement, that the inference is strong that the arrangement was made with the definite purpose of coming within that language. The court, in *Hildreth v. Montecito, etc., Co.* said (139 Cal. 29, 72 Pac. 398):

"Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several and will remain private property. If the persons owning such rights see fit to form a corporation and delegate to such corporation the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works; the water remaining the subject of individual ownership and private use as before. This principle was decided in substance in *McFadden v. County of Los Angeles*, 74 Cal. 571, and it was also recognized in *McDermont v. Anaheim, etc., Co.*, 124 Cal. 114."

It is perhaps also worthy of note that in the case before us the water company did not agree or hold itself out as ready to transport any and all water for even the limited number of persons it was undertaking to serve. The only water which the company agreed to carry was the water deliverable upon the stock of the mutual water company and that which the landowners as riparian owners had the right to take from the Kings river. In other words, even for the limited class it agreed to serve, the water company did not agree to convey any water that might be offered to it.

[5, 6] Our conclusion, then, is that under the arrangement shown the relation between the water company and the landowners was private in character, and not that of a public utility and consumers. It is urged, however, that any question as to the character of the relation is concluded by a previous order of the Commission, which became final, holding that the water company was a public utility, and that the landowners are estopped from questioning the fact because of their acquiescence in that order, meaning by acquiescence, apparently, merely that the order was not contested and was allowed to become

final, for nothing more than this appears. It seems that in 1913 some of the landowners owning lands on the west side of Kings river applied to the Railroad Commission for an order directing the water company to convey to that side of the river and there distribute a pro rata proportion of the water received upon the mutual water company's stock, which water had theretofore been distributed only to lands on the east side of the river. The application to the Commission was, of course, necessarily based on the assertion that the company was a public utility, and for that reason subject to the jurisdiction of the Commission. The company denied that it was a public utility, but took the position that the issue was really between east side and west side landowners, and that it was not concerned. Certain, at least, of the east side landowners resisted the application. The Commission decided that the company was a public utility, but denied the relief asked for. The claim now is that this decision as to the character of the company is *res judicata*. There is more than one answer to this, but one alone need be given. It is that the Commission is not a judicial tribunal in the strict sense, although many of its functions are quasi judicial, so that its orders are not judgments, and in particular its findings of fact are not adjudications, and facts found by it are not *res judicata* and as such finally and conclusively established between the parties for all purposes.

The Commission is essentially an administrative and legislative tribunal, and not a court. It frequently has to hear evidence and determine for its own guidance questions of fact, just, for example, as a board of supervisors frequently has to do, but that it must do these and similar things as a court does them does not make it a court, or change the character of its decrees from administrative or legislative orders into judicial judgments. Their character in this respect is not affected by the provision of section 65 of the Public Utilities Act (St. [Ex. Sess.] 1911, p. 54), that "in all * * * collateral proceedings the orders and decisions of the Commission which have become final shall be conclusive." There may possibly be some doubt as to just what the full effect of this statutory provision is, but, giving it the fullest effect to which it can reasonably be claimed it is entitled, it goes no further than providing that the orders and decisions of the Commission are conclusive for the purposes for which they are made. The point here is that they are not made for the purpose of adjudicating between litigants. For example, assuming that the statute should have full effect, it would follow that the previous order of the Commission could in no wise be attacked or its operation prevented in the present proceedings. The point is that it is not sought to do this, and our ruling that the water company is not a public utility does not do it.

That order stands, and it would stand even if it had been an order directing the company as a public utility to do something. But the operation of the order and its full recognition as a final, existing, and effective order does not involve or mean more as to questions of fact determined by the Commission in making the order than that such questions are conclusively determined for the purposes of the validity of the order. If the previous decision of the Commission that the water company involved here were a public utility had been necessary for the order which it made, which it was not, that fact, assuming that the fullest effect should be given to the statute, would be deemed conclusively established so far as questioning the validity of the order or its effective operation is concerned, but no farther. The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone, and an order of the Commission is not of that character.

[7] As to the contention that the landowners acquiesced in the determination of the Commission as to the character of the water company, the answer is that it is wholly immaterial whether they did or not, unless by reason of the Commission's order and the acquiescence of the parties in it the relation between the company and the landowners was changed. If the Commission had held that the water company was a public utility, and then it and the landowners had not only acquiesced in the order, that is, failed to question it, but had proceeded upon the basis that the company was a public utility, then and there the relation of public utility and consumers would have come into existence between them, regardless of whether it had previously existed between them or not. This, and this alone, is the point of *Francioni v. Soledad, etc., Co.*, 170 Cal. 221, 149 Pac. 161, and *Van Hoosear v. Railroad Commission*, 194 Pac. 1003. Nothing of this sort appears in the present case. The Railroad Commission denied the relief which the west side landowners asked, so that the company and the landowners proceeded as before under the previously existing arrangement between them, and as a consequence without change in their respective rights or in the relation between them. That relation must, as we have said, be held, on the authority of *Allen v. Railroad Commission*, not to be one of public utility and consumers, and consequently not within the jurisdiction of the Commission.

The order of the Railroad Commission is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

(186 Cal. 157)

SOUTHERN PAC. LAND CO. v. MESERVE
et al. (L. A. 6348.)

(Supreme Court of California. June 14, 1921.
Rehearing Denied July 14, 1921.)

1. Public lands §114(6)—Patent made pursuant to grant presumed to cover land covered by grant.

In an action to quiet title, in which plaintiff claimed title under a patent made pursuant to the grant from the United States to the Southern Pacific Railroad by Acts Cong. July 27, 1866, § 18, and March 3, 1871, § 23, which grant covered only odd-numbered sections, it will be presumed that the land is in an odd-numbered section; the patent itself being prima facie evidence thereof, shifting the burden upon defendants of proving the contrary.

2. Evidence §83(1)—Official duty presumed to have been duly performed.

Official duty will be presumed to have been duly performed.

3. Evidence §335(2)—Map of resurvey held competent to show section in which tract of land was situated.

In an action to quiet title, in which plaintiff claimed under a patent issued pursuant to a grant from the United States to the Southern Pacific Railroad under Acts Cong. July 27, 1866, § 18, and March 3, 1871, § 23, a map of a resurvey under Act Cong. March 3, 1909 (U. S. Comp. St. § 4824), held competent to prove the section in which the land was situated, where the map was made for the purpose of ascertaining the tracts listed for patent under such grant, and where defendants' only claim was under a desert entry shown to have been canceled.

4. Evidence §46—Judicial notice taken of a letter of instructions from commissioner of land office to United States surveyor general.

The court will take judicial notice of a letter of instructions from the commissioner of the land office to the United States surveyor general regarding the resurvey it made under Act Cong. March 3, 1909 (U. S. Comp. St. § 4824).

5. Use and occupation §10—Finding as to value of use of land wrongfully occupied held excessive.

In action for damages for wrongful occupation of land, where the use of the land was of no value without water, and where the only water available was that owned by the defendants, finding fixing the value of the use of the land during the occupation as \$200 per year under Civ. Code, § 3334, held excessive in that the computation made allowed plaintiff damages for the use of the water which was defendants' own property; the use of the land without water being without value.

Department 1.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Southern Pacific Land Company, against Alvin R., E. A., and H. W. Meserve. Judgment for plaintiff against the

two last named defendants, and they appeal. Reversed.

Conkling & Brown, of El Centro, and Meserve & Meserve, of Los Angeles, for appellants.

Frank Thunen, of San Francisco, for respondent.

SHAW, J. This is an action to recover possession of a tract of land, to quiet title thereto, and for damages for the withholding of possession thereof by the defendants. The action was dismissed as to Alvin R. Meserve, and judgment was given for plaintiff against the other defendants, from which judgment said defendants appeal. The pleadings, findings, and judgment were in the usual form. The claim of the appellants is that the findings and judgment relating to the title to the land and damages are contrary to the evidence. The finding concerning title is that the plaintiff was the owner of the land and was entitled to the exclusive possession thereof, and that the defendants had no right, title, or interest therein. The land in controversy is described as the southeast quarter of the southwest quarter of tract 188, township 13 south, range 14 east, San Bernardino meridian, as shown by the plats of existing official surveys of the United States.

[1] The evidence shows a straight chain of title to the plaintiff based on a patent from the United States to the Southern Pacific Railroad Company, executed on November 9, 1915. This patent was made in pursuance of the grant from the United States to the Southern Pacific Railroad Company made by the acts of Congress of July 27, 1866, and March 3, 1871 (14 U. S. Stats. 292, § 18; 16 U. S. Stats. 573, § 23). This grant covered only odd-numbered sections of land. The patent from the United States to the Southern Pacific Railroad Company included the particular tract in controversy as a part of tract 188 of township 13 south, range 14 east, San Bernardino meridian. The patent does not on its face show that tract 188 was in an odd-numbered section. Upon the theory that the acts of Congress aforesaid do not authorize a patent to the railroad company of land not in an odd-numbered section, appellants claim that in order to make the patent valid plaintiff should have proved that the tract claimed was a part of some odd-numbered section, and they contend that there was no evidence of that fact. There are two answers to this objection.

[2] There is a presumption that official duty has been duly performed. Since the proper officers of the United States selected and listed this land as a part of the land covered by said grant and issued the patent accordingly, the patent itself is *prima facie*, and in this form of action perhaps conclusive, evidence that the land was included in

an odd-numbered section according to the survey of 1856, the survey in force at the date of said acts, if that fact was necessary to the validity of the patent. If in a collateral attack, such as the one here made, the patent is conclusive upon this point, there is no more to be said. If it is only *prima facie* evidence of the fact, it is sufficient, for in that event it puts the burden on the defendants to prove the contrary, and they introduced no evidence on the subject.

[3, 4] The other answer is that a map from the government records was given in evidence, showing that the land in controversy is part of section 5 of said township and range. Appellants contend that this map was not competent evidence, because, as they claim, it was a resurvey made under the act of March 3, 1909, (35 U. S. Stats. 845 [U. S. Comp. St. § 4824]), which act provides that no resurvey made thereunder "shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands" affected thereby. The map itself shows that the survey which it delineates was made in February and March in the year 1912. A letter of instructions from the commissioner of the land office to the United States surveyor general in California regarding this alleged resurvey, of which letter we may take judicial notice (S. P. Co. v. Lipman, 148 Cal. 491, 83 Pac. 445; S. P. R. Co. v. Wood, 124 Cal. 485, 57 Pac. 388), under date of August 14, 1912, shows that the map was made for the purpose of ascertaining and designating the tracts of land in certain townships, including the one in controversy, which under the grant aforesaid had been selected and listed for patent to the Southern Pacific Railroad Company under said grant. Furthermore, the only interest which the defendants claim in defense was under a desert land entry made by Alvin R. Meserve in 1907, and the evidence shows that on appeal by Meserve to the secretary of the Interior this entry was canceled on February 28, 1912, prior to the completion of said resurvey and prior to the issuance of the patent to the Southern Pacific Railroad Company. It would seem, therefore, that whatever may be the state of the title of the plaintiff, the defendants had no title whatever except such as comes from the bare possession at the time said resurvey was made, and hence the same could not impair their rights. Under any view of the case, therefore, the finding that the title was in the plaintiff was fully sustained by the evidence.

On the subject of damages, the findings are that the action was begun on November 16, 1916; that during the three years immediately preceding that date the two appellants were occupying the land without the consent of the plaintiff and were withholding posses-

sion thereof from the plaintiff; that the value of the use of the said land during said occupation was \$200 per year. The judgment awards plaintiff damages "at the rate of \$200 per annum from November 16, 1913, until surrender of possession by said defendants to plaintiff."

The only witness on the subject of value testified, on examination in chief, that the value of the use of the land in the condition it was in during the said period was \$200 per year. On cross-examination he said that the land was desert land, and that the use thereof was of no value whatever unless water was applied thereto for irrigation, that said defendants had used water on the land during said period, and that the value given by the witness was the value of the use with water. It further appeared that said defendants were able to get water on the land solely because they owned stock in Imperial Water Company No. 4, that no water for use on said land could be obtained except from said company, nor by any one from said company unless he was the owner of stock of said company, and that the plaintiff never owned any such stock. There was further testimony to the effect that during said period the land could not have been rented at all unless the owner could buy stock from said company so as to obtain water therefor. It also appeared that the plaintiff might have been able to obtain water stock from said company by paying the price therefor.

[6] It is claimed by the appellants that this evidence showed that the damages allowed were excessive. Their theory is that the value shown by the evidence—\$200 per year—is composed of two elements: First, the value of the use of the land; second, the value of the use of the water; that water for use on land is a species of real property; that the plaintiff owned no water at all, whereas the defendants were owners thereof; and that the computation made by the court allows plaintiff damages for the use of defendants' property. We see no escape from this conclusion. It appears from the evidence that the stock of Imperial Water Company No. 4 was valuable and could not be had without the payment of money—how much does not appear. It is obvious, however, from the circumstances that the use of the land was of no value without water, and, as water was not available from any other source, that the water stock would probably be worth as much as the land.

The measure of damages for the wrongful occupation of land is the value of its use during the time of such occupation. Civ. Code, § 3334. In the circumstances here appearing this would not be the value of the use of both the land and the water. The plaintiff should have been required to prove

the rental value of the land alone, taking into consideration the possibility and the expense of getting water thereon. That was its condition when defendants took possession. The application of the defendants' water right to the land was not, under the conditions existing in that locality, strictly speaking, an improvement on the land; in effect, it was a combination or union of two properties—water and land—the first owned by defendants; the second by plaintiff. It does not appear that the water stock ever became attached to or appurtenant to the land. Apparently it remains the property of defendants. The plaintiff was entitled only to the value of the use of that which belonged to it. The possibility that the plaintiff or its tenant could have procured water by buying the water stock was a circumstance which would tend to increase the rental value of the land. That value, so increased, would be all that the plaintiff should have been allowed to recover in this case. The damages appear to be excessive.

We are not to be understood as approving the form of the judgment on the subject of damages, as above quoted.

We find no reason for disturbing the finding with respect to the title to the property. It will be necessary, however, that there be a new trial of the issue on the subject of damages, and there should be a reversal for that purpose alone.

It is ordered that the judgment be reversed, that the cause be remanded for a new trial on the issue of the subject of damages, and for further proceedings in accordance with this opinion.

We concur: OLNEY, J.; LAWLOR, J.

(186 Cal. 162)

STORY v. RICHARDSON, State Treasurer
(two cases). (Sac. 3061, 3062.)

(Supreme Court of California. June 15, 1921.)

1. Constitutional law § 16—Constitutional provision must be interpreted in consonance with objects and purposes.

Where constitutional provisions are not free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption.

2. Constitutional law § 16—Court, in construing ambiguous provision, may consider conditions, constitutional convention's debates, etc.

In aid of the interpretation of terms of a constitutional provision not entirely free from doubt, the court may consider conditions existing prior to and at the time of adoption of the provision under consideration, the debates in the constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls.

3. Taxation —382—Provision of Constitution for taxation of gross receipts applicable only to public utilities.

The provision of Const. art. 13, § 14, adopted in 1910, for taxation of electric companies in proportion to gross receipts, is applicable only to public utilities.

4. Taxation —382—Owner of office building not a "public utility engaged in transmission or sale of electricity" within Constitution.

Owner of a 12-story office building in a city, in the sub-basement of which were located three 125-horsepower boilers, pumping engines, lighting engines, etc., to supply tenants occupying the building with light, heat, hot water, elevator, and cleaning service, though during one year he supplied electrical energy and steam to individuals not tenants, but occupying property in the vicinity of the building, *held* not a public utility engaged in the transmission or sale of electricity within Const. art. 13, § 14, providing for taxation in proportion to gross receipts of public utilities, despite the definition of public utility in the Public Utility Act, § 2.

In Bank.

Appeals from Superior Court, Sacramento County; Peter J. Shelds, Judge.

Action by Walter P. Story against Friend William Richardson, Treasurer of the State of California. From the judgment, both parties appeal. Reversed in part and affirmed in part.

U. S. Webb and Frank L. Guereña, both of San Francisco, for appellant.

Amend & Amend, of Los Angeles, for respondent.

LENNON, J. This action was brought for the purpose of having an assessment declared null and void, and to recover from the Treasurer of the State of California the amount of a tax paid by plaintiff pursuant to said assessment, and under protest.

The plaintiff, Walter P. Story, is the owner of a 12-story office building in the city of Los Angeles, in the sub-basement of which are located three 125-horsepower boilers, pumping engines, lighting engines, vacuum sweeper engines, a hot water heater, filtering machinery, house pumps, etc. This machinery and equipment were placed in the building at the time of its construction, for the purpose of supplying the tenants occupying the building with light, heat, hot water, elevator and cleaning service, and have ever since been so used. During the year 1916, in addition to furnishing such service to the tenants of the building, plaintiff supplied electrical energy and steam to certain individuals, some of whom were not tenants of the Walter P. Story building, but occupied property in the vicinity of that building.

The terms of these sales were arranged by private contract between plaintiff and purchasers; plaintiff possessed no franchise, and neither the operation of the plant nor the

sales in question were regulated in any manner by any public utility commission or body. The state board of equalization levied a tax upon the said machinery and equipment in plaintiff's building equal to 5.6 per cent. of the gross sums received from the special sales of electrical energy and steam for the year 1916, which gross returns amounted to \$6,040.13 and \$7,618.77, respectively. Plaintiff claims that this taxation was unauthorized, and that he is entitled to recover the amount thereof. The trial court held that plaintiff was not entitled to recover the tax based upon the gross sales of electrical energy, but that the tax based upon the gross sales of steam was without authority, and void. Plaintiff and defendant have each appealed from those portions of the judgment which are adverse to them.

Section 14 of article 13 of the Constitution of California provides:

"Taxes levied, assessed and collected as hereinafter provided upon railroads, * * * car companies, * * * companies doing express business on any railroad, steamboat, vessel or stage line in this state; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons. * * *"

Subdivision "a" of this section of the Constitution provides that the railroads, car companies, express companies, telegraph companies, gas and electric companies previously mentioned shall annually pay a tax upon the property used exclusively in the operation of their business in this state; the amount of which tax shall equal certain percentages of the gross receipts of said companies; and that—

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided."

Defendant claims that this section of the Constitution confers upon the state the power to levy upon plaintiff's property the tax assessed in the instant case. Controverting this contention, plaintiff asserts that the section permits the state to tax the property of only those companies or persons engaged in the transmission or sale of electricity operating as public utilities, and that plaintiff is not a public utility, and therefore not taxable under the section.

[1-3] Where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in

contemplation at the time of their adoption. Accordingly it was been held, in aid of the interpretation of such terms, that the court may consider conditions existing prior to and at the time of the adoption of the provision under consideration, the debates in a constitutional convention, and the printed arguments for and against the provision submitted to the people at the polls. *Matter of Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; *Older v. Superior Court*, 157 Cal. 770, 109 Pac. 478; *Pacific Gas & Electric Co. v. Ind. Acc. Comm.*, 180 Cal. 497, 501, 181 Pac. 788. The provision of the Constitution here under consideration was adopted by the people of the state at the election of November, 1910, as the result of a movement to separate state and local taxation. In 1905 a commission was authorized to investigate the system of revenue and taxation in force in this state, and recommend a revision thereof. *Stats.* 1905, p. 390. The commission appointed proposed an amendment to the Constitution. Report of the Commission on Revenue and Taxation of the State of California, 1906, vol. II, Appendix to Journals of Senate and Assembly of California, session 1907. In 1910, after some alterations, the amendment was submitted to the people, and adopted by them. The amendment as adopted was fundamentally the same as that proposed by the commission in its report in 1906, and that report may, therefore, be considered in determining the meaning of doubtful provisions. The commission recommended a separation of the sources of state and county revenue, and that the property of certain "public utilities" and certain "other corporations," namely, banks and insurance companies, be taxed solely for the benefit of the state.

The theory of the report was that an ad valorem system of taxation was unsatisfactory, in that it failed to distribute equally the burden of taxation, particularly in view of the fact that, in certain cases, such as public utilities, banks, and insurance companies, the greatest value lay in the extent and nature of operation rather than in the intrinsic worth of separate items of property. Accordingly, a uniform scheme was proposed for the taxation of certain enumerated public utilities, including electrical companies, and that system was that the tax should equal a certain percentage of gross receipts; special methods were prescribed for the taxation of banks and insurance companies. Throughout the report electrical companies were classified and discussed as one group of "public utilities" to be taxed upon gross receipts. In the printed arguments submitted to the voters in 1910, at the time the constitutional amendment was voted upon, the "gross receipts" method of taxation was advocated solely for public utilities. It is clear, both from the report of the commission proposing the amendment, and the arguments advanced

to those voting upon the adoption of the amendment, as well as from the nature of the amendment, that the provision for taxation in proportion to gross receipts is applicable only to public utilities. In discussing the amendment, the cases have generally assumed that the tax upon gross receipts was limited to public utilities, although the precise question has never before been presented for decision. *San Francisco v. Pacific Telephone & Telegraph Co.*, 166 Cal. 244, 247, 135 Pac. 971; *Pacific Gas & Electrical Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700.

[4] Plaintiff is also correct in his contention that he is not a public utility "engaged in the transmission or sale of * * * electricity" within the meaning of said section 14 of article XIII of the state Constitution. He is not engaged in the sale and distribution of electricity to the public at large, or any portion thereof, as such. It appears that plaintiff furnished electrical energy under special contract to certain occupants of his own building and to the occupants of an adjoining building. This was the extent of his special sales of electrical energy.

"The test is * * * whether the public has a legal right to the use, which cannot be gained, or denied, or withdrawn, at the pleasure of the owner." *Farmer's Market Co. v. R. R. Co.*, 142 Pa. 580, 21 Atl. 989, 990.

"The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." *Thayer v. California Development Board*, 164 Cal. 117, 127, 128 Pac. 21, 25.

There was no such general offer on the part of plaintiff. Plaintiff's plant was designed primarily and pre-eminently for supplying service to the tenants of his own building, and the special sales of electrical energy and steam were wholly subsidiary and ancillary to this main purpose. The surplus electrical energy at plaintiff's disposal was therefore so limited as to restrict the sale thereof to exceptional cases and prevent the indefinite offer of service essential to a public use.

Defendant claims that, notwithstanding plaintiff's restricted operation, he comes within the term "public utility" as defined by the "Public Utilities Act" of this state. That act provides that any one who generates or distributes electricity to the public, or any portion thereof, for any compensation or payment whatsoever is a public utility, subject to the provisions of that act. The same act defines "public, or any portion thereof" as—

"The public generally, or any limited portion of the public, including a person." *Stats.* 1915, pp. 115, 118, 119.

"Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility, and thus take property for public use without condemnation and pay-

ment." *Del Mar Water, etc., Co. v. Eshleman*, 167 Cal. 666, 680, 140 Pac. 591, 596.

Consequently, it has been held that the definitions of public utilities contained in the Public Utilities Act must be construed as applying only to such properties as have, in fact, been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. *Allen v. R. R. Comm.*, 179 Cal. 68, 88, 175 Pac. 466, 8 A. L. R. 249. Inasmuch as plaintiff's property was employed solely in a private enterprise, the consummation of the special sales did not bring him within the scope of the definition contained in the act.

Since section 14, article 13, of the Constitution, was designed to authorize state taxation in proportion to gross receipts only in the case of public utilities, and plaintiff is not operating as a "public utility," his property is not taxable thereunder. It follows that the tax based upon gross sales of electricity was without authority, and void. It therefore becomes unnecessary to pass upon the point raised by the state treasurer in his appeal, namely, that the sales of steam were taxable as a by-product of the business in electricity, and that the trial court erred in holding void the tax based upon gross receipts from sales of steam.

The trial court found that plaintiff was not furnishing the commodities of electricity and steam as a public service concern. Therefore, with the exception of the single conclusion of law to the effect that the tax based upon plaintiff's gross sales of electrical energy for the year 1916 was valid, the findings of the trial court are in accordance with the allegations of plaintiff's complaint, and will support the judgment wholly in his favor. That portion of the judgment which declares that plaintiff recover nothing from defendant on account of the tax based upon the sales of electrical energy is reversed, with directions to the trial court to enter a judgment declaring the said tax void, and that plaintiff recover the amount thereof. That portion of the judgment which grants plaintiff a recovery on account of the tax based upon the sales of steam is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; LAWLOR, J.; OLNEY, J.; SHAW, J.; WILBUR, J.

(186 Cal. 183)

TURLOCK IRR. DIST. v. WHITE, Tax Collector, et al. (Sac. 2935.)

(Supreme Court of California. June 15, 1921. Rehearing Denied July 15, 1921.)

Taxation ¶217—Irrigation district not a "municipal corporation" within exception from exemption from taxation.

An irrigation district organized under the laws of California is not a "municipal cor-

poration," within the amendment of 1914 to Const. art. 13, § 1, excepting from the exemption from taxation of property belonging to municipal corporations, "such lands and the improvements thereon located outside the municipal corporation owning the same as were subject to taxation at the time of their acquisition by the county, city and county, or municipal corporation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

Sloane, J., dissenting.

In Bank.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Turlock Irrigation District, a public corporation, against James G. White, Tax Collector of Tuolumne County, and the County of Tuolumne. From judgment enjoining collection of taxes, defendants appeal. Affirmed.

Rowan Hardin, of Sonora, for appellants.

P. H. Griffin and Griffin, Boone & Boone, all of Modesto, for respondent.

PER CURIAM. This appeal is by defendants, from a judgment enjoining them from attempting to collect certain taxes levied by the defendant county against lands of the plaintiff.

The plaintiff, an irrigation district, whose corporate boundaries are wholly within the counties of Merced and Stanislaus, is the owner of land situated in the county of Tuolumne. It is the taxation of this land by the county of Tuolumne that is sought to be enjoined.

Authority to levy and collect such tax is claimed by the defendant county under the amendment of 1914 to section 1 of article 13 of the state Constitution. As this section of the Constitution previously stood, it provided that no property belonging to the "United States, this state, or to any county or municipal corporation within this state" shall be subject to taxation. The amendment excepts from such exemption—

"such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation."

The entire controversy in this case is as to whether or not an irrigation district, organized under the laws of California, is a "municipal corporation" within the meaning of this section of the Constitution.

This amendment to the Constitution (article 13, § 1) was submitted by the Legislature to the people in November, 1914. A printed argument in favor of its adoption accompanied the publication of the proposed amendment, a copy of such argument being mailed to each voter in the state as required by law.

Sections 1195, 1195a, 1195b, Pol. Code. This argument in favor of the proposed amendment clearly explains its purpose, and the voters, in acting upon the amendment, must be deemed to have considered such reasons in interpreting the general term "municipal corporation" used in the proposed amendment. The argument, in part, was as follows:

" * * * This amendment does not seek to hinder in any way the development of enterprises by and for the benefit of counties or municipalities, in any part of the state, but to protect from loss those counties into which they may enter for such purposes. 'A concrete illustration is afforded by the counties of Tuolumne, Mono, and Inyo. In furtherance of obtaining a large water supply, for municipal and other uses, the purchase by San Francisco in Tuolumne county aggregated over \$1,000,000 worth of property. Los Angeles, in Owens river valley, acquired by purchase over 75,000 acres of land, amounting to over one-sixth of the assessed value, and more than one-fourth of the located agricultural land of the county. The city of Los Angeles has acquired large holdings in Mono county. Before such acquisition the area was taxpaying property. Since the acquisition in Inyo county, the city of Los Angeles has continued to pay taxes, as a matter of justice, but its payments are accompanied by protests, in order to preserve to it the right of refusal to pay which many contend that it has under the constitutional provision as it stands at present, and that it might sustain in case of legal contest. While not abandoning any right from a technical standpoint, the city recognizes the justice of the contention upon which this amendment is based.

"The city of San Francisco refuses absolutely to pay one dollar in taxes in Tuolumne county on their \$1,000,000 worth of property, contending they are exempt from such a tax by a constitutional provision. * * *

"It would be possible for an acquiring city or county to virtually destroy the government of a small county by acquiring, for one purpose or another, for municipal use, the substance of its revenue yielding property. That such a result would be improbable and extreme does not alter the fact of its possibility. In the Inyo county instance, refusal by the city of Los Angeles to pay taxes upon real estate which has heretofore borne its due share of the expense of the county government would be a serious matter, either curtailing the county's welfare or imposing a heavier burden on other property. With such a result possible to a fractional extent, it would be equally possible to the fullest extent that the investing city might see fit to go.

"It is to remedy such a condition that this amendment was proposed. Uncertainty on the matter should be removed by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its shares of maintaining the local government.

"It is hoped, therefore, that the justice of this amendment will insure for it the approval of the people of the state."

It is apparent that the term "municipal corporation" was thus presented to the people as synonymous with such corporations as Los Angeles and San Francisco; that is to say, as municipal corporations in the strict technical sense.

In their brief appellants say:

"To start with, it will be admitted that by the late decisions of the Supreme Court said decisions have, by an exceedingly fine analysis, determined that, as a technical, legal proposition, an irrigation district is an arm of the state government, or a public corporation, and not a municipal corporation, as the term municipal corporation is technically known."

However, appellants' contention is that the term "municipal corporation," in its popular acceptance, includes irrigation district, and, consequently, this popular meaning is to be applied, rather than a technical one. The rule appellants rely on is thus stated in a recent case (*City of Pasadena v. Railroad Commission of the State of California*, 192 Pac. 25, 10 A. L. R. 1425):

" * * * The Constitution, 'unlike the acts of our Legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face, according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.' *Miller v. Dunn*, 72 Cal. 465, 14 Pac. 27, 28, 1 Am. St. Rep. 67. Where a word has a popular and also a technical meaning, 'the courts will accord to it its popular meaning, unless the very nature of the subject indicates or the context suggests that it is employed in its technical sense.' *Weill v. Kenfield*, 54 Cal. 118."

Other instances of its application may be found in *Miller v. Dunn*, 72 Cal. 462-465, 14 Pac. 27, 1 Am. St. Rep. 67; *Towle v. Matheus*, 180 Cal. 574-577, 62 Pac. 1064; *San Pedro etc., v. Hamilton*, 161 Cal. 610-617, 119 Pac. 1073, 37 L. R. A. (N. S.) 856; *Perrin v. Miller*, 35 Cal. App. 129-132, 169 Pac. 426.

In support of the proposition that the term "municipal corporation" as commonly understood includes an irrigation district, the following quotation from *Merchants' Bank v. Escondido Irrigation District*, 144 Cal. 329, 77 Pac. 937, is cited:

" * * * But the term municipal, as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special; and, indeed, this must be taken as the definition of a public or municipal corporation."

Appellants also cite the following from *In re Madera Irrigation District*, 92 Cal. 296, 319, 28 Pac. 272, 277 (14 L. R. A. 755, 27 Am. St. Rep. 106):

"The municipal corporations which may be thus created are not limited to cities and towns. The constitution makes provision in various places for municipal corporations, other than

cities and towns. Article XI, §§ 9, 10, 12, 16. In each of these sections provision is made with reference to the government or officers of 'county, city, town, or other public or municipal corporation,' thus clearly indicating that there may be municipal corporations other than those of a town or city."

The fact that the argument submitted to the voters indicated that the term "municipal corporation" was used with technical accuracy requires that the rule relied upon by appellants be applied against them, rather than in favor of their contention, because the very nature of the subject, the context of the amendment, and the manner and reason for its presentation all require that it be construed in its technical sense, and, hence, it is within the exception of the rule of construction above stated. There are, however, other cogent reasons for concluding that an irrigation district is not included within the term "municipal corporation" as used in the amendment. The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a "public corporation for municipal purposes." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. As to swamp land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations. *People v. Levee Dist. No. 6*, 131 Cal. 30, 63 Pac. 676; *People v. Sacramento Drainage District*, 155 Cal. 373, 108 Pac. 207; *Swampland Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866, and *Reclamation District No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277. See, also, *People v. Selma Irrigation Dist.*, 98 Cal. 206, 208, 32 Pac. 1047, and cases there cited. The amendment in question must be considered to have been framed and submitted to the people with these decisions in mind, by which it was settled that such corporations were not "municipal corporations."

It is worthy of note that at the very election at which this constitutional amendment was adopted several amendments were submitted in which the term "irrigation district" was used. For illustration, section 13, § 11, was amended to prohibit the Legislature with interfering with any county, city, town, or municipal improvement, etc.—

"except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

Article 11, § 13½, was amended to include "irrigation district" in the phrase "county, city and county, city, town, municipality, or other public corporation," so that the phrase now reads: "Any county, city and county, city, town, municipality, irrigation district, or

other public corporation," etc., thus tending to impress upon the voter that the term "municipality" did not include an "irrigation district."

At the same election, article 11, § 6, was amended by the people. This section restricts the power of the Legislature in the formation of municipal corporations, to providing by general law for their formation, and prohibits the formation of such corporations by special statute. That section uses the term "municipal corporation," as synonymous with "cities and towns." The section reads, in part, as follows:

"Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization and classification, in proportion to population, of cities and towns. * * *"

If it were intended by the Legislature and by the people to use the term "municipal corporation" with its broadest possible meaning in article 13, § 1, supra, it is reasonable to suppose that language similar to that contained in article 11, § 13½ supra, would have been employed, expressly including, as does the latter section, the term "irrigation districts."

One of the important rules of constitutional construction is thus stated by Mr. Cooley:

"If a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of the object to be accomplished or the mischief to be remedied or guarded against by the clause in which the ambiguity is met with." *Cooley, Const. Lim. p. 100.* (Italics the author's.)

In view of the general policy of the law and the great necessity on which that policy rests, that property held by public corporations shall not be taxed by the state, much less by other public corporations, and the plain fact that this particular amendment of the constitution was manifestly inspired by the desires of three counties to prevent Los Angeles and San Francisco from escaping taxation on property owned by them situated outside their limits for the carrying on of public water systems, together with the further fact that the Constitution itself, in other parts thereof, describes "municipal corporations," and provides for their creation in such a way that it cannot be doubted that none other than the ordinary municipal corporations were referred to, it is clear that irrigation districts were not made taxable by the exception contained in the amendment in question.

It should be stated that it is conceded that irrigation districts were not taxable before the amendment of 1914, and are not now, un-

less such taxation is authorized by the amendment, but it is contended that they then were exempt because of the special exemption of the property of "municipal corporations" contained in such section, and that such irrigation districts are now taxable under the special exception in the amendment authorizing the taxation of "municipal corporations." To the contrary, such exemption existed because of the express exemption of the property of "the state," and contained in that section because of the implications in favor of the exemption of public property. See Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 Pac. 668, and cases therein cited for a discussion of the principle applicable. See, also, Webster v. Board of Regents, 163 Cal. 705, 126 Pac. 974, and cases cited. Reference may also be made to Central Irrigation District v. De Lappe, 79 Cal. 351, 21 Pac. 825, and Lindsay-Strathmore Irrigation District v. Superior Court, 187 Pac. 1056, for a discussion of the similarity of the organization of reclamation and irrigation districts.

The language quoted in the dissenting opinion from Southern Pacific Co. v. Levee Dist. No. 1, 172 Cal. 345, 156 Pac. 502, read in the light of the express statement in the opinion that such districts are not "municipal corporations," would indicate that the court considered that the property of the district was "state property," rather than property of a "municipal corporation." The same view is taken in People v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016, where it is said:

"Certainly, these districts were not municipal corporations as that term is used in the Constitution." "If these districts can be said to be corporations at all, I think they are properly called public corporations for municipal purposes. That phrase means no more than that they are state organizations for state purposes. They certainly are not municipal corporations in the strict sense."

Similarly, in Re Madera Irrigation District, 92 Cal. 296, 322, 28 Pac. 272, 278 (14 L. R. A. 755, 27 Am. St. Rep. 106), it was said:

"The property held by the corporation is in trust for the public, and subject to the control of the state."

However, the reasons presented for the conclusion reached in Southern Pacific Co. v. Levee Dist. No. 1, supra, were so numerous and cogent that the differentiation between the various forms of taxing agencies was of little, if any, weight in arriving at the conclusion that it was intended by the amendment to prohibit all such agencies from exercising the taxing power over railroad corporations, that the decision is of little or no assistance in reaching a conclusion on the question involved here.

Judgment affirmed.

ANGELLOTTI, C. J., and WILBUR, SHAW, OLNEY, LENNON, and LAWLOR, JJ., concur.

SLOANE, J. I dissent. The reasoning of the majority opinion that this constitutional provision should be strictly interpreted against the tax in question because all intendments of the law are against the taxation of public property cannot apply in this instance, because here the provision involved is avowedly dealing with the taxation of public property.

Section 1 of article 13 expressly defines what classes of public property shall be exempt from taxation. It discloses, first, that "all property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed." Standing alone, under the rule cited, this might not include public property, exempt under the general rule of public policy, but the section proceeds with a proviso which shows that it is dealing with the subject of taxation as applied to both public and private property.

The proviso is that various enumerated classes of property, including—

"such as may belong to the United States, this state, or to any county, city and county, or municipal corporation within this state, shall be exempt from taxation."

It is entirely clear that unless the property of an irrigation district is either the property of the state or of a municipal corporation it is not exempt from taxation at all. When the Legislature or Constitution has made express provision for the exemption of certain classes of public property, the inference is clear that it did not intend that other classes should be exempt. 26 R. C. L. p. 291; Chicago Sanitary Dist. v. Martin, 173 Ill. 243, 50 N. E. 201, 64 Am. St. Rep. 110; Bd. of Trustees v. Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806. But under our Constitution the matter is made conclusive by the direction that all property not so enumerated shall be taxed.

This court was confronted with such an alternative in the case of Reclamation Dist. v. Sacramento, 134 Cal. 477, 66 Pac. 668. As stated in the opinion in that case:

"The sole question presented is, whether property acquired by a reclamation district as necessary and indispensable to the execution of its objects is subject to taxation for state and county purposes."

Exemption was claimed for this property by the district under section 1 of article 13 of the Constitution as it read prior to the amendment of 1914, exempting all property which belongs to "this state, or to any county or municipal corporation within this state." Reviewing the authorities on the question as to whether or not a reclamation district was a municipal corporation, without directly

passing upon this point, the court disposes of the case upon another theory. It says:

"It is not necessary to hold this property, thus acquired, to be the property of a municipal corporation, in order to make it exempt from taxation. It would be sufficient to hold that it is public property of the state, within the meaning of the Constitution."

It requires great latitude of construction to hold the property of a reclamation district as property "belonging to the state," but, considering the nature of such district organization, with its limited corporate powers under the law as it existed at the time covered by this decision, it was perhaps a more logical conclusion than to class it as a municipal corporation.

The Supreme Court of Illinois, in determining the liability of a drainage district of the city of Chicago to taxation upon property it owned outside the corporate limits of the city under analogous constitutional provisions (*Chicago Sanitary Dist. v. Martin*, supra), held that, as the legal title to the property was vested in the district, it could not be held to be property "belonging to the state."

People v. Morrill, 26 Cal. 336, defines "lands belonging to the state" as those—

"(1) Which it holds by virtue of grants from the United States; (2) those which it owns by reason of its sovereignty."

In either event, the term implies ownership, and not mere authority and control over. In view of the fact that the law of California governing irrigation districts expressly provides that "the legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district," it would be an elastic use of terms to hold that the interest of the state in such lands amounts to such ownership as to justify holding such property to belong to the state.

As previously pointed out, the only remaining alternative which will permit of any exemption of irrigation district property at all is to include such district, for the purposes of this section, as a "municipal corporation."

It, of course, follows that, if the general exemption clause of section 1, art. 13, of the Constitution, includes irrigation districts under the classification of "municipal corporations" the exception from such exemption of "lands and the improvements thereon located outside the county, city and county or municipal corporation owning the same" must also apply to such irrigation districts, for the term "municipal corporations" is obviously used in the same sense in both connections. But the most persuasive reason for classifying an irrigation district as a municipal corporation under this constitutional provision is that any other construction, in my opinion, defeats the very apparent purpose of the amendment.

It is doubtless true, as set forth in the argument presented to the voters on the sub-

mission of this amendment, that the inducing cause of the amendment was the acquisition of large real estate interests in the counties of Tuolumne, Mono, and Inyo for reservoir purposes by the distant cities of Los Angeles and San Francisco. These corporations happened to be governmental municipalities, but that was not the circumstance which appealed to the voters of these counties and others likely to be invaded by public power and water purveyors.

The real purpose was to prevent abuses threatened and likely to recur from permitting private lands subject to taxation in one jurisdiction to be taken over for public uses by other communities, and, by depriving the territory in which the lands are situated of the revenue from this taxation, thus throw part of the burden of such public use upon territory not benefited by it. What possible reason or justification could there be for protecting these outside jurisdictions from the incursions of towns and cities in search of water storage and distribution, and leaving them exposed to precisely the same invasion by extensive irrigation districts outside their territory? The gist of the matter clearly appears in the part of the argument for this constitutional amendment which says:

"Uncertainty on this matter should be removed by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its share of maintaining the county government."

The direct object of the amendment was to protect and conserve the revenues of the invaded territory, and with that object in view it can make no difference whether the public use acquired is by a city or county, or some other public corporation exercising municipal functions.

No violence is done to the rules of construction under the interpretation of the term "municipal corporations" here contended for. It is common knowledge that in popular usage the term "municipal corporation" is understood as applying to all departments of state organization exercising public functions, and the same general use of the term is common in judicial decisions and with law text-writers.

In 19 *Ruling Case Law*, p. 691, it is said that "municipal" in its primary sense means "pertaining to a town or city or to its local government," but it also declares that the word "municipal" has two meanings, one of which is pertaining to the internal government of a state or nation, and in that sense every corporation formed for governmental purposes is a municipal corporation"; and, further, at page 696, it is said:

"The legislature frequently organizes the people of a certain territory into a district having certain limited powers for the carrying out of some particular public purpose. Familiar ex-

amples are school districts, * * * irrigation districts, levy districts; * * * but it has been held that such a district is a 'corporation for municipal purposes.'"

Such district organizations are very commonly referred to in the California decisions as public corporations for municipal purposes, or quasi municipal corporations. *Merchants' Bank v. Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. 937; *People v. Reclam. Dist.*, 117 Cal. 120, 48 Pac. 1016; *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. 825; *Irr. Dist. v. Williams*, 76 Cal. 366, 18 Pac. 379; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Perry v. Otay Irr. Dist.*, 127 Cal. 565, 60 Pac. 40; *Jenison v. Redfield*, 149 Cal. 500, 87 Pac. 62; *Fogg v. Perris Irr. Dist.*, 154 Cal. 209, 97 Pac. 316; *Healey v. Anglo-Calif. Bank*, 5 Cal. App. 278, 90 Pac. 54; *Dean v. Davis*, 51 Cal. 409.

The same classification is maintained in the federal courts in the consideration of such districts under the laws of California. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 174, 17 Sup. Ct. 56, 41 L. Ed. 369; *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; *Herring v. Modesto Irr. Dist.* (C. C.) 95 Fed. 705.

In the construction of words used in a constitution a more general and inclusive definition is often recognized than in the more technical provisions of a statute or a contract. A constitution is the formulation of broad general rules of governmental policy submitted to the popular will and understanding for their adoption.

"Where a word, having a technical as well as a popular meaning, is used in a constitution, * * * the courts will accord to it its popular signification." *Weill v. Kentfield*, 54 Cal. 111; *Miller v. Dunn*, 72 Cal. 462, 465, 14 Pac. 27, 1 Am. St. Rep. 67; *Towle v. Mathews*, 130 Cal. 574, 577, 62 Pac. 1064; *San Pedro, etc., v. Hamilton*, 161 Cal. 610, 617, 119 Pac. 1077, 37 L. R. A. (N. S.) 686; *Perrin v. Miller*, 35 Cal. App. 129, 132, 169 Pac. 426.

This rule of liberal construction appears to have been applied by this court in *So. Pac. Co. v. Levee Dist. No. 1*, 172 Cal. 345, 156 Pac. 502, construing the use of the word "municipal" in an amendment to the state Constitution in a way which we think has a marked bearing on this case. In the amendment of the Constitution by adoption of the new section 14, art. 13, for the purpose of changing the system of taxation of corporations, it was declared that the system of taxation provided should "be in lieu of all other taxes and licenses, state, county, and municipal." Levee district No. 1 of Sutter county, being a levee district organized under the act of the Legislature for the creation of such districts, undertook to levy a tax upon property of the Southern Pacific Company within such district, and attempted to sustain the validity of such tax against the plea of this constitutional amendment, on

the ground that it is a district, and not a municipality, and that the amendment does not exempt from district taxation. This court, in the case cited, while holding directly that such levee district was not a municipal corporation, decided, upon an exhaustive consideration of the purposes of the section, and the obvious intent of the constitutional amendment, that district taxes of this nature were included under the term "municipal," and says:

"It would appear to be beyond peradventure, therefore, that, when the Constitution declared that the state taxes 'shall be in lieu of all other taxes, state, county and municipal,' it used the words 'state, county and municipal,' as inclusive and descriptive, and not as designed to exempt districts from its operation. * * *"

An irrigation district probably comes nearer than any other of the subordinate public corporations of the state to meeting the technical requirements defining a municipal corporation. It has its own directors and officers, conducts its own elections, can sue and be sued in its corporate name, issues bonds, levies, collects, and disburses its own revenues, acquires and holds property, both real and personal, in its own name, and in the management of its internal affairs is entirely independent of the county and state, aside from the control of general laws.

While the courts have frequently drawn the line between public corporations of a quasi municipal character and those performing strictly municipal functions, it has usually been for the purpose of defining limitations upon the political powers of these lesser state agencies, but no reason seems to exist why the distinction should be pushed so far in this case as to exclude irrigation districts from the operation of the constitutional amendment under discussion.

(186 Cal. 143)

PEOPLE v. CLIFTON. (Cr. 2331.)

(Supreme Court of California. June 13, 1921.)

1. Homicide §238 — Evidence held not to show defendant so intoxicated as to be without appreciation of his act or ability to form a deliberate intent to kill.

In a prosecution for murder, evidence held to show that the defendant was not intoxicated to such an extent as to render him unconscious or without appreciation of the nature of his act in so cutting deceased with a knife as to cause death and not to show him incapable of forming a deliberate intent to kill.

2. Homicide §22(2), 180 — Instruction on murder requiring deliberate intent to kill, and permitting jury to consider defendant's intoxication, approved.

The jury was correctly instructed that to constitute first degree murder the unlawful killing must be accompanied by a deliberate and

clear intent to kill, and that it should consider the evidence as to defendant's intoxication at the time, together with other evidence, to determine defendant's purpose or intent in committing the act.

3. Criminal law \S 763, 764(1) — Instruction that prosecution must establish "each material fact so charged" in indictment not objectionable as meaning that indictment's allegations "are facts and true."

The claim that an instruction that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved on the prosecution to establish to a moral certainty and beyond a reasonable doubt "each material fact so charged," was an instruction to the effect that allegations of the indictment "are facts and true," held without foundation.

4. Witnesses \S 277(4), 380(2) — Defendant's statements shortly after homicide held admissible to discredit his testimony; defendant may be cross-examined as to all matters concerning direct examination.

In a prosecution for murder the state may fully cross-examine defendant as to all matters concerning his examination in chief under Pen. Code, \S 1323, and in so doing may show by his own admissions that he has made a statement contrary to his direct examination to discredit him, so that his answers to questions soon after the homicide as to the cause of trouble between him and deceased, where not amounting to a confession of guilt, were admissible as to his credibility.

5. Criminal law \S 786(1) — Refusing of instruction as to defendant's credibility held not error in view of the facts.

Where defendant's answers to questions as to cause of difficulty shortly after homicide were introduced to discredit his testimony in chief, an instruction that if defendant was at such time, because of intoxication, unable to understand questions or answers they should not be considered, while hardly objectionable, was not erroneously refused, where, in view of the character of answers given, it appears that witness sufficiently understood and intelligently answered questions.

6. Homicide \S 253(1) — Evidence held sufficient to sustain conviction of first degree murder.

In a prosecution for first degree murder, evidence held sufficient to sustain conviction.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

David Clifton was convicted of murder in the first degree, with penalty of death, and from the judgment and order denying new trial he appeals. Judgment and order affirmed.

Ralph W. Smith, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, C. J. The defendant was convicted of murder of the first degree for the killing of one Henry Smith on April 9, 1920, and was adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

The killing was admitted, but it was claimed on the trial that it was done in lawful self-defense. In view of the record it cannot reasonably be contended that the jury was not justified in concluding otherwise and finding the defendant guilty. It is earnestly urged, however, that the evidence was not such as to justify a verdict of murder of the first degree, for want of testimony to support a conclusion of the presence of the deliberation and premeditation essential to such a verdict.

[1] While there was evidence which would strongly justify a claim before the jury that the homicide was the result of a drunken quarrel between defendant and deceased, without any element of deliberation and premeditation on the part of defendant, there was, in our opinion, sufficient evidence upon which to found a contrary conclusion. Deceased and defendant and two women, all negroes, were living in a small four-room shack, fronting on an alley between O, P, Fourth, and Fifth streets in the city of Sacramento. Apparently all were ignorant and superstitious. Deceased was living with one of these women, a Miss Fisher, and the other woman, a Miss Watson, had been an occupant of the house for only a few days. The relations between defendant and deceased had been very friendly, so far as the evidence shows, to within a couple of days of the quarrel, and defendant had originally taken up his abode in the house at the invitation of deceased. The only evidence of any trouble between them prior to the fatal quarrel was that of Miss Watson. She testified to a verbal altercation between them a day or two before with relation to the defendant carrying and using red pepper as a protection against evil spirits in and about the house, which ended in defendant drawing a knife, and being pushed out through a door by Miss Fisher. She also testified that the day before the homicide deceased accused Miss Fisher in the presence of defendant of giving defendant money and taking care of him out of his (deceased's) labor. She said that he also told Miss Fisher to make defendant leave the house, and that he would not stay there if defendant remained. She also testified that during the morning of the day of the homicide defendant sharpened his knife in her room, and, after sharpening it, said it would do the work. In none of these statements was she corroborated by other witnesses, and her evidence may well be claimed to be somewhat rambling and unconvincing. The question of her credibility was, however,

a question for the jury. Later in the day defendant and deceased, both of whom had apparently been drinking previously, together with a white man called "Pat," who has never been produced as a witness, were in the dining room of this house, engaged in drinking and talking. According to defendant, a quarrel commenced between him and deceased on the question as to which of the two should go out after more liquor, and deceased attacked him with a butcher knife, but there is nothing except this testimony of defendant to suggest that deceased had a knife or was armed. The evidence was such as to fully warrant the jury in concluding that he was unarmed. No witness professes to have seen the commencement of the physical encounter. The two who say they witnessed any part of the encounter, a negro named Miller and Miss Watson, found the two grappling on the floor of the room, Miss Watson saying that defendant was on top of deceased, and that deceased was pleading with him to stop cutting him, and Miller saying that each man was on his side. According to both of the witnesses deceased was then bleeding badly. The defendant then got up and left the house, and was arrested a short time thereafter in the immediate locality, near the corner of Fifth and P streets, where he was standing against a fence. The knife, with blood upon it, was found in his pocket. Deceased, who died the same day, had received several small knife wounds, one being between the thumb and index finger of his left hand, and a mortal wound about nine inches in length across the abdomen, portions of the small intestines being severed. The case was such, assuming the reliability of Miss Watson as a witness, as to warrant a conclusion that there was some feeling of hostility between the two men, and a disposition on the part of defendant to use his knife on deceased, and also that defendant attacked deceased with his knife, deceased being unarmed, and inflicted the abdominal wound with the deliberate purpose of killing. If this wound was consciously inflicted, it is hard to account for the act upon any other theory than that it was done with the deliberate purpose of killing, for the nature of the wound was such that it was most likely to result in death. That it was consciously inflicted seems very clear, unless defendant was intoxicated to such an extent that he did not know and appreciate what he was doing. The strongest evidence in defendant's behalf is that relating to his intoxication. Unquestionably he was under the influence of liquor to some extent. All those who had anything to do with him that afternoon, including the officers, agree on this. The question in this connection is whether he was intoxicated to such an extent as to render him unconscious of or without appreciation of the nature of his act and incapable of forming a deliberate intent to kill. We are forced to the conclu-

sion that the evidence was such as to sufficiently support a negative answer to this question.

[2] The jury was correctly instructed that to constitute murder in the first degree, the unlawful killing must be accompanied by a deliberate and clear intent to kill, and also that it was proper to consider the evidence on the subject of intoxication at the time of the act, together with all the other evidence in the case, for the purpose of determining the purpose or intent with which he committed the act. It found the existence on the part of defendant of this deliberate and clear intent. While in this respect the case may be one that may merit earnest consideration on the part of the executive upon an application for executive clemency, it is not one in which this court is authorized to reverse for want of sufficient legal evidence.

[3] The claim that an instruction that every material allegation of the indictment was put in issue by the plea of not guilty, and that it devolved upon the prosecution to establish to a moral certainty and beyond all reasonable doubt "each material fact so charged," was in substance an instruction to the effect that the allegations of the indictment "are facts and true," is, it would seem hardly necessary to say, entirely without foundation.

[4] Defendant testified as a witness in his own behalf. Among other things he testified that there had never been any trouble between himself and deceased prior to the fatal quarrel, and especially that there had never been any trouble or feeling between them with regard to the woman Fisher. He also testified that the deceased attacked him with a knife, "with a keen butcher knife," "a little keen butcher knife that was wrapped around the handle with some string," which he, defendant, knocked out of his hand. On cross-examination the foundation was properly laid with a view to his impeachment as a witness in regard to these matters by asking him if at the city jail about 2:25 p. m. of April 9, 1920 (the day of the homicide), in the presence of certain specified persons, he did not give certain answers to certain questions. The questions and answers involved were as follows:

"Q. What did the fight start over? A. God! his woman, I guess. That was the only thing it started over.

"Q. What is the woman's name? A. Miss Cora Fisher.

"Q. Dave, did you get cut anywhere? A. No, sir; not to my knowledge, no.

"Q. Henry didn't have a knife out or anything? A. Not that I know of.

"Q. Did he have a gun or anything? A. No, sir.

"Q. Did he say he was going to get a gun or anything? A. No, sir.

"Q. He didn't? A. Yes, sir.

"Q. Did Henry have a knife or anything in his hand? A. No, sir; I don't remember."

Defendant answered that he did not remember making any statement. In rebuttal, Mr. Vinson, the official shorthand reporter who took down the questions and answers in shorthand, testified to the giving by the defendant of these answers to such questions on the occasion specified. Objection was made to this evidence on the part of Mr. Vinson on the ground, substantially, that it was not made to appear that the statement was voluntary, or that defendant was apprised of his rights, and that his condition was such that he was not able properly to understand the questions and know the statements he was making. There was considerable testimony as to his condition with regard to being intoxicated and the extent thereof, but the evidence before the court was clearly of such a nature as to warrant the conclusion that he sufficiently understood the questions and the answers he was giving. It is contended that the court erred in admitting the evidence thus given by Mr. Vinson.

There can be no question, of course, as to right of the prosecution to fully cross-examine the defendant as to all matters concerning which he was examined in chief (section 1323, Pen. Code), and in so doing to show by his own admissions, if they could, that he had made statements contrary to those made upon his direct examination, for the purpose of throwing discredit upon them. See *People v. Gallagher*, 100 Cal. 466, 475, 35 Pac. 80; *People v. Creeks*, 170 Cal. 368, 379, 149 Pac. 821. It seems plain on principle that in the event of his failure to admit the making of such contrary statements, when properly questioned as to the same, proof thereof might be made by other persons who heard him make them, just as in the case of any other witness. This is certainly true if such statements do not constitute a confession of guilt of the offense for which the defendant is on trial, in which event it may be assumed for the purposes of this decision that the same would not be admissible in the absence of proof of being voluntarily made. The trial court admitted proof of the statements here involved for the purpose of impeachment, without proof of their voluntary character. But it is perfectly clear that they did not constitute a confession of guilt, within the meaning of the rule requiring such proof. The distinction between a confession of guilt and a mere admission of a fact or facts not constituting guilt of the offense in question is very fully and learnedly discussed in *People v. Fowler*, 178 Cal. 657, 664, 174 Pac. 892, and need not here be further discussed. These statements, being mere admissions of material facts not amounting to a confession of guilt, were also admissible as such altogether regardless of any question of impeachment. See *People v. Sexton*, 132 Cal. 37, 39, 64 Pac. 107. As we have said,

the evidence was clearly sufficient to warrant the conclusion of the trial court that he was not so incapacitated by intoxication that he did not sufficiently understand the questions asked and the answers he gave.

[5] It is argued that the trial court erred in refusing to give an instruction, requested by defendant—

"That before you can consider the statement made by the defendant at the city jail on April 9, 1920, in reply to questions of Mr. Hughes * * * in the presence of the police officers and Mr. Vinson, the reporter, or any part thereof, the evidence must show to your satisfaction that the accused, David Clifton, was at the time of the making of the statement in possession of his mental faculties, and was so possessed to understand the questions which he answered. Should you find that the defendant was not so possessed of his faculties by reason of his having been drinking liquor, or any other cause, then you are to disregard the evidence as to those portions of the statement concerning which defendant was examined on the witness stand, and which have been admitted in evidence."

As an abstract statement of law we see no very good objection to this instruction, and, in view of the evidence as to some intoxication on the part of the defendant, it might well have been given. However, one of the grounds upon which the learned judge declined to give it was that "there is not sufficient evidence, if any, on which to produce such an instruction," and it is true that there is no affirmative evidence in the record tending to show lack of understanding on the part of defendant of the purport of the questions and his answers. The answers of the defendant were responsive to the questions, and indicated comprehension of the subject of inquiry. In view of the character of the answers given it is difficult to imagine that defendant did not fully understand both questions and answers. Every witness who testified regarding the matter testified that, although the defendant was somewhat under the influence of liquor, he apparently sufficiently understood and intelligently answered the questions. Under the circumstances we think it cannot be held that the trial judge erred in refusing the instruction for the reason above stated, and on which, among others, he founded his refusal.

[6] No other point is made for reversal, and careful consideration of the record shows nothing in the way of substantial error in the proceedings in the trial court. Defendant had a fair trial, and there is sufficient evidence to support the verdict.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

(186 Cal. 75)

SAN FRANCISCO BAR ASS'N v. OPPENHEIM. (Cr. 2350.)

(Supreme Court of California. June 6, 1921.)

1. Evidence §317(2)—Hearsay testimony by clerk as to what was said by defendant judge sought to be disbarred inadmissible.

In proceedings to disbar an attorney holding office of police justice, for misconduct relative to admitting to bail one charged with homicide, testimony as to what the clerk of court said that defendant judge said was inadmissible to show the making of an order or statement by defendant judge.

2. Attorney and client §53(2)—Evidence insufficient to warrant finding police judge guilty of misconduct relative to admitting to bail.

In proceedings to disbar a police judge for misconduct relative to admitting to bail one charged with homicide, evidence held insufficient to warrant the court in finding defendant judge guilty.

3. Attorney and client §53(2)—Evidence insufficient to show police judge guilty of bribe taking.

In proceedings to disbar a police judge for misconduct in receiving a bribe on a corrupt understanding that he should be corruptly influenced in the decision of certain criminal cases, the allegation being that he discharged the defendants in each of such cases, evidence held insufficient to sustain such charges.

Lawlor, Olney, and Sloane, JJ., dissenting.

In Bank.

Application by the San Francisco Bar Association for disbarment of Morris Oppenheim. Order to show cause discharged, and proceeding dismissed.

John O'Gara, J. J. Webb, and Max Kuhl, all of San Francisco, for accusers.

Thos. B. Dozier and A. S. Newburgh, both of San Francisco, for accused.

ANGELLOTTI, C. J. This is a proceeding instituted in this court for the disbarment of Morris Oppenheim, an attorney and counselor, for conduct involving moral turpitude. Defendant was at all the times mentioned in the accusation one of the police judges of the city and county of San Francisco, and, as in the case of John J. Sullivan (Crim. No. 2347, decided May 5, 1921) 198 Pac. 7, all the charges against him are for acts and conduct on his part with relation to matters coming before him as such police judge. Three separate specific charges against the accused are made by the accusation. The accused denied the truth of each charge. By order of the court, the evidence in support of and against the charges was taken by the chief justice, and the transcript of the evidence taken has received full consideration at the hands of each member of the court.

The charges are of the same general nature as those made against John J. Sullivan in the proceeding referred to above. In the opinion in that matter we sufficiently discussed the rules of law applicable, and it is not necessary to repeat that discussion here. In this matter, as in the Sullivan Case, the only direct evidence of guilt of the accused of any of the specific offenses charged is that of C. Vincent Riccardi, whose credibility as a witness is fully discussed in the opinion in that case. It is unnecessary to repeat that discussion here, further than to say, as we substantially said there, that we can accept his testimony as true only in so far as it is substantially corroborated by other evidence. We had occasion in the Sullivan Case to discuss the business of Peter P. McDonough and the intimate relations existing between him and the accused therein. The same sort of intimacy existed between him and the accused here, and all that is said in the opinion in that case about these matters is equally applicable here.

The specific charge mainly relied on is the first in order in the accusation, being with relation to the conduct of the accused in a matter pending before him as a committing magistrate, in which one George Imperiale was charged with the crime of manslaughter. The charge is that while this matter was so pending before him, the accused entered into a conspiracy and agreement with one Peter P. McDonough wherein and whereby it was understood and agreed that accused, as police judge, should make such orders in regard to the bail of Imperiale that the latter would be induced to discharge his then attorney, one John V. Filippini, and employ in his place C. Vincent Riccardi, and also to pay for attorney fees and his release from custody and for the dismissal of the case \$500, of which sum McDonough was to receive a part; that, in pursuance of such corrupt agreement, accused, on April 24, 1919, first made an order fixing the bail at \$5,000 bond or \$2,500 cash, and subsequently on the same day made an order holding Imperiale without bail, thus inducing Imperiale to discharge Filippini from his employment and to employ Riccardi in his place, and that then accused made a third order, fixing the bail at \$1,000, which amount was furnished by McDonough, and Imperiale thereupon released; and that on or about May 23, 1919, the case was finally dismissed; and that the sum of \$500 was paid by Imperiale for attorney fees and for his release, and for the dismissal of the case, of which sum McDonough received \$200. There is no claim either in the accusation or the evidence that accused was to receive or did receive any money in this matter.

Imperiale, who was engaged in the business of running an auto stage or truck, had in operating his car, run into and killed a

child. The charge of manslaughter was based upon his alleged negligence in this matter. In so far as the dismissal of the charge by accused is concerned, it is not claimed that the accused was not fully justified in his action by the facts. No effort was made by the accuser to show what an investigation of the facts disclosed. Mr. George B. Keane, an attorney employed by the parents of the dead child, testified that he fully investigated the facts, and concluded that there was no case against Imperiale. It is undisputed that in open court he so stated to the accused judge and asked that the matter be dismissed. In so far as the record shows, there was no probable cause shown for believing Imperiale to be guilty of the crime with which he was charged, and the dismissal was proper.

It is solely in connection with the matter of the bail of Imperiale that anything improper appears. Imperiale, an ignorant foreigner, was in custody on the charge of manslaughter, having been arrested the night before. Riccardi had such information as to lead him to the conclusion that he had some property and sufficient resources to enable him to pay a large amount of money to gain his liberty. Here was a fertile field for development in the eyes of Riccardi. An intervening obstacle to such development was the presence in the case of Mr. John V. Filippini as the attorney of Imperiale. Mr. Filippini was an attorney at law of good repute, without much police court or criminal practice experience, who as a lawyer had previously done some business for Imperiale and had his confidence. In consequence of this he had been engaged to appear for him in this matter, and was, with Mrs. Imperiale, in and about the hall of justice and the courtroom of accused on the morning of April 24th, when Imperiale was first brought into court to answer to the charge, engaged in an effort to obtain the release of Imperiale on bail. It was considered by Riccardi to be necessary to exclude Filippini from the case and to obtain his own employment in his place. The plan adopted to accomplish this was to bring Imperiale and his wife and Filippini to a conclusion that Filippini could not obtain an order for such release on bail, or other favorable action in the case, and that Riccardi could obtain his release at once and eventually a dismissal of the case.

There can be no doubt that Imperiale and his wife and Filippini were prevailed upon to believe that Filippini could do nothing for Imperiale in that court, and that with the assent of Imperiale, Filippini withdrew from the case, and Riccardi took charge. Except for the continued representations and insinuations by Riccardi as to his ability to accomplish results and the lack of knowledge of Filippini as to how things must be done in order to obtain favorable results in that court, the potent consideration leading the

parties to the conclusion that Filippini could do nothing was certain information given them as to an alleged change made by the accused in the matter of the bail. It is the alleged willful participation by the accused with Riccardi in this matter, as well as in the original fixing of bail, that is mainly relied on by the accuser.

Riccardi's story is, in brief, substantially as follows: All his dealings in the matter were with McDonough, and at no time did he speak to the accused about the case. Before court convened on the morning of April 24, 1919, he went to McDonough's place of business and acquainted him with the prospect of mutual gain in the Imperiale case in the event that he was employed as attorney in place of Filippini. McDonough agreed to help and Riccardi divulged his plan, which was to have the judge fix the bail at so high a figure as to make it impossible for Filippini to obtain it. McDonough said he would communicate with the judge at once. Riccardi went back to the courtroom, arriving there before court was convened. After the accused took his place on the bench for the disposition of the business of the day's calendar, application was made by Filippini for the fixing of bail in the Imperiale case. The judge fixed it at \$5,000 bond or \$2,500 cash. Filippini left the courtroom saying that he would endeavor to obtain it. Riccardi thereupon went to McDonough again and told him that Filippini would probably get the required bond and suggested that he have the accused raise the bail or refuse bail altogether. McDonough said he would do this. Riccardi went back to the courtroom a little later. Court had adjourned and the accused had left the courtroom. Imperiale and the other prisoners were still in the dock in the courtroom. He (Riccardi) says that he was informed by the clerk of the court that an order of "no bail" had been made. It was at this stage that Filippini withdrew from the case and Riccardi became attorney for Imperiale. He then went back to McDonough's place of business, in company with Mrs. Imperiale, and sought an order fixing the bail at \$1,000 cash. McDonough went into a back room and came back with such an order signed by the accused. He heard the voice of accused speaking in such back room. He procured \$1,000 from McDonough to deposit with the bond and warrant clerk, and went to the office of such clerk with the money and the order fixing bail, there deposited the money and the order, and received an order directed to the prison keeper at the city prison for the release of Imperiale. He went back to the courtroom with this order, and showed it to Filippini who was still there. The prisoner had in the meantime been taken to the city prison. The order for release was taken to the city prison and delivered to the officer in charge, and Imperiale was discharged from custody at 11:55 a. m.

This story is absolutely uncorroborated in so far as any competent evidence directly implicating the accused is concerned. Moreover, in certain essential details it is opposed, in our opinion, to a clear preponderance of the testimony, altogether regardless of the denials under oath of both accused and McDonough. The latter denies that he had anything whatever to do with the case, beyond furnishing on application, in the course of his business, the money to be deposited as bail, and says he never communicated with the accused in relation to the case. The accused testified that McDonough never communicated with him about the case, and denied that he ever made any "no bail order" or said anything about such an order to any one. He further testified that having first fixed the cash bail at \$2,500 on the statement of the arresting officer, he reduced it to \$1,000, before leaving the courtroom; his best recollection being that he so reduced it on the application of Mr. N. C. Coghlan, who came into the case by arrangement with Riccardi.

In so far as appears, except for Riccardi's testimony there is nothing to suggest even a suspicion of wrongdoing in the matter of the original fixing of bail. When the application was made by Mr. Filippini, the accused said he would have to wait for the arresting officer's statement. When the officer arrived, he told the accused that the case was a serious one of deliberately running down a little boy and killing him. He also said something about previous negligent driving by Imperiale. The accused then made the order, and when Filippini protested and said it should be reduced to \$1,000, somewhat impatiently said the order had been made and would stand. This is, in substance, the testimony of Mr. Filippini. To us, in view of the seriousness of the charge and the statement of the arresting officer, the amount so fixed does not appear excessive, certainly not so excessive as to suggest improper motive. Much is made of the fact that on cross-examination the accused could not remember ever having fixed so high an amount of bail in a case of involuntary manslaughter, and that he admitted that in the ordinary case of this character, where generally the party charged was the employee of some person of known responsibility, the bail was fixed at a sum which appears to us absurdly low. But here it is not disputed that neither Mr. Filippini nor Imperiale was known to the accused, and, according to Mr. Filippini's testimony, the officer's statement was such as to make the matter seem very serious in so far as the defendant therein was concerned.

[1] As to the alleged subsequent order of "no bail" there is no competent evidence whatever. Of course, such an order would be absolutely without warrant in law in any but a capital case, and if there were any competent evidence showing the making of such an order by accused, or the willful doing of

anything for the purpose of making Filippini believe that such an order had been made, it would constitute most substantial corroboration of Riccardi's story. There is no record of any such order, and no one testified to having heard the accused make either any such order or any statement designed to convey the idea that such an order had been or would be made. The only possible foundation for any claim that the accused made any such order or statement is a statement made by the clerk of the court (since deceased) to Mr. Filippini, when, in company with Riccardi and Mrs. Imperiale, he returned to the courtroom after court had adjourned and the judge had departed, and while the matter of his withdrawal was still unsettled. Mr. Filippini testified substantially that the clerk then informed him that the accused had made an order of "no bail," which was "the last straw," and it was at once concluded that he could do nothing for Imperiale, and he withdrew. We have no doubt of the truth of Mr. Filippini's testimony, and must accept it as an established fact in the case that the clerk of the court so stated to him. In view of certain insinuations in the course of the proceeding before us as to his attitude and testimony, we feel that it is due him to say that in our opinion there was nothing in his conduct in this very disagreeable episode in his professional career to reflect unfavorably in the slightest degree upon his character, and that his testimony throughout appears to us to be that of a fair and intelligent witness, sincerely endeavoring to state the whole truth. This statement, however, of the clerk to Filippini, and as Riccardi claims, to him, was admitted solely for the purpose of showing the influences directly used upon Filippini and Imperiale to bring about Filippini's withdrawal. Of course as against the accused, this testimony as to what the clerk said that the accused said was incompetent to show that the accused in fact said it, and objection was duly made to its being considered for any such purpose. Unfortunately the clerk died without having testified in any of the investigations relative to the matter before us. We have no disposition to needlessly say anything unfavorably reflecting upon his memory, especially in view of his inability to reiterate, explain, or deny, but it is obvious that he may have made this statement to Filippini without having any direction or information from the accused, and for the very purpose of assisting Riccardi in his effort to obtain Filippini's withdrawal. As the case now stands before us, such a theory is as probable as the theory implicating the accused. Strange as it may seem, the undisputed evidence is that the clerk of this court kept no record of orders relative to bail, and was not expected to keep any such record, even though the same were made in open court. If this be true there was no occasion for the judge to acquaint him with the fact

of any such order. Then, too, the discussion hereinafter contained as to the proof relative to the final order fixing the bail at \$1,000 indicates that such order was made before the judge left the courtroom. Regardless of all this, however, under most elementary rules, evidence of this statement of the clerk was inadmissible to show the making of an order or statement by the accused.

[2] It is, however, in respect to the final order on bail, the order fixing the bail at \$1,000 cash, that the story of Riccardi is opposed to the clear preponderance of the evidence. This was the order said by him to be made after Filippini's withdrawal and his own employment, and because of such change in attorneys. It is the testimony of all that this change in attorneys was not consented to until after court had adjourned for the day and the accused had left the courtroom. To obtain a reduction of the bail at that stage, it is admitted that it was essential to obtain an order fixing the bail at the reduced sum, signed by the judge, which, when deposited in the office of the bond and warrant clerk with the amount of bail so fixed, would authorize that officer to issue an order of release. Such an order, we have seen, Riccardi testified he obtained at McDonough's place of business. No such order has been produced. Furthermore, no one, except Riccardi, testified that he ever saw any such order. Mrs. Imperiale, who accompanied Riccardi to McDonough's place of business, would not testify that she saw or was told of any such order. In passing it may be said that Riccardi's visit to McDonough's place at this stage is entirely explainable upon the theory that it was for the purpose of securing the \$1,000 to deposit as cash bail. Filippini testified that he was not shown any such order. There is absolutely no scrap of affirmative evidence, except that given by Riccardi, to the effect that any such signed order ever was in existence. And in so far as the official record evidence goes it is opposed to the theory that there was any signed order fixing bail, and also opposed to the theory that the reduction to \$1,000 was made after the adjournment of court, and Filippini's withdrawal from the case. The uncontradicted evidence of many witnesses is to the effect that there was a difference in the form of the order of release issued by the bond and warrant clerk, between those issued when the amount of bail was evidenced by a signed order of the judge, filed in such office, and those issued when there was no such order and it was stated at the office by the party depositing the bail that the amount had been fixed in open court, without a signed order. In the latter class it was the uniform custom to accept the statement of the party as to the amount and to issue the order of release specifying the amount of the deposit, in view of the fact that the prison record showed the amount fixed in

open court, if it was so fixed without a signed order, and if the fact of an order in accord with the representation stated and shown in the order of release did not appear in the prison record, the order of release would not be honored. If, however, there was a signed order fixing bail, which might be made out of as well as in court, and of which, consequently, there would be no prison record, it was the uniform custom to stamp with a rubber stamp, in one corner of the order of release, the words "This bail has been fixed at above sum by order of ———, Judge of police court, No. ———," filling in the blanks with the name of the judge and the number of his department. The order of release in this case was produced in evidence, and is without these stamped words, showing, therefore, if the uniform custom was followed, as we may assume, that it was issued upon the representation to the bond and warrant clerk that an order had been made in open court, and that it was not issued upon an order signed by the accused.

In addition to this we have the city prison register in evidence, together with the testimony of Officer Norman, a prison keeper, who himself made the entry of \$1,000 in the appropriate column thereof relative to Imperiale on that day from the sheet returned to him by the court bailiff with the prisoners still in custody, including Imperiale, when such bailiff returned such prisoners to the city prison after the adjournment of court. These prisoners had been so returned when Riccardi went back into the courtroom, after his visit to McDonough's office to obtain, as he said, the order fixing bail. The testimony of Officer Norman was clear and convincing, and, with his entry in the register, shows that when Imperiale was returned to the city prison that day, the court sheet returned with him showed a notation by the bailiff of the fact of his admission to bail in the sum of \$1,000 cash. Officer Bates, the bailiff of the court, testified that he heard the accused first fix the bail at \$2,500 cash, and that later, before leaving the bench, he told him to make the bail \$1,000 cash. He further testified that he saw Mr. Coghlan go up to the bench and speak to the judge before this reduction. In consequence of this direction, in making notes on his daily list of prisoners at the close of court, he made a note of the fact that the bail had been so fixed, and it was this sheet returned to the prison with the prisoners from which the prison record was made. This notation, so far as appears, was the only record made of any order fixing bail in the Imperiale case. It is difficult to understand the reason for the looseness of the practice apparently prevailing in this department in the matter of bail orders made in open court, a practice entirely without sanction in law, but the evidence is undisputed that such "orders" were frequently made by orally notifying the bailiff of the amount, and

the bailiff was expected to make the record thereof by noting the amount on his daily sheet, for delivery to the prison authorities. The judge sometimes made a note on his personal docket and sometimes made no note. In this matter no entry at all appears on his docket. He explains this by saying that he made his entries for the information of the bailiff in filling out his sheet for the prison authorities, and that if the bailiff was personally notified by him there was no necessity for such an entry. Mr. Coghlan has a very dim recollection that while court was in session that morning he, as an attorney acting on behalf of Imperiale, requested a reduction of bail to \$1,000, but his recollection is confessedly so dim as not to assist materially. Just what prompted the reduction of \$2,500, to \$1,000, by the accused does not satisfactorily appear to us, except that there is nothing to our minds satisfactorily establishing any improper influence operating on the accused in so doing, but the clear preponderance of evidence, excluding altogether from consideration the testimony of the accused and McDonough, and accepting, as we do, everything testified to by Mr. Filippini to be true, is to the effect that there was no signed order fixing bail, and that the final order fixing bail at \$1,000 cash was made before the judge left the courtroom and before Filippini had withdrawn from the case. This being the situation, the case necessarily fails for want of proof in so far as the accused is concerned, both as to the theory of a no-bail order for the purpose of accomplishing the withdrawal of Filippini, and the reduction to \$1,000, as soon as Riccardi was employed. It is suggested that there was an admission of wrongdoing on the part of accused in an interview between him and Riccardi in the presence of certain newspaper men, but we do not so construe the conduct and words of the accused, as testified to by Mr. Warner, one of the newspaper men. We have discussed the evidence in relation to this specific charge at considerable length in view of the fact that it is the charge mainly relied on. We are satisfied that it may not fairly be held that the charge is sufficiently sustained by proof to warrant us in finding the accused guilty thereon.

[3] The two remaining charges are that accused in each of two matters pending before him as a committing magistrate, one being the case of L. Yussel, charged with assault with intent to commit murder, and the other being the case of G. Pasquale, charged with assault with intent to commit rape, agreed to receive, and did receive, a bribe of \$100 from Peter P. McDonough upon the corrupt understanding and agreement that he should thereby be corruptly and unlawfully influenced in the decision of the case, and that he was thereby corruptly and unlawfully influenced to dismiss and did dismiss each of said cases corruptly and unlawfully. As

to both these charges the only direct evidence of guilt on the part of accused is that of Riccardi, the attorney for the defendant in each case. He testified as to an arrangement in each case with McDonough, to whom he agreed to pay \$100 to obtain a dismissal. He said substantially that McDonough said the amount was so small he would give it all to the judge. The cases were dismissed on different dates. Upon the dismissal of each case he paid the stipulated \$100 to McDonough in his place of business. Accused was present on each occasion. As each payment was made McDonough delivered the money to the accused, who accepted it. So runs Riccardi's story. It is absolutely denied in all respects by both accused and McDonough. There is no such corroboration of Riccardi's evidence to be found in the record of these matters before the accused and his conduct as a magistrate with relation thereto, which was the only corroboration attempted, as in any degree to add to the weight of such evidence in so far as it purported to sustain the specific charge made. As to the Pasquale case, the assistant district attorney, Mr. W. P. Canbu, testified substantially that he stated to accused in open court that it was not a proper case for holding for trial in the superior court and consented to a dismissal, and a reading of the evidence introduced before the accused does not satisfy us that he was in error in so recommending. The evidence in the Yussel case was not such as to make it clear to us that the defendant should have been held for trial. As to each of these specific charges we have, in the last analysis, only Riccardi's uncorroborated story, and it produces no measure of conviction in our minds. Therefore, each of these charges must fail in this judicial proceeding for want of proof.

We desire to say that we fully appreciate the motive of the bar association in instituting this prosecution, as well as that in the Sullivan Case, and the courteous and able assistance given us on the trials by the committee conducting it. We are fully aware that nothing but a most commendable desire to rid the bar of members believed by the members of the association to be unworthy prompted the making of the charges, and it may well be that their reasons for their belief were well based. But certainly charges of specific misconduct on the part of a member of the bar can be sustained by a court only upon satisfactory proof of the particular misconduct alleged, and that proof is, to our minds, wanting here.

The order to show cause is discharged and the proceeding dismissed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.

We dissent: OLNEY, J.; SLOANE, J.

LAWLOR, J. I dissent. According to the evidence of the accuser, Riccardi, in the corridor before court convened, was told by the officer who made the arrest about Imperiale and his owning three Pierce-Arrow automobiles. Riccardi scented the chance to work the system, so he immediately went to McDonough's and, upon a promise to share the fruits of the enterprise with him, enlisted his co-operation. Riccardi then went to the courtroom, where he was a witness of the proceedings. When the accused came on the bench the case was called, but the determination of Mr. Filippini's application for bail was deferred until the officer appeared. The statement of the officer that it was a serious case, which was accepted by the accused and the order of bail of \$5,000 bonds or \$2,500 cash, followed. Mr. Filippini took issue with the statement of the officer and addressing the court stated he had known the defendant, that he was a responsible man, and applied for lower bail. The accused, in a loud voice, answered, "that is the order." Mr. Filippini replied, "Very well, if that is the case I will see if I can raise it." Riccardi promptly returned to McDonough and informed him that Mr. Filippini was going to secure bail, and said McDonough had better send word to the judge to order higher bail, or no bail. This McDonough promised to do. A man at once left McDonough's office to go to the courtroom and Riccardi followed him. When Riccardi reached the court room he observed McDonough's man speak to the accused at the bench, and presently, as the accused was leaving the courtroom, he stopped to speak to clerk Kane. Neither of these conversations was heard by Riccardi. Riccardi next proceeded to try to get the case. He first had a conversation with Mrs. Imperiale outside the courtroom, the gist of which was that for \$500 he would secure bail and Imperiale's release in ten or fifteen minutes; he also promised a dismissal of the case without a trial on the merits. As Mr. Filippini reached the sidewalk to take his automobile, Mrs. Imperiale came running up to tell him about what Riccardi, a man she did not know, had said to her. They went back into the building, met Riccardi, and after some talk near the telephone booth the trio entered the courtroom. The Riccardi proposal was taken up and discussed with Imperiale, who was in the dock. Mr. Sapala, Mrs. Imperiale's brother-in-law, was in the party. While this conversation was in progress, clerk Kane interrupted Mr. Filippini, whom he knew, and said to him:

"Mr. Filippini, by the way, you recollect in that Imperiale case this morning—the court has made a no bail order. 'Is that so,' I said, 'This is worse and more of it.'"

Mr. Filippini then told Imperiale he did not want anything to do with Riccardi "because he has a different system of handling

cases in this court than I have," and left Imperiale to decide between them. Mr. Filippini finally said:

"Well, now, I will not have anything further to do with the case. Now you will have to take Mr. Riccardi. It is worse and more of it now. I will not have anything more to do with it."

The retirement of Mr. Filippini and the employment of Riccardi followed. Riccardi, accompanied by Mrs. Imperiale and Mr. Sapala, then went to the office of McDonough. Riccardi entered a rear room where McDonough joined him; Mrs. Imperiale and Mr. Sapala remaining in the waiting room. In the conversation between Riccardi and McDonough the former proposed that the bail be fixed at \$1,000. McDonough went into another room and Riccardi states that while McDonough was in there he heard the voice of the judge. McDonough returned with a bail order of \$1,000 signed by the accused, which he gave to Riccardi, together with \$1,000 in currency. As Riccardi passed out he delivered an eulogium upon his own cleverness and told Mrs. Imperiale to go to his office. He took the bail order and the currency to the office of the warrant and bond clerk, received a signed order of discharge and returned to the courtroom to have Imperiale released, but he found Imperiale had been taken back to the city prison. The order of release was exhibited to Mr. Filippini, who had remained to witness the outcome of the bail matter, and the city prison records show that Imperiale was discharged from custody at 11:55 a. m.

The ultimate question to be decided is whether Riccardi's testimony is sufficiently corroborated to warrant an inference that the accused was a guilty participant in the scheme to eliminate Mr. Filippini from the case and fleece Imperiale out of \$500.

From my own analysis of the evidence I am convinced it is shown not only that the accused had a hand in victimizing Imperiale, but that the fraud could not have succeeded without his co-operation. Riccardi, like a bird of prey, was waiting in the hall of justice for something to turn up, especially among his own countrymen. He testified he did not know Imperiale. Somebody having knowledge of the case, therefore, must have told him about it and that Imperiale had property. It is not suggested how he got the information, if it was not from the officer. The officer said he had known Riccardi slightly for three years, that Riccardi first broached the subject, asking him if Imperiale was charged with manslaughter. It is conceded Imperiale was not to blame for the death of the child, and the question arises: Why did the arresting officer report to the accused it was a serious case? Did the accused know about the charge against Imperiale when he convened court? It was the custom of the

accused, according to his own testimony, to reach the neighborhood of the hall of justice half an hour before court time. He admitted that on such occasions he sometimes conversed with McDonough at or in front of his place of business about cases that came before him, but he made the same qualification as did the accused in the Sullivan disbarment proceeding—they never mentioned felony cases. I shall not repeat what I said in that case about McDonough's activities in the police courts as a professional bail-bond broker and his relationship with Sullivan, for the majority opinion states the same conditions prevailed between the accused and McDonough. I am sure no member of this court doubts that McDonough would speak to the accused about any case before him if he had any interest in it, and it is idle to think he did not speak to him about the Imperiale case. The accused and McDonough deny they saw each other that morning, or that the case was ever mentioned between them. In regard to what is said in the main opinion about the amount of the bail fixed by the accused, it is proper to point out that the question is not what would be proper bail in a manslaughter case, but rather whether the accused in this particular manslaughter case departed from his usual standards in such cases. If he did, it is a circumstance against him, independent of what would be proper bail. I think the accused showed every evidence of having an unusual interest in the case. He adopted completely the appraisal of the arresting officer without asking for or receiving the testimony of Imperiale or his witnesses as to the facts of the charge, and when Mr. Filippini explained his relationship with and knowledge of the character of the defendant, he sustained the order of bail with a warmth wholly unaccountable upon any theory of judicial balance. His demeanor and action were well calculated to inspire the defendant and his distracted wife with fear and apprehension, and to render them the more susceptible to Riccardi's devices. It must be kept in view that no record was made by either the accused in his docket or the clerk in his minutes, or the bailiff on his sheet, of this bail order, a circumstance not depending on Riccardi's testimony and which tends to justify an inference that the original order was only pretended to be made to help the scheme along. Such an entry might be evidence against him. I do not agree with the prevailing opinion that there was not even a suspicion of wrongdoing in the original fixing of bail. However, the solution of the first fixing of bail must depend in part upon what followed, and when all the evidence is considered no doubt will remain that it was a part of the plan to drive Mr. Filippini out of the case and make way for Riccardi.

With regard to the statement of clerk Kane to Mr. Filippini that the court made a "no

ball" order: The testimony of Mr. Filippini is sufficient to prove it was made to him, and to corroborate Riccardi's testimony on the point, notwithstanding the bailiff testified that while he was in close proximity to clerk Kane at the time he did not hear the conversation. I do not agree with the majority opinion that it is as probable clerk Kane made the statement to assist Riccardi as it is that it implicated the accused. To my mind, the more natural inference, and the one more in keeping with the presumption of innocence and a regard for the memory of the deceased clerk, is that he acted upon the direction of the judge of the court. The presumption would be that the clerk regularly performed his duty and obeyed his superior officer. However, if the presumption of innocence is applied to the accused, is it likely the clerk would take the risk of making an unauthorized statement with the liability of exposure when Mr. Filippini became aware such an order was without warrant of law? The fact the "no ball" order did not appear in the judge's docket does not help the case of the accused for the reason that the original order of bail was not entered therein. With respect to the failure to produce the "no ball" order I shall later refer to the method of transacting business in that department and the practice of ignoring the plain provisions of the law. I concur with the majority opinion that the statement itself is only admissible for the limited purpose of showing its effect on Mr. Filippini and the Imperiales. The fact, however, that the accused, after McDonough's man had spoken to him at the bench, stepped over to the clerk's desk to speak to him, is substantive evidence against the accused in the chain of circumstances relied upon by the accuser, to be given such weight as each justice may deem it entitled.

Now as to the final order of bail: It will not be questioned that if the accused only pretended to make the original order of bail it would follow that McDonough also dictated the final order. The two events stand or fall together. The accused knew that Mr. Filippini had left the courtroom to raise the original bail and that he made no report to the court. It is not disputed the final order was made without any reference to this circumstance. Furthermore, it is plain the Imperiales and Mr. Filippini when they learned of the no ball order despaired of securing bail except through the medium of Riccardi, for the substitution of attorneys immediately followed. It is clear that if Riccardi was not responsible for McDonough having the final order made it must have been made without regard to Mr. Filippini and the Imperiales, for, as I have shown, the accused had curtly denied the application for lower bail and Mr. Filippini had left the courtroom to secure bail on the original order.

This brings me to a consideration of the

affirmative defense interposed by the accused, in addition to the denials of himself and McDonough, that the Imperiale case had ever been mentioned between them. It was not claimed that Riccardi had ever mentioned the subject to the accused and McDonough testified that Riccardi never spoke a word to him about bail in the Imperiale case. The testimony of the accused was that before he left the bench on that morning, on the application of Mr. Coghlan, the final order of bail was made. McDonough supplemented his above denial with the admission that Riccardi did come to his office on that morning, accompanied by Mrs. Imperiale and Mr. Sapala, and that Riccardi merely said they were waiting for Mr. Coghlan. McDonough also testified that Mr. Coghlan applied to him for \$1,000 for bail in the Imperiale case and that he gave it to him. Mr. Coghlan was called as a witness to support the defense, but his testimony is so intrinsically indefinite that it would not support a finding that he had anything to do with procuring bail for Imperiale. For instance: If Mr. Coghlan figured in the matter of bail he must have done so during the forenoon of April 24th. The record shows the following:

"Q. What time of the day was it? I mean as to before or after noon. A. It was in the afternoon."

In other connections in his testimony the time is given as "in the forenoon," and in one instance the expression "in the morning, of course," was used. His testimony as to his applying to the accused for the bail order is, if anything, less definite. He admitted he did not know the time when, or the place where, he made the application, except that the court "would be naturally the place where it occurred." He admitted that he appeared in the trial of a case in the superior court the same morning and names the case and the department in which it was tried, but every effort failed to get him to make a definite statement as to the circumstances under which he came to ask for bail, when he asked for it, or what he did with the bail money when he got it. It is difficult to understand why, if there is any foundation for his testimony, he could not recall the circumstances under which he applied for the order and secured the money from McDonough, for it is conceded that as Riccardi contemplated an early visit to the eastern states he employed him to try the Imperiale case; that the bail was put in his name; and that he represented Imperiale during the absence of Riccardi until May 23d, when the charge was dismissed, at which time \$250 was paid to him by Mr. Filippini. Moreover, the relations between Riccardi and Mr. Coghlan were of an intimate character, for at that time he was representing Riccardi personally in a criminal action and had been associated with him in other professional em-

ployment. Every reason is seen why he should be able to recall the circumstances, especially as it appears that he testified in a grand jury investigation of the Imperiale case about a year before he gave testimony in this proceeding. He does not even intimate that he gave the bail to the warrant and bond clerk, or that he had anything to do with the issuance of the order of release, or its presentation at the city prison. I am satisfied from the evidence that he never had anything to do with the matter of obtaining the order or securing the \$1,000 bail money; that it was an invention pure and simple, and that he was brought into the proceeding to save the accused and McDonough, with whom for years he has been on terms of friendship. If Riccardi's testimony is entirely left out of view, and the transaction as it is revealed in the testimony of Mrs. Imperiale and Mr. Filippini is considered, this affirmative defense cannot stand. It throws out of balance every other circumstance in the case. Mr. Coghlan does not claim he spoke to either of the Imperiales or Mr. Filippini at that time, and the accused admits he did not mention to him that Mr. Filippini was representing Imperiale and had left the courtroom to get bail. The truth doubtless is that pressing Mr. Coghlan into service in this proceeding came as an afterthought. It appears that his connection with the Imperiale case got into the newspapers during the grand jury investigation; that one day in February, 1920, when he came home at 1 o'clock in the morning, the accused and McDonough were waiting for him in front of his house; and that the following Sunday he visited Riccardi at Los Gatos. He denies, however, that this visit had anything to do with the investigation. It is equally clear to me that the accused put Mr. Coghlan forward because of his conceded connection with the Imperiale case in the expectation that his testimony would refute Riccardi's story, minimize the effect of the testimony of Mr. Filippini and Mrs. Imperiale, and, upon the entire evidence, inject a doubt into the case.

But if the testimony of Mr. Coghlan lacked definiteness, that of the accused and McDonough is not open to the same comment, for it is plain they have not hesitated in their testimony to state that the bail was effected through Mr. Coghlan. Unquestionably this testimony is willfully false and furnishes corroboration of the story told by Riccardi. Innocent men do not commit perjury, nor seek to induce others to do so, and under a familiar rule of evidence their entire testimony should be distrusted. So far as their testimony is concerned, that of Riccardi should stand as undenied. It is worthy of note that when the accused was examined by the grand jury he made no reference to Mr. Coghlan making application for bail. The

bailiff of the court testified that he saw Mr. Coghlan approach the accused while he was on the bench that morning and speak to him. On cross-examination he stated that within a few minutes after Mr. Coghlan left the accused told him to make the bail \$1,000.

"Q. At that time did you connect Mr. Coghlan with the reduction of the bail? A. I did not at that time, but I did very soon afterwards. Q. How soon afterwards? A. Well, I saw Mr. Coghlan in the case and then when the case came up there was a question of bail. I always did believe—I don't know—that Mr. Coghlan had that bail fixed. * * * I believe it. I don't know it."

His attention was called to his testimony before the grand jury that he answered, "Not that I know of," when he was asked if any one else made application for a reduction of bail after the first order was made; also, that he answered, "I would not," when he was asked if he would know the man who asked to reduce the bail.

"The Court: You testified that way before the grand jury? A. I did. Q. Mr. Webb wanted to know why you didn't tell them that you knew it was Mr. Coghlan? A. I didn't know it was Mr. Coghlan and don't know it now."

The main opinion does not discuss this affirmative defense, as such. It does, however, suggest that Riccardi going to McDonough's when he claimed he obtained the bail order signed by the accused "is entirely explainable upon the theory that it was for the purpose of securing the \$1,000 to deposit as cash bail." This is at once a concession that Riccardi and not Mr. Coghlan got the bail from McDonough, and that Riccardi deposited it. In connection with the accused's testimony that he reduced the bail to \$1,000 before leaving the courtroom, it is stated "his best recollection being that he reduced it on the application of Mr. N. C. Coghlan, who came into the case by arrangement with Riccardi." The only reference in the opinion to Mr. Coghlan's testimony is that he "has a very dim recollection that while court was in session that morning, he, as attorney acting on behalf of Imperiale, requested a reduction of bail to \$1,000, but his recollection is so dim as not to assist materially." It is to be noted the opinion does not state Mr. Coghlan had come into the case on that morning, or that he acted as attorney for Imperiale for the purpose of bail. No other reference is made to the testimony of the accused that Mr. Coghlan was connected with the bail matter, and the testimony of McDonough is not mentioned at all.

I have expressed myself in the Sullivan disbarment proceeding to the effect that Riccardi testified under conditions peculiarly calculated to induce him to tell the truth. I also referred to the system which prevailed in the police courts at the time material here and the evil influence a professional bail-

bond broker like McDonough would exercise upon the administration of justice. All that I said then applies with equal force in this proceeding. Yet we are urged to believe that in the Imperiale case where McDonough's money was at stake, the subject was never mentioned by him to the accused. Inferences are just as much evidence as are the facts from which they may be drawn, and the irresistible inference arising from the entire evidence is the inference which the Imperiales and Mr. Filippini drew from the action and bearing of the accused, the statement of clerk Kane, the securing of lower bail by Riccardi, his production of the bail money, and the release of the prisoner—that Riccardi was dealing with forces superior to the law itself. I cannot see that there can be any ground for doubt that the accused was apprised of the Imperiale case before he went on the bench that morning, that the amount of bail was unusual for him to set, that he resented Mr. Filippini's remarks and his insistence on lower bail, that he advisedly refrained from entering the bail order in his docket, that he made the bail order at the suggestion of McDonough and not on the application of Mr. Coghlan, and that Riccardi saw McDonough on the three occasions he has described, that through McDonough he got the bail order and from him received the bail money, and that he deposited the bail and secured the order of release.

In the face of the inferences, which indisputably arise from the evidence viewed in its entirety, Riccardi's testimony assumes a secondary importance—the silent and impressive circumstances surrounding the transaction indubitably show that while Riccardi never spoke to the accused about the case, the stealthy influence of McDonough was at work. The vital question in the case is: Why did the accused make the final order of bail? The majority opinion does not purport to rely on the testimony of the three principal figures in this defense; it does not deem Mr. Coghlan's testimony of material assistance and, with the exception of the one allusion to that of the accused, it ignores his testimony and McDonough's on the point. Concededly, if this defense were established the case of the accuser would fail. On the other hand, if it was founded on perjury no question of the sufficiency of the evidence to corroborate Riccardi's testimony should remain. The main opinion concludes that the testimony of Riccardi implicating the accused is "absolutely uncorroborated," and it further holds that in certain essential details it is opposed to a clear preponderance of the evidence independently of the denials of the accused and McDonough. This position of the prevailing opinion rests upon three propositions—there was no suggestion of wrongdoing in the fixing of the original bail, there is no competent evidence that a

"no bail" order was made, and, apart from the testimony of the accused and McDonough, and accepting everything Mr. Filippini testified to as true, the clear preponderance of the evidence is to the effect there was no signed order fixing the final bail, but that it was made before the accused left the courtroom. The first two propositions have been discussed by me, and I shall now consider the third.

It is to be noted the opinion does not state upon whose application the final court order was made, but in view of what it has said concerning Mr. Coghlan's testimony I may assume it does not conclude the application was made by him.

The majority view is that Riccardi is not corroborated as to how and under what circumstances the final order was made, and therefore the accusation fails of proof. It is pointed out in the opinion that, under the practice followed in the issuance of orders of release on bail, the order of release admitted in evidence would indicate the accused had not made a signed bail order, but that it was made in open court. The order of release is on blue paper, but does not contain a rubber stamp notation, and hence this means, according to the evidence, that the party depositing the bail must have stated to the warrant and bond clerk the order was made in open court, thereby refuting Riccardi's testimony that McDonough delivered to him in his office an order of bail signed by the accused. This must be so, it is argued, for the reason that under the evidence, if the order of release had contained the rubber stamp notation it would have been returned to the warrant and bond clerk, because the sheet which had been delivered to the bailiff that morning and upon which, as he claims, he had made the entry at the close of the session, shows the final bail order was made in open court.

I have not been able to accept the testimony of the bailiff that the entry on the sheet was made in pursuance of the direction he testified he received from the accused to "make the bail in the Imperiale case a thousand dollars." According to the testimony of the city prison officials and the records of the office the entry must have been on the sheet when it was delivered with Imperiale at the city prison. The bailiff was the only witness to the records who claimed to have an independent recollection of the Imperiale case as of the time it came up. For some unexplained reason bail orders in this department of the court were customarily given to the bailiff instead of to the clerk in matters coming up during the court proceedings. The conventional way, of course, would be to give all orders, bail and otherwise, to the clerk and for the bailiff to get his information from him. In this way a court record would be kept of the court business. This was not done in this department,

at least so far as bail is concerned. The charter provides that the clerk shall keep full and complete records of all cases in the court and the disposition made thereof by the court (article 5, c. 8, § 10). The bailiff is to preserve order and to execute the orders of the court (Id., § 14). Besides the Imperiale case there were eleven other cases on the sheet that day, the information as to the disposition of which the bailiff testifies he got from the judge's docket, but as to the disposition of the Imperiale case he relied entirely on his memory and, indeed, could not say whether the docket contained any mention of it. I have heretofore touched upon his testimony as to Mr. Coghlan's asserted connection with the bail. The testimony of this witness, who, it seems, kept in his possession a duplicate of all these sheets, leaves some doubt in my mind as to the records of the Imperiale case, but I am free from doubt that the bail order was not made as testified to by him.

Now as to the order of release. Riccardi first testified that a man connected with his office deposited the bail. He finally testified, however, that upon further reflection he must have made the deposit and received the order of release himself. Both Riccardi and Mr. Filippini, to whom, according to the testimony of both, Riccardi exhibited his release, said it was on blue paper, but apparently neither of them was questioned as to whether it contained the rubber stamp notation. Mr. Filippini was so surprised and deeply interested in Riccardi's performance in securing bail that he went to see and had a long talk with the warrant and bond clerk after the order of release was exhibited to him by Riccardi, but this conversation was properly excluded. It does appear, however, that when Mr. Filippini entered the office a white paper dropped on the floor and that the incident was discussed between them, but what was said is not shown. Apart from the contention as to whether Riccardi received the bail order in McDonough's office, no particular importance should attach to the circumstance of whether or not a bail order was signed in any given instance, for when the accused was asked whether it was not the custom in his department of the court to sign an order of bail even when the order of bail was made in open court, he answered: "Yes, it was usually done; that in a few cases it was not done." It was probably the rare exception not to sign an order in that department, for otherwise the records of bail would, in most instances, depend on the bailiff of the court. No special stress, therefore, should be laid merely on whether or not a bail order was signed, nor on the failure to produce a signed order, for at that time no effort was made to preserve them.

The determination of the question as to the order of release must rest on the action

of the two officials—the bailiff in furnishing the data for the city prison records, and the warrant and bond clerk in issuing an order of release minus the rubber stamp notation. As I understand the matter, no record was kept by the warrant and bond clerk which would show who deposited the bail, nor the representations by such person in cases where a signed order of bail is not produced. The warrant and bond clerk has no independent recollection of the occurrence, and upon the face of the records, it would seem that the depositor of the bail must have represented that a signed order of bail had not been made. In my opinion, this was not the fact, and the truth of the matter must be sought elsewhere. It may be argued that if the bail was deposited by the man in Riccardi's office (he did not appear as a witness) he may have assumed and stated to the warrant and bond clerk the bail order was made in open court, and if by Riccardi himself, he may have declared it was a court order so as to protect the system against exposure, for he has testified that all his operations in that department were carried on through McDonough and never with the accused himself. These, however, are mere conjectures, and upon the evidence as to the contents of the order of release and the circumstances under which it was issued I entertain such a doubt, that if the decision turned on this question alone, I would resolve it in favor of the accused.

But it cannot be held that this question is decisive. The evidence as to why the accused made the final order of bail is so convincing I have no doubt of his guilt. Riccardi and the officer agree they had the conversation in the corridor that morning some time before the accused went on the bench. The officer left and Riccardi proceeded to McDonough's and had his first interview with him about the Imperiale case. It is unnecessary to again review the proceedings in court which resulted in Mr. Filippini leaving to get bail. Riccardi had his second interview with McDonough and was preceded to the courtroom by McDonough's man, who spoke to the accused. While negotiations were on the accused spoke to the clerk and left the courtroom. Upon the assumption that the bail orders during the proceedings are generally given to the bailiff it is clear why, if there was a "no bail" order, it was given to the clerk, for otherwise it would have appeared on the bailiff's sheet. Mr. Filippini retired to get bail and Riccardi made his third visit to McDonough's, obtained the bail money, Imperiale was released on schedule time, and all the surrounding circumstances proclaimed Riccardi as the genius of the occasion.

There was no question in the mind of Mrs. Imperiale, who had waited anxiously at McDonough's for her husband's deliverance, nor of Imperiale when he was released

after being returned to the city prison, nor of Mr. Filippini, amazed at the performance, when Riccardi showed him the order of release, as to who had secured the results. In the face of such circumstances the denials of the accused and McDonough should carry no weight. In view of Mrs. Imperiale's great relief at the outcome too much stress should not be put on her failure to note whether Riccardi, when he emerged from the back room, had a paper in his hand, if that were the way he would carry such a paper, or whether or not he had the bail money.

I have said Mr. Coghlan testified before the grand jury. It is apparent the affirmative defense was never thought of until that occasion, for the testimony of the accused, who preceded Mr. Coghlan on the stand, is barren of any suggestion that the latter applied to him for a reduction of bail. In addition to what I have already said about this defense it is proper to refer again briefly to the evidence. It was through Riccardi Mr. Coghlan was employed in the Imperiale case. Riccardi's movements from the time he spoke to the officer until Imperiale was released from custody are accounted for, and Mr. Coghlan had not been seen by the Imperiales or Mr. Filippini during that time. No one has testified, not even Mr. Coghlan himself, that he was employed to secure bail. The truth of the matter probably is that Mr. Coghlan knew nothing about the case until after Imperiale was released, and that while Riccardi was attending to the matter of bail Mr. Coghlan was engaged in the superior court. It is evident that he only met the Imperiales on that day to arrange to have him try the case while Riccardi was in the east.

The Penal Code provides:

"A docket must be kept by * * * the police justice, or by the clerk * * * if there is one, in which must be entered each action and the proceedings of the court therein. * * *" Section 1428.

The provisions of this Code relative to bail are applicable to bail in police courts (section 1458). In matters of bail the bailiff seemed to discharge the duties properly belonging to the office of clerk, and only occasional entries were made in the docket by the accused. The evidence does not sustain the theory that it was through ignorance or carelessness the accused conducted the court in defiance of the law, but indicates that the methods followed were intended as a protection to him in carrying on operations such as those charged in the accusation. In the Imperiale case no entry appears of the original or final bail order. The two orders—one fixing and the other reducing the bail—should have been entered. Yet orders of bail in other cases do appear in the docket.

The first bail order was entirely disproportionate to the bail usually fixed by the accus-

ed in manslaughter cases, apart from the existing arrangement with the transportation companies in that class of cases. The accused, after the officer testified, said it was a very serious case and apparently nothing had intervened to change his mind as to its gravity. It may be inferred from the excessive ball and the other circumstances that the first order was only tentative. The purported "no ball" order, for obvious reasons, would not be entered. And if the final order had been entered the question might arise as to why the original order was not entered. If the final order was not made on the application of Mr. Coghlan, why, and under what circumstances, was it made? Concededly, not through either Mr. Filippini or Riccardi.

And it must not be lost sight of that in spite of these charges the accused and Riccardi were on speaking terms, and that they drank together. On an occasion within two months of the hearing, in the presence of some newspaper men, the following colloquy ensued:

"Judge Oppenheim: Did you ever say that you ever did business with me? Riccardi: Well, no, not exactly, but indirectly a hundred times, and the goods were always delivered. Judge Oppenheim: Very well."

Judge Oppenheim then turned around and walked away.

In view of the relationship between the accused, McDonough, and Riccardi, and the system under which they operated, I think the testimony of Riccardi as to the Leandro Ysussi case, in which the defendant was charged with intent to commit murder, and as to the case of Geralmo Pasquale, involving a charge of assault with intent to commit rape, it being alleged in the accusation that the accused received a \$100 bribe to dismiss in each case, and that he did so, finds ample corroboration in the aggravated character of the cases. The method followed in each of these cases was to make repeated orders of continuance covering several months and finally, without even the formality of taking the evidence of the defendant, dismiss the case.

The accused should be disbarred.

(109 Kan. 314)

SNYDER v. ERIKSEN. (No. 23220.)

(Supreme Court of Kansas. June 11, 1921.
Rehearing Denied July 7, 1921.)

(Syllabus by the Court.)

1. Master and servant §302(2)—Owner of motortruck negligently operated by driver going to dinner held liable for injury.

An employee in a furniture establishment, who had been employed to do general work

in the store and assist other employees in delivering goods, but had not previously been assigned to the duty of driving trucks, went out to the fair grounds to help a superior employee who had been given charge of assembling and setting up an exhibit, and when the noon hour arrived the employee was directed by his superior to take a motortruck and drive to his home to get his dinner, in order that he might sooner return and continue his work. On the way to his dinner he drove the truck in a negligent manner and struck and injured a pedestrian on the street. Held, that he was then acting within the scope of his employment and in furtherance of his employer's business, and that his employer was liable for the negligent injury.

2. Appeal and error §1064(4)—Instruction using word "perhaps" held not prejudicial.

The instructions given to the jury examined, and held to be without prejudicial error.

3. Trial §350(2)—Court may supervise special interrogatories and may reject improper or immaterial questions.

It is competent for the court to supervise and shape special interrogatories that are submitted to a jury, and it may reject questions that are improper or immaterial, and limit the questions to ultimate facts on controverted issues.

4. Trial §215—Court may explain special interrogatories and instruct as to law applicable thereto.

The court may also explain the questions and instruct the jury as to the law applicable to them, exercising caution not to express an opinion as to controverted facts, and held, that the action of the court in explaining the questions and advising the jury as to the applicable rules of law was not an invasion of the province of the jury.

5. Trial §362—Court may require jury to make answers to special interrogatories more definite and complete, or to correct manifest errors.

If the answers returned by the jury are indefinite or incomplete, or show a misconception of the questions, the court may, on the application of either party, or on its own motion, require the jury to make the answers more definite and complete, or to correct manifest errors in the answers.

6. Pleading §236(4)—Amendment to state in more detail elements of negligence charged held proper.

No error was committed in permitting the plaintiff to amend his petition, at the close of defendant's evidence, so as to state in more detail an element of the negligence charged against defendant.

7. Verdict not excessive.

Under the evidence, it is held that the damages awarded are not excessive.

Appeal from District Court, Douglas County.

Action by M. A. Snyder against C. J. Eriksen. Judgment for plaintiff, and defendant appeals. Affirmed.

R. E. Melvin and Geo. K. Melvin, both of Lawrence, for appellant.

J. B. Wilson and A. C. Wilson, both of Lawrence, for appellee.

JOHNSTON, J. A motortruck owned by the defendant, C. J. Eriksen, and driven by Vernon Pettit, his employee, was driven upon a sidewalk, running down and severely injuring the plaintiff, M. A. Snyder, who was walking upon the sidewalk. She recovered a judgment for \$500, and the defendant appeals.

Defendant was a dealer in household goods in Lawrence, and had several employees, among whom was Pettit, who was principally engaged in blackening stoves and assisting other employees in the delivery of goods. On the day of the accident the employees of defendant were engaged in assembling and setting up an exhibit of defendant's goods at the fair grounds near the city. For that purpose they used two trucks; one of them was driven by an employee, Crossgrove, and the other by McPherson. Pettit went out to the fair grounds in the truck driven by McPherson, and, after working for a short time, McPherson and Pettit returned to the city for other goods; McPherson driving the truck. When they arrived at the store McPherson found customers waiting for attention, and he directed Pettit to drive the truck loaded with exhibits back to the fair grounds, and this was done. When the noon hour arrived Crossgrove, who was then in charge of the exhibits, said to Pettit, "As you have a long distance to go to dinner, you had better take the truck, as you will get back to work sooner." He took the truck, and while on the way to dinner he had difficulty with the steering gear and was unable to guide or control the truck. He ran the truck against a wagon and then over the curb and up on the sidewalk, knocking down and running upon the plaintiff, who happened to be walking there.

The charges of negligence were the driving of the truck at a dangerous rate of speed on the wrong side of the street, in failing to stop the truck when it approached the wagon in the street and the sidewalk, and the further negligence of providing and using a truck with a defective steering gear, which rendered it uncontrollable at times. There was abundant evidence to sustain the charge of the negligent handling of the car, but the principal contention of the defendant is that the evidence failed to show that the defendant was responsible for the acts of Pettit while driving the truck. The claim is that Pettit was not acting within the scope of his employment in taking and driving the truck to dinner, but was acting for himself and in pursuit of his own purposes. The contention is that the evidence does not show that the defendant ever authorized him to use the truck for any purpose at any time or

under any circumstances, and that any direction given Pettit by Crossgrove or McPherson was without authority, and that no liability could arise against him for the negligent acts of Pettit. The turning point in the case is whether Pettit was acting within the scope of his employment while driving the car at the time of the accident, or, in other words, was he acting in furtherance of his master's business as distinguished from his own private business or pleasure? Where one person is injured by the negligence of another, he ordinarily seeks and is entitled to indemnity from the one whose negligence caused the injury. Where the one who directly inflicted the injury is the servant of another, and was at the time acting under the directions of the master, or engaged in his business and in furtherance of his interests, the injured person may look beyond the direct author of the wrong and require the master to respond for the damages sustained. It is fundamental that the owner of an automobile is not required to respond in damages for injuries caused by the negligence of the driver, unless the driver was the servant or agent of the owner, and was at the time acting within the line of his duty and in furtherance of the master's business. *Halverson v. Blosser*, 101 Kan. 683, 168 Pac. 863, L. R. A. 1918B, 498.

[1] Here Pettit was the employee and servant of the defendant. He was in the line of duty when he went out to the fair grounds to assist Crossgrove in placing the exhibit, and when under the direction of McPherson he drove the truck loaded with goods from the store to the fair grounds. He was within the scope of his employment when he assisted Crossgrove in setting up the exhibit. When the noon hour arrived a somewhat different situation arose. If in going to and getting his dinner he was using his own time to accomplish his own ends, and was not acting under the direction of the master or in furtherance of his business, the defendant was not responsible for the negligence of Pettit. If he had taken the truck without permission, and had occasioned the injury to plaintiff while on a mission to get his dinner, or on an errand purely personal to himself, the defendant would have been free from liability. It cannot be said, however, that Pettit was acting for himself and exclusively pursuing his private and personal ends. Neither can it be said that his use of the truck on the occasion had no connection with his master's business. In the first place, he was directed by Crossgrove to take the truck on the trip during which the injury was inflicted. Crossgrove was in charge of the work and Pettit was acting under his direction. It was as much his duty to observe the order of Crossgrove as if it had been given by the defendant himself. The authority to take the truck was not given wholly for the convenience and personal

benefit of Pettit, but he was directed to take it in order to expedite the work at the fair grounds. The direction was given and the truck used, not only upon an express order, but also in order that there might be an earlier return to defendant's service and in furtherance of his interests. It therefore had a close connection with the defendant's business, and was done to facilitate the work of setting up the exhibit. True, it was in part to accommodate the servant, but the truck was taken and used, in part at least, for the accommodation of the defendant and the promotion of his business.

Defendant cites and relies on *Steffen v. McNaughton*, 142 Wis. 49. The action was brought to recover for injuries negligently inflicted by a chauffeur while driving the car of his employer to his home to get dinner and he carelessly collided with and injured a pedestrian at a street crossing. Under his employment the chauffeur was to provide his own meals, and usually walked to his home to get dinner. He was employed to care for and operate the car under the direction of the owner or any member of his family. In going to his dinner he took the car without the permission of the owner, and, while he had used it for that purpose on other occasions, it had always been done without the knowledge or consent of the owner. It was contended that, as the chauffeur had been given general control of the car, and as the use he made of it tended to reduce the time necessary to get his dinner and to that extent facilitated his labor for the owner, he should be regarded as having acted within the scope of his employment, and that the owner was liable for his negligent act. This contention was rejected on the ground that the owner never, by words, act, or conduct, gave the chauffeur permission to use the car for the purpose named; that he was not only using it at the time without consent but for his own private purpose and during a period when the relation of master and servant was suspended. The court held that there was nothing in the evidence to warrant the inference that the car was used to shorten the time taken for the midday meal or to facilitate the owner's business. The opinion indicates that if the car had been used by the chauffeur to go to his dinner as an aid to an early return to labor, or in obedience to an order of the owner, or a member of his family, or had been done with their implied consent, a different result would have been reached. The instant case is distinguishable from that one because here the servant was acting in obedience to an express direction and in furtherance of the defendant's business. The law relating to a master's liability is embodied in the following brief and comprehensive statement:

"For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's

business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible." *Ritchie v. Waller*, 63 Conn. 155, 160, 28 Atl. 29, 30, 27 L. R. A. 161, 38 Am. St. Rep. 361.

[2] The sixth instruction, of which complaint is made, is in accord with the views stated and fairly presented the questions of fact to the jury. Attention is also called to the seventh instruction, wherein the court told the jury that—

"If the young man was using this truck in his private matters, of his own volition, to go to his dinner, I think, perhaps, Mr. Eriksen would not be responsible. If, however, his immediate superior that day, Mr. Crossgrove, directed him to take that truck and use it to go to his dinner in order that he might get back to his work sooner, then its use would be right in line with his employment, and if he was negligent while using the truck under such directions Mr. Eriksen would be responsible for the negligence of the young man."

There is reason to criticize the use of the word "perhaps," where the court referred to the defendant's lack of responsibility if Pettit was using the truck for his own private purposes. A more positive statement should have been made, but in other parts of the charge the court distinctly stated that the defendant would not be liable for the negligence of Pettit if the latter took and used the truck without permission for his own purposes. It was made plain to the jury that if he was directed to take the truck in order to get his dinner so that he might return to his work earlier, and in that way further the business of the defendant, the latter would be responsible. It is clear that there could have been no prejudice by the use of the objectionable word. It appears beyond cavil that Crossgrove was the immediate superior of Pettit, and there was no error in the statement to that effect by the court.

Other criticisms are made of the instructions, but we find nothing substantial in them.

[3] An attack is made on the action of the court in reforming and explaining 29 special questions that were presented for submission to the jury. Some of these were stricken out because they were repetitions, and others because they were not proper or material. Some that involved several propositions were properly subdivided and reformed so that each should relate to a single ultimate fact. The most complaint is made of the action of the court in explaining the questions to the jury. As an example of the action taken, the first question asked was:

"In what capacity was Vernon Pettit employed by the defendant, Eriksen, on the day of the injury?"

As to that the court said:

"Well, the undisputed evidence, gentlemen, that day, he was employed as an assistant to Mr. Crossgrove. Nobody disputes that. He was helping Mr. Crossgrove."

The second question was:

"At the time of the accident and the injury to the plaintiff, was said Vernon Pettit engaged in the business of Eriksen?"

The court stated:

"Now, that's at the time of the accident down here on the street. Well, I told you that, gentlemen. If he was pursuing his own business, he would not be. If he was acting under the directions of Mr. Crossgrove, who had been assigned to that particular business, then he was in the employ of Mr. Eriksen, engaged in his business at that time."

Other questions involving the same inquiry in different forms were given a like explanation. One question was: "Did Eriksen know that Vernon Pettit was driving said truck before the accident happened?" As to that the court remarked: "I think there is no question about that, that he did not know." The question, "What items of damages do you allow plaintiff and the amounts thereof?" was reformed and divided into five questions, asking how much was allowed on each separate element of the damages claimed; the court stating that it was not suggesting that anything be allowed for any of them and leaving the matter of allowance wholly to the jury. There can be no good ground of complaint of the action of the court in shaping and making definite the special questions submitted. No questions should be submitted except those which can be fairly and definitely answered and so far as practicable they should be so framed as to admit of categorical answers. It is the function and duty of the court to shape and supervise the questions, eliminating those that may be immaterial and submitting only inquiries as to ultimate facts on controverted issues. *Mo. Pac. Ry. Co. v. Holley*, 30 Kan. 465, 1 Pac. 130; *Id.*, 30 Kan. 474, 1 Pac. 554; *Evans v. Moseley*, 84 Kan. 322, 114 Pac. 374, 50 L. R. A. (N. S.) 889.

[4] The explanation of the special questions and the comments on them, although an unusual practice, is not one to be condemned, unless the court in some way invades the province of the jury. Here the comments of the court were in the nature of instructions, and may be regarded as an addition to its general charge. It is proper for the court to aid the jury by pointing out the vital issues and the material questions in the case, stating the rules of law applicable to them, but, of course, it should be careful to avoid any expression of opinion as to

controverted facts. The answers to be returned should not be indicated by the court, and, while several answers were suggested here, they related to matters that were not in fact in dispute and such inquiries might well have been rejected from the list of questions submitted. While the court explained the special questions at considerable length and commented freely on them, it was manifestly done with a view of aiding the jury to understand the questions. We think the court did not intimate to the jurors its own opinion on the disputed facts, nor trench on the functions of the jury. There was no attempt to color or control their findings on disputed issues, and we think no prejudicial error resulted from the action taken.

[5] After the jury returned their answers, the court examined them, and, finding some of them to be indefinite and incomplete, required the jury to retire and make more explicit and complete answers. To the fourth question, "At the time of the accident and injury to plaintiff, was said Vernon Pettit the agent, servant, or employee of Eriksen for the purpose of running and operating said truck?" the answer first returned was: "Under orders." The answer finally returned was: "Yes." In answer to question 10, "Was the injury of plaintiff caused by an unavoidable accident?" the first answer was: "Yes; by a capable driver." This was an obvious misunderstanding of the question. The court, after reminding them that an unavoidable accident was one where no one was to blame, gave them an opportunity to make a correction of an error which the jury readily recognized, and the answer was changed to "No." To the question, "Had Crossgrove any authority from Eriksen to employ Pettit to run or operate said truck or to allow him to use it?" the answer was: "No testimony as to that." Their attention was drawn to the misconception and inconsistency by the court, and after calling their attention to the declaration of law that had been made respecting the relationship between the defendant, Crossgrove, and Pettit, the jury changed the answer to "Yes."

Where special findings are indefinite and incomplete, or there has been a manifest misunderstanding of questions asked, it is proper, and indeed it is the duty of the court, to require the jury to make more definite answers, or to correct answers where there has been obvious misinterpretation of the questions. It is not proper for the court to change the findings understandingly made, merely to make them consistent with the general verdict. It has been determined to be the duty of the court upon motion of either party to require the jury to make their answers responsive to the questions asked, and, where they are indefinite or incomplete, to make them definite and complete. *Francis v. Brock*, 80 Kan. 100, 102 Pac. 472; *Garvin*

v. Garvin, 87 Kan. 97, 123 Pac. 717; Stewart v. Produce Co., 88 Kan. 521, 129 Pac. 181, 50 L. R. A. (N. S.) 111, Ann. Cas. 1914B, 701. That which may be done in this respect upon the motion of a party may certainly be done on the court's own motion, in order to avoid an abortive result.

[6] At the close of defendant's evidence the court, on the application of plaintiff, permitted her to amend her petition so as to allege in more detail that the truck was driven in violation of an ordinance of the city, which was produced. The original petition had alleged in general terms that it had been driven in violation of the laws of the state and the ordinances of the city. No error was committed in allowing the amendment.

[7] In view of the evidence as to the extent of the injuries, the claim that the damage awarded (\$500) is excessive cannot be sustained. While the injuries are not permanent in their nature, the extent of the injuries and the suffering that resulted from them leads us to think that the award is not unreasonable.

The judgment is affirmed.

All the Justices concurring.

(109 Kan. 246)

McINTOSH v. ATCHISON, T. & S. F. RY. CO. (No. 22983.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Damages \S 34, 62(2) — Aggravation of damages by malpractice recoverable by injured person using diligence in selecting physicians.

It is the duty of a person injured through the negligence of another to use reasonable diligence in securing medical or surgical aid, and he cannot recover for suffering or ailment resulting from his own failure to exercise such diligence; but if that degree of care is used by him in the selection of physicians or surgeons, and their lack of due care and skill in treatments or operations aggravates or increases the original injuries, such increase is not deemed to be the fault of the injured person, but is regarded in law as a part of the original injury, which reasonably ought to have been anticipated by the original wrongdoer, and for which he is responsible.

2. Damages \S 213—Instruction on aggravation of injury by malpractice held correct.

An instruction on the subject is held to have been appropriate under the evidence and a correct statement of the law.

3. Master and servant \S 297(2)—Special findings held inconsistent.

Special findings of the jury relating to the negligence of the defendant and the contributing negligence of the plaintiff in the reading and comparison of orders issued as to the

passing of railroad trains, which resulted in a collision and consequent injuries and death of trainmen, examined, and held to be evasive, and so inconsistent as not to warrant the entry of a judgment thereon.

Appeal from District Court, Cowley County.

Action by George R. McIntosh against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and remanded for new trial.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and J. E. Torrance, of Winfield, for appellant.

W. L. Cunningham, of Arkansas City, for appellee.

JOHNSTON, O. J. George H. McIntosh brought this action against the Atchison, Topeka & Santa Fé Railway Company, under the Federal Employers' Liability Act (Comp. St. \S 8657-8685), to recover damages sustained by him in a head-end collision, caused, it is alleged, by the negligence of the defendant in giving an order as to the time and place of the meeting of two trains. The trial resulted in findings and verdict in favor of the plaintiff, fixing the extent of his injury at \$25,000, but also finding that \$7,000 should be deducted from that amount on account of the contributory negligence of the plaintiff. Defendant appeals, and alleges that the evidence does not support the verdict and several of the special findings; that there was error in rulings on the admission of evidence, and in the giving and refusing of instructions, and also that the verdict was given under the influence of passion and prejudice.

It appears that two trains of the defendant were traveling upon a single track in opposite directions; the one on which plaintiff was riding and acting as engineer was No. 352, and was going north from Arkansas City to Florence. His train crew consisted of himself, Fireman Benning, Butts, the conductor, and Brakemen Babbitt and Hopson. The train coming south was designated as extra 1817. When plaintiff's train No. 352 reached Winfield Junction, some switching was done, and, the signal indicating that there were orders as to the operation of the train, plaintiff and Babbitt went into the office of the operator, and there found orders on a table in three piles, one for the engineer, one for the conductor, and one being the office copy. Plaintiff and Babbitt picked up the orders from the table, and plaintiff read his copy aloud in the presence of the operator, White, and Brakeman Babbitt. The conductor did not come for his copy as he should have done, but Babbitt signed the order for him and took a copy to the caboose at the rear of the train where the conductor

then was, and delivered it to him. The conductor read the order in the presence of the brakeman, but neither he nor the engineer compared their orders, as the rules required.

The contents of the order is in dispute, and plaintiff's right of recovery depends upon whether the order contained directions for the trains to meet and pass at Rock or Douglass. Plaintiff and Babbitt both testified that Douglass was named as the passing station, and Hopson testified that he heard Butts, the conductor, read the order which gave Douglass as the meeting point. On the other hand, the train dispatcher testified that Rock was the station named for passing, and that, after giving it, the order was repeated back to him by the operator, each word being spelled out. Telephones were used for transmitting the orders. White, the operator, said that the orders were written on carbon paper by a single impression, and were all alike, and that Rock was written as the passing place. Butts, the conductor, produced and identified the order given to him, and it directed the trains to pass at Rock. The train master testified that, on the morning following the accident, he found the office copy of the order in the operator's office, and that it gave instructions for the trains to pass at Rock, but this copy was not produced, because it was said to have been lost. The order delivered to those in charge of train 1817, which was said to have been sent at the same time as the one sent to train 352, named Rock as the passing point. Upon receiving the order train 352 proceeded north to Rock, and, after attending to the discharge and taking on of freight at that place, the conductor gave the leaving signal, and the train moved forward to a point between Rock and Douglass, where the collision occurred.

In the course of the trial the defendant introduced in evidence a petition filed by the plaintiff in another court against the Atchison, Topeka & Santa Fé Hospital Association and the defendant company, in which he alleged that, while in the hospital for treatment of the injuries sustained in the collision, the attending physicians mistreated him, and aggravated his injuries, and among other things averred that:

"If he had been properly treated he would have recovered from his injuries. * * * That he suffered intense pain, and that, were it not for the negligence of said defendants, he would now be a strong able-bodied man, in good health, and that by the negligence of said defendants he has been rendered entirely helpless, and will be a permanent cripple, * * * all to his damage in the sum of \$35,000, for which he asks judgment."

In respect to this evidence, the court instructed the jury:

"A person injured by the negligent acts of another does not insure that the surgeons, doctors, or nurses employed by him will be

guilty of no negligence, want of care or skill, or error in judgment.

"The liability to mistake in judgment, or the efforts or means used in the endeavor to effect a cure or to remedy a condition, is an incident to the original injury, and, the injured party having used ordinary care in the selection of attendants, the injury resulting from such mistake is in law regarded as one of the immediate and direct damages resulting from the injury.

"There has been introduced in evidence in this case a petition filed in the district court of Sumner county, Kan., against the defendant herein and other defendants to recover for injuries alleged to have been the result of malpractice on the part of the physicians and surgeons employed to treat the plaintiff for injuries for which he claims damages in this case. This has been permitted upon the theory that it may affect the plaintiff's credibility, or throw light upon the facts and circumstances in this case. And you have the right to so weigh this evidence in connection with all the other facts and circumstances in this case, you being the sole judges of the weight and effect of such testimony. The filing or prosecution of that suit is not to be considered by you as in any manner augmenting or diminishing to the plaintiff's claim for damages here if he was injured as he sets out in his petition in this case, and you find that such injury was the result of the negligence of the defendant; and, if you find that the plaintiff used ordinary care in the selection of his attendants, physicians, and surgeons, then, if there were any mistakes in judgment, efforts or means used by the physicians in endeavoring to effect a cure or remedy the same were incidents of the original injury, and the injury resulting from such circumstances would be in law regarded as one of the immediate and direct damages resulting from the original injury. And a recovery by the plaintiff in this action would be a complete bar to that or any action by him to recover any damages for malpractice, if any, against the defendant or any attendant physician or surgeon employed by him or on his behalf to effect a cure of his original injury."

[2] Assuming for the sake of argument that the testimony was admissible, it was brought into the case by the defendant, and it became the duty of the court to instruct the jury as to the consideration which should be given to it. It was probably introduced in an effort to show that the alleged injury sustained by the plaintiff was not so great as claimed by him in this action, since he had deliberately stated in his pleading in the other action that but for the negligence of the doctors he would now be a strong able-bodied man, and in good health. The instruction was appropriate, and, within the authorities, must be regarded as a correct statement of the law.

[1] A person injured by the negligence or wrong of another is entitled to recover from the wrongdoer the damages which naturally result from the wrong. It is the duty of a person injured through the negligence of an-

other to use ordinary and reasonable diligence in securing medical or surgical aid, and he cannot recover for suffering or ailment due to his own want of such diligence. In that respect he is only required to do what a reasonable person would under the circumstances. If he exercises that degree of care in the selection of physicians or surgeons, their mistakes or lack of skill in treatments or operations which aggravate or increase his injuries cannot be counted as the fault of the injured person, but are regarded by the law as a part of the original injuries for which the wrongdoer is responsible, and is a result which reasonably ought to have been anticipated by him. However, if the original injury is aggravated by the failure of the injured person to exercise reasonable care to obtain medical aid or surgical assistance, or in failing to follow the advice or instructions of the physicians or surgeons, the enhanced damages are to be excluded from the recovery. *Tex. & Pac. Ry. v. Hill*, 237 U. S. 208, 35 Sup. Ct. 575, 59 L. Ed. 918; notes in 48 L. R. A. (N. S.) 93, 110, 114, 116; note, 19 Ann. Cas. 979; 8 R. C. L. 449. There was no attempt here to show any negligence on the part of the plaintiff in the selection of a physician or in the means taken to effect a cure. It appears that the plaintiff was promptly taken to the Atchison, Topeka & Santa Fé Hospital, which was maintained by the employees of the defendant for the treatment of injuries sustained in the operation of its railroad. Other objections are made to the instructions, but none of them are deemed to afford grounds for a reversal, or to require special discussion.

[3] An attack is made on the special findings, not only as to their being contrary to the evidence, but also because they are evasive, equivocal, and inconsistent. Under the evidence rules were prescribed by the defendant for the running of trains, one of which was that the engineer was made responsible for the safety of the train. Another was that, when orders were delivered by the operator to the conductor, one copy was to be given to the engineer, who was to read it aloud to the conductor, and then to the fireman and head brakeman, and the conductor was also required to show his copy to the rear brakeman. It is conceded that the engineer took a copy of the order, whatever it contained, from the operator's table, and that he did not read it to the conductor or compare it with the conductor's copy. He states that the one he took and read named Douglass as the passing station, while the conductor's order presented in evidence named Rock as the passing place. In respect to the rules, the jury found that they required the plaintiff on receiving an order to read it aloud to the conductor of his train, and to sign the conductor's copy, and also that he was jointly responsible with the conductor

in observing the rules governing the movement of trains. It was found by the jury that the order sent by the train dispatcher directed that the trains should pass at Rock. The next question is:

"(4) If you answer the above question 'Yes,' then state whether said train order was received by the operator at Winfield Junction. Ans. Yes.

"(5) If you answer the last above question 'Yes,' then state whether said operator at Winfield Junction made three impression copies of the train order on tissue paper. Ans. Evidence does not show.

"(6) If you find from the evidence that plaintiff's injury was caused through the negligence of the railway company, then state in what such negligence consisted. Ans. Operator White delivered order to Engineer McIntosh to meet extra 1817 at Douglass.

"(7) If you find from the evidence that the plaintiff's injury was caused through the negligence of the railway company, then state what officer, agent, or employee of said railway company was guilty of such negligence. Ans. Operator White.

"(8) Was train order No. 36, a 31 order, received at Winfield Junction from the train dispatcher at Newton, changed by Operator White at Winfield to read 'Douglass' instead of 'Rock?' Ans. Evidence shows 31 order No. 36 delivered to Engineer McIntosh read Douglass, and not Rock; evidence does not show how changed.

"(9) If you answer question No. 8 'Yes,' then state whether he (White) wrote the word 'Douglass' in all the impression copies of the 31 order which he delivered to the train crew. Ans. Evidence shows order to engineer McIntosh read Douglass, but satisfactory evidence does not show as to the other orders."

"(11) If you find that plaintiff was guilty of contributory negligence, how much do you reduce the amount of your verdict on account of such contributory negligence? Ans. \$7,000."

There was a manifest lack of candor in the answer to the fifth question. The inquiry was an important one in the determination of the action. The defendant contended and offered testimony tending to show that three copies of the order were simultaneously made with a steel stylus on tissue paper, with carbons, directing that the trains should pass at Rock, and that the copy taken by the plaintiff was necessarily the same as the one given to the conductor. In confirmation of this theory, the copy delivered to the conductor which was offered in evidence did name that station as the passing place. There was ample evidence upon which to base a finding upon the question, conflicting, it is true, but it was the function and duty of the jury to determine the conflict, and give either an affirmative or negative answer to the question. The finding that there was no evidence on the subject was evasive and untrue. There was also a lack of fairness in the answers to the eighth and ninth questions. The evidence warranted direct answers, and de-

defendant was entitled to have the questions fairly answered. The answers relating to the negligence of plaintiff and defendant are too inconsistent and unsatisfactory to warrant the judgment that was entered.

The jury found that the plaintiff's injury was caused by the defendant's negligence, and the negligence was that White, the operator, gave plaintiff an order to pass the other train at Douglass. The jury found that plaintiff himself was guilty of negligence which contributed to his injury, and deducted \$7,000 from the amount of damages on that account. His negligence consisted in failing to observe the rule to compare his order with that of the conductor. The jury evidently regarded this to be a grave neglect, as it found that it contributed to the wreck and injury, and warranted the imposition of a penalty of \$7,000. Now there could be no contributory negligence on the part of the plaintiff if the order given to him was the same as that held by the conductor, if both named Douglass as the passing point. A comparison of them in that case would not have avoided the collision. In finding that plaintiff was negligent the jury necessarily found that the orders did not correspond, and that the difference would have been developed by a comparison. The finding that he was negligent in this respect, and that his negligence contributed to the wreck, was, in effect, a finding that Rock was the passing station named in the conductor's order, and yet, in answer to question 9, the jury found that the evidence did not show what was written in the conductor's order. The findings of the jury are therefore in conflict with the verdict; part of them are inconsistent with the theory upon which a recovery is sought, and are inconsistent with each other.

The judgment will therefore be reversed, and the cause remanded for a new trial.

All the Justices concurring.

(109 Kan. 254)

STATE v. STEPHENS et al. (No. 23029.)

(Supreme Court of Kansas. June 11, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors §251—Interest of innocent holder of chattel mortgage on automobile used in violation of liquor statute held subject to forfeiture.

Chapter 217 of the Session Laws of 1919, which declares that automobiles used in the unlawful transportation of intoxicating liquors are common nuisances, and provides for their condemnation and forfeiture, is not susceptible of an interpretation that the interest of an innocent holder of a chattel mortgage on an automobile used in violation of the statute is to be preserved from such condemnation and

forfeiture. The forfeiture of such interest is merely an incident to the proper and effective execution of the forfeiture declared by the statute.

2. Constitutional law §303—Intoxicating liquors §245—Providing for forfeiture of interest of holder of chattel mortgage on automobile used in transporting liquor not unconstitutional.

Chapter 217 of the Session Laws of 1919 contains no constitutional infirmity because the interest of an innocent holder of a chattel mortgage on an automobile is not preserved from forfeiture when the automobile itself is adjudged to be a common nuisance and forfeited according to the statute, following *State v. Peterson*, 107 Kan. 641, 193 Pac. 342, and *Goldsmith, Jr.-Grant Co. v. United States*, 41 Sup. Ct. 189, decided by the Supreme Court of the United States, January 17, 1921.

3. Intoxicating liquors §247, 250—Evidence insufficient to sustain that automobile forfeited for use in unlawful transportation was so used only in one instance; that automobile was unlawfully used in only one instance held no ground for extension from forfeiture.

The contention that the automobile was only used unlawfully in "one isolated instance of violation of the statute" is not sustained by the evidence; and, even if so, no exemption from forfeiture on that account can be fairly discovered in the all-inclusive language of the statute declaring that an automobile thus unlawfully used for the transportation of intoxicating liquors is a common nuisance and subject to forfeiture.

Appeal from District Court, Cherokee County.

Proceedings by the State against R. L. Stephens for the forfeiture of an automobile charged to have been used in the maintenance of a nuisance, wherein Melvin N. Rothchild and another interpleaded as holders of a chattel mortgage. Judgment for the State, and interpleaders appeal. Affirmed.

C. A. McNeill and Leo Armstrong, both of Columbus, and John W. Creekmur, of Chicago, Ill., for appellants.

Richard J. Hopkins, Atty. Gen., and Don H. Elleman, of Columbus, for the State.

DAWSON, J. This appeal is taken by the holders of a chattel mortgage on an automobile which was condemned and forfeited as a nuisance under chapter 217 of the Session Laws of 1919.

The state charged the defendant Stephens with three offenses: (1) Having intoxicating liquors in his possession unlawfully; (2) bringing intoxicating liquors into the state unlawfully; and (3) maintaining a nuisance in a Ford automobile on a certain public highway in Cherokee county—

"where intoxicating liquors, as a beverage, were and are sold, bartered, and given away in violation of law, and where patrons were and are

permitted to resort for the purpose of drinking intoxicating liquors, as a beverage, and where intoxicating liquors were and are kept for sale, barter, and delivery in violation of law, * * * and that said automobile was and is used for transporting intoxicating liquors from without the state of Kansas to, within, and into the state of Kansas, and for transporting intoxicating liquors from one place within the state of Kansas to another place within the state of Kansas, which said place * * * and said automobile were and are a common nuisance."

The defendant was arrested and pleaded guilty on the first and third counts. The automobile was seized by the sheriff, and the proper preliminary steps prescribed by the statute were taken to forfeit the automobile.

Within time, the appellants Rothchild & Little, of Chicago, Ill., a firm which deals in chattel mortgages on automobiles, were permitted to interplead, claiming that they held a valid and duly recorded chattel mortgage on the automobile, and that they had neither knowledge nor notice that the automobile was being used or had been used for the unlawful transportation of liquors, and that the chattel mortgage by its terms provided that the mortgagor should not remove it from Tulsa county, Okl., and that in case of such removal, or if the mortgagee should "fear removal," the right of immediate possession of the automobile inured to the mortgagee, etc.

The evidence fully supported the claims of the interpleaders, but they did formally admit:

"That at the time the automobile in question was seized by the sheriff of Cherokee county, Kan., it was in possession of one R. L. Stephens, the defendant in this action, and that it was being used by him for the purpose of transporting intoxicating liquors from without the state of Kansas to, within, and into Cherokee county, Kan."

The findings and judgment of the trial court (abridged) read:

"The court further finds that the interpleaders have a bona fide mortgage on said automobile in question, as alleged in the interplea, and that same was duly and legally filed and recorded as required by law; * * * and the court further finds that the above-named interpleaders had no knowledge of the use of said automobile for such unlawful purpose; and the court further finds that said automobile was a common nuisance as defined by section 1 of chapter 217, Session Laws of the state of Kansas for the year 1919. It is therefore by the court considered, ordered, and adjudged that said automobile in question be, and the same is hereby, forfeited as a common nuisance," etc.

[1, 2] The interpleaders appeal, contending that the statute does not contemplate the forfeiture of the interest of an innocent chattel mortgagee; that if so construed the statute violates the Fourteenth Amendment; and

the court erred in finding that the automobile was a nuisance and in forfeiting it as such.

Touching these points in order, it would seem that there is scarcely room for two opinions touching the legislative intention. Section 1 of the statute (chapter 217, Laws of 1919) reads:

"All automobiles, vehicles and other property used in the transportation or carrying of intoxicating liquors into this state or in carrying and transporting intoxicating liquors from one place to another within this state are hereby declared to be common nuisances."

Sections 2 and 3 of the act relate to the procedure for the seizure, notice, condemnation, and forfeiture of automobiles (and other property) unlawfully used in violation of the intoxicating liquor law. In part, section 3 also provides:

"At or before the time fixed by notice, any person claiming an interest in the vehicles, automobiles or other property seized, may file his answer in writing, setting up his claim thereto, and shall thereupon be admitted as a party defendant to the proceedings against such vehicles, automobiles or other property."

Section 4 provides:

"If the court shall find that such vehicles, automobiles or other property or any part thereof were at the time a common nuisance, as defined in section No. 1, it shall adjudge forfeited so much thereof as the court shall find was such common nuisance, and shall order the officer in whose custody it is to sell the same publicly, and said officer shall cause notice to be given by publication for at least two weeks in the official county paper of the time and place of the sale of said property and shall file in said court his return showing the sale of said property and the amount received therefor and shall pay the same into court to await the order of the court. The court, if it approves such sale, shall declare forfeited the proceeds of said sale and shall order the money received for said property at said sale paid into the treasury of the county for the support of the common schools, after paying out of the proceeds of said sale the costs of the action, including costs of sale and the keeping and maintenance of said property."

The appellants cite decisions from other jurisdictions which seem to uphold their first contention—that the interest of an innocent holder of a chattel mortgage on property used in an unlawful way is to be protected from forfeiture. Doubtless those decisions are interpretations of the statutes with which they deal. But under our statute there is no room for such interpretation. Our statute says without qualification that automobiles used for the purpose of transporting intoxicants unlawfully are common nuisances, and forfeitures shall be adjudged thereon. Such property, so used, is a nuisance. The forfeiting of the interest of a chattel mortgage holder in property unlawfully used is merely one of the more or less regrettable, but neverthe-

less necessary, results incidental to the proper execution of the judgment.

In *State v. Peterson*, 107 Kan. 641, 193 Pac. 342, most of the questions so urgently presented here were considered by this court, and the contentions of appellants were not sustained. The court there held that the act did not show a legislative intention to exclude from forfeiture the interest of a chattel mortgagee of an automobile used in the unlawful transportation of intoxicating liquors. In the opinion it is said:

"Doubtless the Legislature realized that any provision for the protection of a lien of a mortgagee would open the door to collusion and afford a ready means of evading the law. How readily such a provision might be used for defeating the purpose for which the law was enacted is apparent when we consider that any person desiring to engage in the illegal transportation of intoxicating liquors could, by placing an incumbrance upon an automobile, minimize the financial investment and hazard of the business." 107 Kan. 645, 193 Pac. 343.

But it is urged that, if this be the correct interpretation of the statute, the act is unconstitutional. That matter was fully considered in *State v. Peterson*, supra, and it is needless to extend this opinion by a rediscussion of the point. The court is still satisfied with its decision there made—that the act does not offend against the Fourteenth Amendment, or any other constitutional principle. And since that decision the Supreme Court of the United States, in *Goldsmith, Jr. v. Grant Co. v. United States* (decided January 17, 1921), has authoritatively spoken to the same effect. In that case an automobile had been used for the removal and concealment of intoxicating liquors in evasion of the federal revenue laws. The Grant Company owned the automobile in question and sold it, retaining title for unpaid purchase money, to Thompson, a taxicab operator, and to Lamb, a newspaper man. Thompson used the car for the unlawful removal of the liquors. None of the other parties claiming an interest in the automobile knew or had reason to suspect that it would be illegally used. The federal statute declared it to be unlawful to remove, deposit, or conceal goods or commodities with intent to defraud the government of its taxes, and—

"All such goods or commodities . . . shall be forfeited; . . . and every . . . carriage, or other conveyance whatsoever, and all horses, or other animals, and all things used in the removal or for the deposit or concealment

thereof, respectively, shall be forfeited." 14 Stat. at Large, 151, c. 184, § 14.

The Grant Company contended on appeal that the act of Congress violated the Fifth Amendment (which limits the power of the nation over persons and property substantially the same as the Fourteenth Amendment limits the power of the state). This contention was not sustained. The court, in part, said:

"It is the illegal use that is the material consideration; it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a 'thing' that can be used in the removal of 'goods and commodities,' and the law is explicit in its condemnation of such things."

[3] It is finally contended that the automobile was not a nuisance because it was only used unlawfully in "one isolated instance of violation of the statute." We find no evidence in the record to support that contention. The extent of its use was not the subject of judicial inquiry. The pertinent entry in the record recites that the interpleaders admitted that at the time it was seized by the sheriff it was being used "for the purpose of transporting intoxicating liquors from without the state of Kansas to, within, and into Cherokee county, Kan." In Stephens' application for a parole from the jail sentence he made a self-serving statement to the trial judge that he had never violated the law before and never would violate it again, and that he was only carrying home from Joplin, Mo., to Tulsa, Okl., two pints of apricot brandy for his wife. But that statement or affidavit of Stephens in seeking a parole was not presented as evidence on the issue between the state and the interpleaders touching the unlawful use or the extent of the unlawful use of the automobile. Indeed, no such issue was raised in the trial court. Moreover, the all-inclusive language of the statute will not permit of an interpretation that an automobile is to be exempt from forfeiture when it has only been used unlawfully for the transportation of liquors in "one isolated instance of violation of the statute."

The record contains no error, and the judgment is affirmed.

All the Justices concurring.

(45 Nev. 135)

EDWARDS v. CITY OF RENO et al.*
(No. 2481.)

(Supreme Court of Nevada. July 2, 1921.)

1. Pleading \S 214(3)—Demurrer held not to admit infirmities in improvement proceeding.

In a suit against a city and its officers to annul a contract for paving and restrain defendants from consummating the contract or incurring expenses in which it was alleged that the acceptance of bids and awarding of the contract constituted a material and substantial departure from the terms of the estimates, maps, diagrams, notice, and advertisement for bids, and was made without notice or hearing except an *ex parte* hearing, a demurrer to the complaint did not admit as true the infirmities alleged.

2. Appeal and error \S 185(1)—Moot character of question may be shown at any time.

The fact that there is no controversy between parties to the record may be shown at any time before the decision of the case, though the questions involved had become moot before the judgment appealed from was rendered, and the point was not raised in the lower court.

3. Appeal and error \S 843(1)—Moot questions not decided.

Appellate courts do not give opinions on moot questions or abstract propositions.

4. Appeal and error \S 781(2)—Appeal dismissed when tax sought to be enjoined paid under protest.

Treating a suit against a city and its officers to vacate a paving contract and restrain defendants from consummating the contract as analogous to an action to enjoin the collection of an illegal assessment or tax, an appeal by plaintiffs will be dismissed, where the contract has been fully performed pending the action, and plaintiffs have paid the assessment in full, though under protest.

Appeal from District Court, Washoe County; Edward F. Lunsford, Judge.

Action by W. F. Edwards against the City of Reno and others. From a judgment dismissing the action on demurrer, plaintiff appeals. Motion to dismiss appeal. Granted.

Augustus Tilden, of Reno, for appellant.

Le Roy F. Pike and Harwood & Tippet, all of Reno, for respondents.

SANDERS, C. J. It appears from the complaint in the court below that the city of Reno, in January, 1920, passed and adopted an Ordinance No. 264, entitled:

"An ordinance declaring the determination of the city council of the city of Reno to make certain improvements in the various wards in the city of Reno, by constructing, grading and paving, with concrete, bitumen or asphaltum certain streets and alleys and portions of streets in said city; and constructing granite header stone along certain streets; describing

definitely the location of said improvements; providing that the costs and expense thereof shall be paid entirely by special assessment, upon and against the lots and premises abutting or fronting on said improvements in accordance with their number of feet frontage, except where, by the charter of the city of Reno, certain portions thereof are required to be paid from the general fund of the said city of Reno; providing for the issuance of special assessment bonds for the payment thereof, and other matters relating thereto."

Pursuant to its Charter and Ordinance No. 264, it passed and adopted Ordinance No. 265, entitled:

"An ordinance empowering, authorizing, and directing the city assessor of the city of Reno, county of Washoe, state of Nevada, to levy a special assessment to defray the costs of making certain improvements in the various wards in the city of Reno, by constructing, grading and paving with concrete, bitumen or asphaltum, certain streets, and alleys, and portions of streets, in the said city, and constructing granite header stone along certain streets, according to the plans and estimates of costs thereof on file in the office of the city clerk of the city of Reno, describing definitely the location of said improvements, stating the amounts of said assessment and designating the lots, lands, and premises to be assessed, stating that the same shall be assessed according to frontage, providing for the issuance of special assessment bonds for the payment thereof, and other matters relating thereto."

Pursuant to the terms of Ordinance No. 264, and our statute law (section 1530, Rev. Laws), the city council of Reno caused to be published a notice, dated January 31, 1920, entitled:

"Notice to Bidders for Street Paving in the City of Reno.

"Notice is hereby given that the city council of the city of Reno, Nevada, will receive sealed bids up to 8 o'clock p. m., March 8, 1920, said bids to be filed with the city clerk of the city of Reno, and to be for the following work:

"Bid No. 1. 400,000 square feet of cement concrete pavement.

"Bid No. 2. 635,000 square feet of cement concrete pavement.

"Bid No. 3. 115,000 square feet of sheet asphalt pavement.

"Bid No. 4. 235,000 square feet of bitulithic pavement on a cement concrete base.

"Bid No. 5. 145,000 square feet of bitulithic pavement on a rock macadam base.

"Bid No. 6. 90,000 square feet of bitulithic pavement on a concrete base.

"For specifications and locations of proposed work, bidders shall apply to the office of the city engineer of the city of Reno.

"Bidders may bid on any one or all of the above bids.

"The city council reserves the right to accept or reject any and all bids."

Thereafter divers bids, based on estimates, plats, diagrams, proceedings, ordinances, and

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied September 9, 1921.

notice to bidders, were received by said city council. On the 27th day of February, 1920, said council, without previous notice or advertisement or published notice, caused to be prepared and mailed, or otherwise privately delivered to each of said bidders, a letter, in words and figures following, to wit:

"Dear Sir: Am sending you to-day under separate cover 'Specifications Form of Contract,' etc., of the proposed work for street improvement for the city of Reno.

"The city of Reno is asking for the following bids, to be received up to 8 o'clock p. m. Monday, March 8, 1920, in addition to those advertised for:

"635,000 sq. ft. of bitulithic or asphaltic concrete pavement, 1½ inches thick on a 3½ inch asphaltic concrete base.

"310,000 sq. ft. of bitulithic or asphaltic concrete pavement, 1½ inches thick on a rock macadam base.

"310,000 sq. ft. bitulithic or asphaltic concrete pavement, 1½ inches thick on a 3½ inch asphaltic concrete base.

"On all asphalt pavement, the contractor to furnish all materials.

"Yours very truly,

"Harry Ohism, City Engineer."

Thereafter, on the 9th day of March, 1920, the city council rejected all bids as provided for the performance of said improvements in the area specified with "concrete," and accepted a bid and let a contract for the performance of said work or improvements with "bitulithic concrete."

W. F. Edwards and A. P. Laffranchino, for the benefit of themselves and all others similarly affected, brought their action against the city of Reno, its mayor and city council, seeking to have the contract let, or about to be let, for the paving of its streets and alleys with "bitulithic concrete" vacated and annulled, and praying that defendants be restrained from consummating the contract, and, if the same has been entered into, from proceeding or incurring or paying any expense thereunder until the further order of the court, and that said restraining order, after hearing, be made permanent, and that a mandatory injunction issue, requiring defendants to proceed to entertain bids for the performance of said work or improvements as provided in the ordinances, estimates, maps, diagrams, and notice to the public, inviting objections and suggestions, and the advertisement for bids. The gravamen of the complaint is that the acceptance of the bid or bids, and awarding the contract for bitulithic concrete, constitutes a material and substantial departure from the terms of the estimates, maps, diagrams, notice, and advertisement for bids, and that such departure is unfair to and a fraud upon the owners of property to be benefited by said improvements, and was made without notice to or hearing given said owners, and without any hearing had as to the respective merits of said materials, except an ex parte hearing

granted to the proponents of said material called "bitulithic concrete," a patented article, bearing a patented name.

The defendants interposed a demurrer to the complaint, which was sustained. Thereafter an amended complaint was filed and served, which was also demurred to, and the demurrer sustained. The plaintiff declined to further amend, and judgment was entered, dismissing the action. The plaintiff, Edwards, appeals from the judgment on the judgment roll alone. Upon the filing of his appeal, respondents, upon notice previously given, moved the court to dismiss the appeal, upon the grounds, in short, that between the date of the commencement of the action and the final judgment of dismissal the record presents only a "moot question." In support of the motion are the affidavits of the assistant city engineer and the city clerk of Reno. The affidavit of said clerk, among other things, states that a contract had been entered into between the city of Reno and the Clark & Henery Construction Company, a corporation, for the grading and paving with bitulithic concrete and bitulithic material covering the streets and alleys referred to in the ordinances, resolutions, and proceedings set forth in appellant's amended complaint, on March 10, 1920; that pursuant to the ordinances and proceedings of said city council, an assessment was levied upon the property abutting upon said streets and alleys, amounting to the sum of \$138,071.96, and that the property owners so assessed have paid all of such assessment, except the sum of \$34,626.21, which latter sum is a lien upon the property so assessed; that bonds of the city of Reno were issued and sold to pay for the paving of street intersections and to cover the assessment not paid in cash by the property owners (and not paid out of the general fund of the city) in the sum of \$24,626.96; that W. F. Edwards paid the amount so assessed against his property in full in cash on the 22d day of April, 1920; that the entire contract has been performed and completed, and the streets and alleys have been graded and paved, as contemplated by the ordinances, resolutions, and proceedings, and that all of the money, amounting to the total sum of \$160,698.94, has been paid, except the sum of \$500, withheld by the city as a guaranty fund for the replacing of any faulty pavement or defects, etc. The affidavit of the assistant city engineer contains the statement that the contract in question had been fully executed, performed, and completed on November 23, 1920, and the work required thereby was finally accepted and approved by affidavit on November 23, 1920.

In opposition to the motion to dismiss, appellant caused to be filed an affidavit containing the statement that in April, 1920, the city treasurer of respondent issued to appellant two certain bills or demands for the

sums due upon the assessments involved in this action and appeal, aggregating \$326.50, upon the face of which is printed a statement to the effect that if the amount therein mentioned was not paid on or before the 22d day of April, 1920, the amount could not be paid except in 10 annual installments, with interest on deferred payments at the rate of 7 per cent. per annum; that affiant, upon instructions from appellant, paid the amount under protest on the 22d day of April, 1920, and upon the receipts for said payments so made is written the words, "Paid under protest," which bills or demands and receipts are exhibited with the affidavit.

[1] It is urged by brief, and was argued orally by appellant's counsel, that the demurrer to the complaint admits as true the specifications of the divers infirmities in the assailed assessment, and that to sustain the motion to dismiss would impose a lien upon the holdings of all those nonpaying property owners in the sum of \$24,626.98, based upon an admittedly illegal and void assessment. We do not understand that the demurrer carries with it such an admission or concession, or is to be so construed.

[2] It is also urged in opposition to the motion to dismiss that the opinion of the court below was rendered in October, 1920, nearly six months after the payment under protest of the amount assessed against appellant's property, and that the point now urged for dismissal was as available then as now, yet it was not raised in the court below, and, had it been urged in the court below, appellant would have had his legitimate opportunity to amend. In support of this position our attention is directed to this court's denouncement of the practice of reserving a material point with the object of barring an adversary of an opportunity to amend. Commending, as we do, its disapproval of such practice as being contrary to "the spirit of the Code" (*Treadway v. Wilder*, 8 Nev. 92; *Cal. Tel. Co. v. Patterson*, 1 Nev. 150), we do not think counsels' conduct has any bearing upon the question here presented. The fact that there is no controversy between parties to the record ought, in the interest of a pure administration of justice, to be allowed to be shown at any time before the decision of the case. *Little v. Bowers*, 134 U. S. 558, 10 Sup. Ct. 620, 33 L. Ed. 1016.

[3] Appellate courts do not give opinions on moot questions or abstract propositions. *Pac. Live Stock Co. v. Mason Valley M. Co.*, 39 Nev. 105, 153 Pac. 431. This court has gone so far as to hold that where parties to an appeal settle the controversy, the appeal will be dismissed, though the case has been argued and submitted. *Wedekind v. Bell*, 26 Nev. 395, 69 Pac. 614, 99 Am. St. Rep. 704.

[4] It is further urged that, appellant having paid the assessment under protest, no moot question is presented, and appellant's rights

in the premises still rest upon the legal sufficiency of his cause of action. Treating the case and relief sought as a proceeding analogous to that of an action to enjoin the collection of an illegal assessment or tax, upon reason and authority we are of the opinion that, the contract sought to be canceled having been fully performed and the appellant having paid the assessment in full, even though under protest, we should sustain the motion. The rule is well established that:

"When an appeal is taken from an order dissolving or denying a preliminary injunction, or dismissing the bill, and, pending the appeal, the act sought to be restrained has been accomplished, that fact, upon being brought to the attention of the reviewing court by motion, supported by affidavit, affords sufficient ground for dismissing the appeal, the dismissal being without prejudice. * * * So, upon an appeal from a decree dismissing a bill brought to enjoin the collection of taxes, the payment of such taxes pending the appeal affords good reason for dismissing the appeal." *High on Injunctions* (4th Ed.) § 1701a.

In *Singer Manufacturing Co. v. Wright*, 141 U. S. 696, 12 Sup. Ct. 103, 35 L. Ed. 906, the court said:

"We are relieved from a consideration of the interesting questions presented as to the validity of the legislation of Georgia, levying a license tax upon dealers in sewing machines. * * * The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion. * * * The payment of the taxes was, it is true, made under protest, the complainant declaring at the time that they were illegal, and that it was not liable for them; that the payment was made under compulsion of the writ; and that it intended to demand, sue for, and recover back the amounts paid. If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action at law. It does not continue in existence the equitable remedy by injunction, which was sought in the present suit. The equitable ground for the relief prayed ceased with the payment of the taxes."

See, also, *San Mateo v. Southern Pacific Ry. Co.*, 116 U. S. 138, 6 Sup. Ct. 317, 29 L. Ed. 589; *Tomboy Gold Mines Co. v. Brown*, 74 Fed. 12, 20 C. C. A. 264.

The action in the case at bar having been dismissed, and, during its pendency, the act sought to be restrained having been performed, that fact, upon being brought to the attention of this court by motion, supported by affidavit, affords sufficient ground for dismissing the appeal.

The motion to dismiss the appeal is granted.

DUCKER and COLEMAN, JJ., concur.

(101 Or. 1)

HARNEY VALLEY IRR. DIST. v.
WEITTENHILLER.

(Supreme Court of Oregon. June 21, 1921.)

1. Parties \Leftrightarrow 76(6)—Want of capacity to sue waived by failure to demur.

In proceeding by irrigation district to test the validity of its organization under Laws 1919, p. 693, the objection that the petition was authorized by only two directors, the bond of neither of whom had been approved by the county judge, was waived by failure to raise objection by demurrer under Or. Laws, § 68, subd. 2, and sections 71 and 72; the objection being to the legal capacity to sue, the want of which appeared on the face of the petition.

2. Evidence \Leftrightarrow 5(2)—Judicial notice taken of organization and boundaries of irrigation district.

The court will take judicial notice of the organization and boundaries of an irrigation district organized under Laws 1917, p. 743, and acts amendatory thereto.

3. Waters and water courses \Leftrightarrow 224—Irrigation district a complete and independent corporate entity.

An irrigation district, organized under Laws 1917, p. 743, and acts amendatory thereto, constitutes a complete and independent corporate entity.

4. Waters and water courses \Leftrightarrow 225—Organization of irrigation district not "county business," within constitutional provision providing for commissioners to sit with county judge in transaction of county business.

In proceeding to organize irrigation district under Laws 1917, p. 743, and acts amendatory thereto, the county judge had jurisdiction without the attendance of the county commissioners, notwithstanding Const. art. 7, § 12, providing for election of commissioners to sit with county judge while transacting "county business"; the organization of an irrigation district not being "county business," within the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, County Business.]

5. Waters and water courses \Leftrightarrow 225—Agreement between promoters of district being organized and corporations owning extensive lands within proposed district held not to affect validity of organization.

Agreement between promoters of irrigation district being organized under Laws 1917, p. 743, and acts amendatory thereto, and two corporations owning extensive lands within the proposed district, that corporations were to have the right to name two of the directors did not affect validity of the organization of the district, where election was ordered by county judge on petition and notice in proper form, signed by proper petitioners, after a hearing without the agreement having been brought to court's attention, and where there was no charge of fraud or corruption in procuring order or in conducting the election, and where it did not appear that the men named as directors were incompetent or disqualified, or had

knowledge of the agreement; the judgment being conclusive, under Or. Laws, §§ 756, 7308.

In Banc.

Appeal from Circuit Court, Harney County; Dalton Biggs, Judge.

Proceeding by the Harney Valley Irrigation District to determine the legality of proceedings in connection with the organization thereof, opposed by P. S. Weittenhiller. From the judgment rendered, both parties appeal. Affirmed.

This is a proceeding commenced to determine the legality of the proceedings in connection with the organization of the Harney Valley irrigation district. It is admitted that immediately prior to December 4, 1919, the requisite number of legal petitioners addressed to the county court of Harney county a petition praying that a hearing be had and an order made determining whether a sufficient number of owners of land in the proposed district had petitioned for the formation thereof, and whether the petition and the notice of time of presentation thereof were duly published as provided by law, designating the name of said district, establishing and defining the boundaries thereof, calling an election for the purposes set forth in the petition, fixing the time and place therefor, and establishing a convenient number of election precincts in said proposed district; that notice of the presentation was given, and that the petition and notice were regularly published in newspapers of the county, all in conformity to the statute. It is admitted, likewise, that all of the land described in the petition to be included in the district is in Harney county, Or., and that on January 5, 6, and 7, 1920, at a hearing on the petition, sundry applications were considered for inclusion in the district, and others for exclusion therefrom. The petition goes on to trace the action of the county court culminating in an order for an election. It is admitted that the county clerk gave notice of the election in the statutory manner; that the ballot was in the form directed by the statute; that due notice of the election was given; that three certain candidates were nominated for directors; that the election was held; that two of the elected directors filed with the county clerk of Harney county their official bonds; that "at the hour of 1:30 p. m. on the 26th day of February, 1920, the said board of directors organized by electing A. R. Olsen temporary chairman and electing Robert M. Duncan temporary secretary"; and that among other business the board of directors provided by resolution that a proceeding be brought by petition in the name of Harney Valley irrigation district in the circuit court of the state of Oregon for the county of Harney, under the provisions of chapter 390, Laws 1919, to examine ju-

judicially into "the sufficiency, regularity, and legality of proceedings in connection with the organization of Harney Valley irrigation district, and that the temporary secretary be authorized to verify the petition in such proceeding." The prayer is to the effect that the court judicially examine into the regularity, legality, and sufficiency of the proceedings in connection with the organization of the district.

Afterwards, on April 10, 1920, P. S. Weittenhiller demurred to the petition, but later withdrew his objection and by consent filed an answer, showing his qualification as a landowner within the proposed district, and admitting substantially what has been noted above, contending that the proceedings were had before the county judge without assistance of or consultation with the county commissioners, and on account of that were void. As new matter answering the petition, the following was alleged by the defendant Weittenhiller:

"That during the month of November, 1919, certain persons interested in the organization of said proposed Harney Valley irrigation district, to wit, William Hanley, Arthur R. Olsen, Robert M. Duncan, C. A. Sweek, Charles Faulkner, Sam Mothershead, and M. B. Hayes, prepared a petition asking for an order of the county court of Harney county, Oregon, ordering an election to be held, at which election such persons as were qualified should vote to determine whether or not the said Harney Valley irrigation district should be organized, and circulated said petition among the said qualified electors during the month of November, 1919, and as an inducement to secure the necessary number of signers for said petition entered into an agreement with the Pacific Live Stock Company, a corporation, and the William Hanley Company, a corporation, wherein it was stipulated and agreed by and between said parties to said agreement that, if the said Pacific Live Stock Company and the said William Hanley Company should sign the said petition, and would vote for said Harney Valley irrigation district, and would use their influence in order to carry said election, and would not oppose the organization of said district, the said Pacific Live Stock Company might name one director for said proposed irrigation district and the said William Hanley Company might name one director for said proposed irrigation district, for the period of five years from and after the organization of said irrigation district, or during the period of construction of the irrigation works thereafter to be undertaken and completed for the said district.

"The said agreement was reduced to writing and was circulated along with the petition for the organization and formation of said district among the qualified voters for said district, and that numerous of said qualified voters signed said agreement; that said protestant does not have possession of said agreement, nor a copy thereof, and does not know the exact names of the persons who signed said agreement, but is informed and believes, and upon information and belief alleges the fact to be that the said Pacific Live Stock Company and the said Wil-

liam Hanley Company, corporations, and the said Arthur R. Olsen, Robert M. Duncan, C. A. Sweek, Sam Mothershead, and M. B. Hayes, and other persons whose names are not known to this protestant, but who constituted a majority of said petitioners, did sign said agreement."

Contending that the nomination and election of Olsen and Hanley, members of the two corporations mentioned, were carried out under the terms of the agreement stated, that the two corporations would not have signed the petition for organization of the district, and that the proper number of landowners could not have been obtained, except for the agreement, the answer concludes with a prayer to the effect that the organization of the district be declared null and void. The circuit court sustained a demurrer to the new matter in the answer, and dismissed the affirmative defense.

The court heard the case on the pleadings thus formed, made findings of fact and conclusions of law favorable to the petitioner, and entered a decree to the effect that the Harney Valley irrigation district and all of the proceedings in connection with the organization thereof, and the organization of the board of directors, were regular and legal, and that the said district was legally organized under the provisions of chapter 357, Laws 1917, and acts amendatory thereto. Both parties appealed; the district contending that the circuit court decree is vague and indefinite, in that "it does not set forth the boundary lines of the district as organized and does not name the directors of the said district." No assignments of error are included in the record in favor of Weittenhiller.

R. M. Duncan, of Vale (McCulloch & Duncan, of Vale, on the brief), for appellant.

C. B. McConnell, of Burns, and Edwin Snow, of Boise, Idaho (C. B. McConnell, of Burns, and Hawley & Hawley, of Boise, Idaho, on the brief), for respondent.

BURNETT, C. J. (after stating the facts as above). [1] It is first contended by Weittenhiller, whom we will denominate "the defendant," that the petition does not state facts sufficient to constitute a cause of suit, so to speak, in that it was authorized by only two directors, the bond of neither of whom had been approved by the county judge. This relates, not to the sufficiency of the facts to constitute a cause of suit, but merely to the legal capacity of the moving party to institute the proceeding. The position of the defendant is, not that the facts stated are insufficient to allow the court to institute an inquiry into the validity of the organization, but that it does not lie in the mouth of the moving party to state those facts. In other words, properly framed, the objection is that the plaintiff has not legal capacity to sue, within the meaning of sub-

division 2 of section 68, Or. L., prescribing grounds of demurrer. It is said in section 71, Or. L.:

"When any of the matters enumerated in section 68 do not appear upon the face of the complaint, the objection may be taken by answer."

Those "matters" are statutory grounds of demurrer, among which is want of legal capacity to sue. The following section, 72, declares that—

"If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The defect complained of, if it be one, appeared on the face of the petition in the instant proceeding. It was the duty, therefore, of the defendant, under section 68, supra, to demur to the petition on the ground that "the plaintiff has not legal capacity to sue." Having withdrawn his demurrer, he waived that pleading. Inasmuch as it appeared on the face of the petition, the objection could be taken only by demurrer, so that the situation is controlled on this point by section 72, which spells waiver of the objection.

The principal contention on behalf of the defendant is that, conducted as the proceedings were, before the county court presided over by the county judge alone, the county commissioners not being in attendance, that tribunal had no jurisdiction to perform the acts ascribed to it by the petition. In the judicial article of the state Constitution (article 7, § 12) it is said:

"The county court shall have the jurisdiction pertaining to probate courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law. But the legislative assembly may provide for the election of two commissioners to sit with the county judge whilst transacting county business in any or all of the counties, or may provide a separate board for transacting such business."

The defendant maintains that the organization of a drainage or irrigation district is "county business"; that it is essentially requisite in the transaction of such business that the county commissioners sit with the county judge, in the absence of which condition, the action of the court when presided over only by the county judge is void for want of jurisdiction. The matter is to be determined by the significance to be attached to the term "county business," for that is the only business the commissioners have authority to transact. The subject was treated by this court in *State v. MacElrath*, 49 Or.

294, 89 Pac. 803. In that case the question was whether the orders of the county court in directing an election to be held under the local option law, so called, should be made by the county court presided over by the county judge alone, or whether they must be made by the county judge and commissioners sitting as a court for the transaction of county business. After premising that it was the first time the question had been presented for decision, although it had been assumed in previous cases that orders made by the county court in such cases sitting for the transaction of such business were valid, this court, speaking by Mr. Chief Justice Bean, recited the statute, now codified under section 937, Or. L., defining county business, to be transacted by county commissioners, as providing for the erection and repair of courthouses and public buildings, establishing, vacating, and altering county roads, and other matters relating to the fiscal concerns of the county, and went on to say:

"It will thus be seen that, while the business has been subdivided and classified, there is but one court provided by the Constitution and laws. In the transaction of all matters properly coming before it, except county business or such as is specially imposed on the court sitting for the transaction of county business, the county judge sits alone. When county business is being considered, the two commissioners sit with him and are a part of the court; but the judge and commissioners do not constitute a separate tribunal. They are still the county court, charged by the statute with the performance of certain specified duties. * * * In ordering an election under the local option law, and in declaring the result of such an election, the county court is not exercising any of its ordinary duties. It is not transacting probate business, because that contemplates matters dealing with the settlement of the estates of deceased persons. It is not exercising criminal or civil jurisdiction, because that assumes adverse parties and the determination of issues between them. It is not transacting county business, because the duties imposed upon it do not come within the provision of the statute defining what shall constitute county business. The county, as such, has no interest in the question whether an election under the local option law shall be held, nor is it affected in any way by the result. In the performance of the duty imposed upon it by the local option law the county court is acting in a special capacity and in the discharge of 'other powers and duties prescribed by law.'"

The conclusion was that the order of the county court was valid, although it was made while the court was presided over by the county judge alone. In *State v. Maddock*, 58 Or. 542, 115 Pac. 428, it was held that "county business" relates to the fiscal concerns of the county and the management of its affairs as a public corporation. In *Russell v. Crook County Court*, 75 Or. 168, 145 Pac. 653, 146 Pac. 806, the same term was said to include

all business pertaining to the county as a corporate entity.

[2-4] When an irrigation district is organized, it is authorized through its board of directors to acquire property for the purposes of its organization, to sue and be sued, to enforce and maintain its rights, privileges, and immunities, and the court in all acts, suits, or other proceedings shall take judicial knowledge of the organization and boundaries of such district. Within its sphere, therefore, the irrigation district constitutes a complete and independent corporate entity. The details of its formation do not constitute county business. So far as the county court is concerned, those particulars come within the category of "such other powers and duties * * * as may be prescribed by law," measuring in the language of the Constitution the jurisdiction of the county court required to be held by the county judge.

It is argued that the matters under consideration constitute county business for the following reasons: (1) The county clerk gives notice of the first election, and the bonds of the directors must be in the form prescribed by law for the bonds of county officers and must be filed with the county clerk. (2) The county treasurer is made ex officio treasurer of the district. (3) The assessment for the district is to be placed upon the county assessment roll, and the taxes are to be collected and accounted for by the sheriff in the same manner as other taxes of the county. (4) In case the district fails to levy the necessary taxes for payment of the charges against the district, the county court sitting for the transaction of county business shall make the levy. (5) Claims against the district shall be paid by warrants drawn by the county clerk. There might be some force to these arguments, if the county in its municipal character were profited or impoverished in the least by any of the transactions mentioned. But it is not. Its concerns as a separate municipal corporation are not at all affected by any of the transactions relating to irrigation districts. It is said that the county clerk gives notice of the first election. So, also, he issues marriage licenses; but no one will contend that marriages are part of the county business. It does not affect the county in any way because the individual who happens to be county treasurer is also made ex officio treasurer of the district. No one would say that the collection of taxes, which the sheriff makes for all the cities, towns, and school districts, constitutes county business. The county itself is not concerned in any of those things.

[5] Finally, it is urged that the action of the promoters of the organization of the district, named in the answer, in agreeing with the William Hanley Company and the Pacific Live Stock Company that each of those firms should name a director in the

corporation, vitiates the whole proceeding. It is not stated that either of the men named as a director was incompetent or disqualified, or had any knowledge of the so-called agreement. The agreement does not appear to have been filed in the county court or brought to its attention. The activity of the promoters thus described was political in its nature, and not contractual. It would seem that adopting the policy of "one big district," including the extensive lands of the two corporations and the nomination of the parties named as directors, constituted in effect a political platform on which the petitioners for the district entered the campaign for the organization of the concern. The matter was agitated in public, because the answer says that a majority of the petitioners signed the so-called agreement. It is not pointed out in the answer that any one was influenced or intimidated by the agreement.

We have, then, a petition and notice admittedly in proper form, signed by proper petitioners, presented to a tribunal having jurisdiction over the subject-matter. Upon a hearing wherein some petitioners sought to be included in the district and others endeavored to be excluded, the court made an order calling for an election. No charge of fraud or corruption in procuring this order or in conducting the election is laid at the door of the petitioners or of the county court. Having jurisdiction of the persons and of the subject-matter, which is the only legitimate conclusion to be drawn from the admitted allegations about the county court:

"The effect of a judgment * * * is * * * conclusive between the parties and their representatives and successors in interest." Section 756, Or. L.

Referring specially to the irrigation statute under which these proceedings were had, we find in section 7308, Or. L., that the county court shall meet on the Monday next succeeding the election, canvass the votes, and, if upon such canvass it appears that at least three-fifths of the votes cast are "Irrigation District—Yes," the court shall by an order entered on its minutes declare such district duly organized under the name and style theretofore designated, shall declare the candidates receiving, respectively, the highest number of votes for officers as directors, to be duly elected to such offices, and shall cause a copy of the order to be filed for record in the office of the recorder of conveyances of the county in which any portion of the lands involved is situated, "and from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices upon duly qualifying as provided by this law, and they shall hold their offices, respectively, until their successors are elected and qualified." This constitutes

a statutory declaration of the legal effect of the filing of the order.

We have, then, in the circuit court a petition, the facts stated in which are sufficient to involve the authority of the court to examine the proceedings and determine the regularity of the organization. If the two directors were incompetent to allege those facts, in other words, had not legal capacity to cause the suit to be instituted, that defect, appearing as it does upon the face of the petition, was waived by the defendant's refusing to demur to the same as well as by not urging it in the answer. The tribunal presided over by the county judge, namely, the county court, was exercising "such other powers and duties * * * as may be prescribed by law," when it ordered the election, canvassed the returns, and declared the result of the election to be the establishment of the district. The pre-election conduct of the promoters of the district did not affect the jurisdiction of the court. Its proceeding was based upon a sufficient petition, uninfluenced by the political action of those favoring the scheme. It has judicially considered and determined the question of the organization of the district. Its proceedings are regular, and we are not called upon to go further than to approve the organization of the district, the only question submitted for our consideration. Prescribing, as it does, the boundaries, the order of the county court establishing the district sufficiently meets the assignment of error in the brief of the plaintiff. The precedents cited by the defendant in this part of the case do not apply here, for they all relate to agreements among the directors or stockholders of going concerns, and have no bearing on political activities prior to the formation of a quasi municipal corporation, such as a statutory irrigation district.

The decision of the circuit court is affirmed.

Mr. Justice BROWN took no part in the consideration of this case.

(101 Or. 85)

LOGAN et al. v. CROSS.

(Supreme Court of Oregon. June 28, 1921.)

1. Sales §=209, 399—Delivery of hay in stack without segregation; buyer could replevin.

Where one purchased and paid for a certain number of tons of hay out of a certain stack, segregation of such amount of hay from the stack was not necessary to an actual delivery thereof, and purchaser could bring action in replevin to recover the same.

2. Replevin §=96—Verdict in replevin action held definite and certain, though value was not given.

In replevin to recover a specific amount of hay out of a stack, where complaint alleged that defendant was in unlawful possession thereof and that it was of the value of \$535, and answer alleged that defendant was the owner of such hay which was of the value of \$535, a verdict finding that plaintiffs were the owners and entitled to the possession of such amount of hay was both definite and certain as to the amount and value of the hay, although it did not state the value thereof, and there was no prejudicial error.

3. Costs §=184(10)—Prevailing party only entitled to witness fees for day of trial.

Although a case was at issue on March 8th, the first day of the term, and was not set down for trial until March 17th, plaintiffs were not entitled to per diem witness fees of 11 days, although witnesses were under subpoena in attendance upon court during such time; no party to a lawsuit being entitled to costs for witnesses who were in attendance upon the court before the case was set down for trial.

Department 2.

Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by A. M. Logan and Fisher C. Logan, copartners doing business under the firm name and style of Logan Brothers, against R. B. Cross. From a judgment for plaintiffs, defendant appeals; and from a ruling of the court sustaining objections to items of a cost bill, plaintiffs appeal. Affirmed.

See, also, 192 Pac. 656, 1119.

The plaintiffs are brothers and engaged in the stock business in Crook county. The defendant is the owner of a hay ranch near Prineville. In June, 1919, the plaintiffs entered into a written contract with the defendant for the purchase from him of 200 tons of hay in the stack at the agreed price of \$20 per ton and at the time paid \$500. In consideration thereof plaintiffs were to have certain pasture and feeding privileges on defendant's lands. At the time the contract was made the hay was growing in the field. A large portion of it was alfalfa, the third crop of which was cut some time in September, and it was all to be stacked and fed on defendant's premises. The hay was put up in five different stacks at convenient places for feeding, and stacks 1, 2, 3, and 4 were more or less mixed hay, and stack 5 was all alfalfa. There was a driveway between stacks 4 and 5 and both were in the same inclosure. By the terms of the contract the hay was to be delivered and paid for November 1. Desiring to obtain his money, the defendant asked the plaintiffs if they would be willing to have the hay measured and pay for it in September, to which they agreed, and during that month stacks 1, 2, 3, and 4 were meas-

ured, and the balance of \$4,000 was then paid. In checking up the measurements, it was found that there were not 200 tons of hay in the four stacks, but the parties could not and never did agree upon the amount of the shortage. The original measurement of the stacks was made by the defendant and one of the plaintiffs, and by mutual agreement the figures were submitted to Baldwin, a Prineville banker, for computation as to the number of tons, and it seems that he made an error and rendered different statements of the amount. It was agreed that there was an actual shortage, the plaintiffs claiming it was about 7 tons, and the defendant about 4. Plaintiffs claim that this resulted in an agreement that they should have a sufficient amount of hay out of stack 5 to make good the 200 tons. In making the September measurement, the initial end of the rope or line was held by one of the plaintiffs and the other end by the defendant, who called off and reported the actual length and breadth and "overs" of the four different stacks, and it was the measurements which the defendant reported that were submitted to Baldwin, the banker. In the course of time the plaintiffs became suspicious that the defendant had committed a fraud upon them, and other measurements were made, from which it appeared there was an actual shortage of 21.4 tons. Claiming that they own and should have that amount of hay in stack 5 and its possession, plaintiffs commenced this action, in which they allege that on November 1, 1919, they were and are now the owners of and entitled to the possession of 21.4 tons of alfalfa hay in the stack on the defendant's place, commonly known as the Hoffman ranch in Crook county, state of Oregon; that the defendant wrongfully took and now withholds possession of the hay in Crook county to plaintiffs' damage in the sum of \$535; that demand has been made and possession refused. For answer the defendant denies every allegation of the complaint, and in the first further and separate answer alleges that on November 1, 1919, he was and is now the owner and in the possession of the 21.4 tons of alfalfa hay in the stack, "which said hay was and still is of the value of \$535," and as a plea in abatement, bar, and estoppel, the defendant further alleges that the plaintiffs had never filed any certificate of the firm name or style; that by reason thereof they are not entitled to maintain this action. The reply is a general denial. After the testimony was taken, defendant moved for a nonsuit, which was denied, and the jury returned the following verdict:

"We, the jury impaneled and sworn to try the above-entitled cause, find for the plaintiffs, and that the plaintiffs are the owners of and entitled to the possession of 21.4 tons of alfalfa hay as described in the complaint, and in case the delivery of the said hay cannot be had, then that plaintiffs have judgment against

the defendant for the sum of five hundred thirty-five (\$535.00) dollars."

On March 18, judgment was entered on the verdict, and on March 31, the defendant filed a motion to set it aside and for a new trial, upon the grounds that the complaint does not state facts sufficient to constitute a cause of action; that there is no evidence to support the verdict and errors in law occurring at the trial, to which exceptions were duly taken. The defendant appeals, and in the abstract of record makes 25 different assignments of error as to the admission of evidence, the failure to strike out certain testimony, the overruling of the motion for a nonsuit, in the giving of certain instructions, in refusing to accept the original verdict of the jury, and in accepting the verdict which was finally rendered. After the entry of judgment, plaintiffs filed a cost bill, claiming that they should have costs to the amount of \$272.30, to which the defendant filed objections to the mileage and per diem of certain witnesses. The trial court sustained the objections and found that the plaintiffs were only entitled to \$93.30, as costs, from which ruling the plaintiffs appeal, claiming that the court committed error in sustaining the objections.

N. G. Wallace, of Prineville (M. E. Brink, of Prineville, on the brief), for appellant.

Jay H. Upton, of Prineville (Willard H. Wirtz, of Prineville, on the brief), for respondents.

JOHNS, J. (after stating the facts as above). [1] The June contract for the sale and purchase of the 200 tons of hay was executory; but when the plaintiffs paid the defendant the full amount of the purchase price in September, the defendant then sold, and plaintiffs bought and paid for, 200 tons of hay, and it then became an executed contract and was an actual sale and purchase. The defendant admits that there was an actual sale and delivery of all the hay in stacks 1, 2, 3, and 4, and that there were not 200 tons in those four stacks. The testimony is conclusive that the parties never did agree upon the amount of the shortage, and for that reason they could not agree upon a final settlement. The plaintiffs claim, and the defendant admits, that they bought and paid for 200 tons of hay. The defendant also admits that the full amount of 200 tons of hay was not in the four stacks at the time the final payment was made in September. The plaintiffs contend that they wanted and insisted upon the full amount of the hay, that it was then agreed that they should have the amount of the shortage out of stack 5, and that through the agreement they became the owners of enough hay in stack 5 to make good the shortage; in other words, that the defendant not only sold and delivered to them the amount of hay in the four stacks, but that he

also then sold and delivered to them a sufficient amount of hay in and out of stack 5 to make the full 200 tons. The defendant denies this, and upon that point there is a sharp conflict in the evidence; but the fact remains, and the defendant admits, that the plaintiffs did buy and pay for 200 tons of hay, and that there was a shortage. If only the four stacks were delivered, the plaintiffs did not get the amount of hay they bought and for which they paid. Under the terms of the contract the hay was to be fed on the premises where it was stacked, and the plaintiffs were to have the use of the meadow, and a large number of their cattle were in the pasture. It is significant that the hay in stack 5, which was the last and third cutting of the alfalfa, was stacked within 20 feet of stack 4, which the defendant admits was sold and delivered to the plaintiff, and there was a driveway between the two stacks. The jury found, and the testimony tends to show, that there was fraud in the original measurements, and that the four stacks were short in both breadth and length, and that it was the defendant who made the errors or committed the fraud. There is ample evidence in the record from which a jury could find that the defendant sold and made a symbolical delivery to the plaintiffs of enough hay from and out of stack 5 to make good the shortage in the four stacks and complete the full amount of the purchase. The defendant contends that there was no actual delivery or segregation of the hay which the plaintiff was to receive out of stack 5, that as to such portion the sale was never completed, and that for such reason replevin does not lie. That is to say, that because the plaintiffs may have been the owners of a portion only of the hay in stack 5, and that because their portion could not be segregated or identified, they cannot maintain replevin for the hay in stack 5. The testimony shows that all of the hay in that stack was alfalfa. In *Wells on Replevin*, p. 174, § 205, it is said:

"But in cases like the preceding, where the goods mixed are of the same kind, though not capable of separation by identification, yet if a separation and delivery can be made of the proper quantity without injuriously affecting the remainder, each may claim his share from the general mass, and may employ this action to secure it"—meaning an action in replevin.

In *Ruling Case Law*, vol. 23, p. 862, § 11, it is said:

"The general rule is well settled that replevin can be maintained only for specific property capable of identification and delivery, and will not lie for an undivided interest in personal property. An exception to this rule, however, is made by some authorities where the property sought to be replevined consists of a part of a large mass of the same nature and quality, such as wheat in an elevator, corn in a crib, etc., easily divisible into aliquot parts. And the

rule quite generally followed is that as to articles like wheat and the cereal grains, and the flour manufactured from them, wine, oil, and fruits of the earth which are sold, not by a description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure or count, and which are undistinguishable from each other by any physical difference in size, shape, texture or quality, there may be different owners of a common mass, each having a separate property in his share, and each entitled to sever it from the share or shares of the others, and if necessary for the preservation of his rights, to maintain replevin for the same, subject to deductions for any loss or waste properly falling to his share while the property remained in mass. So one who has the ownership of the entire mass may recover a portion thereof."

On principle, hay in the stack would come within the exception. Among others, the court gave the following instructions:

"The plaintiffs must further prove by a preponderance of the testimony that the hay claimed by plaintiffs, or some portion thereof, that is as to stack 5, was delivered to plaintiffs by defendant or pointed out or designated by defendant at some time prior to the filing of the complaint. * * *

"The plaintiffs must prove that they were the owners and entitled to the immediate possession of the hay, and in that connection you must determine whether a delivery of the 21 tons or any portion thereof was made to the plaintiff by the defendant prior to the bringing of this action. If you find from a preponderance of the testimony that there was no delivery, manual or otherwise, or by designation or the pointing out of the hay by the defendant, then the plaintiffs would not be entitled to recover, as there would be no specific hay upon which they could recover. There must be a designation of the hay, a pointing out of the hay by the defendant in order to segregate and set it apart so that a replevin action would lie."

[2] In the instant case the plaintiffs bought and paid for 200 tons of hay, and it is admitted that there was an actual delivery of the hay in the four stacks, and there is testimony tending to show that the defendant sold and delivered enough hay from and out of stack 5 to make the full amount of 200 tons, and the jury found that it took 21.4 tons additional hay to complete the contract. In the first instance the jury found a verdict that the plaintiffs were the owners and entitled to the possession of 21.4 tons of alfalfa hay and fixed its value at \$428. The court refused to accept this verdict, and after further deliberation the jury returned a verdict that the plaintiffs were the owners and entitled to the possession of that amount of hay and that "in case the delivery of the said hay cannot be had, then that plaintiffs have judgment against the defendant for the sum of five hundred and thirty-five (\$535.00) dollars." Appellants claim that the court erred in refusing to accept the original ver-

dict, and that the final verdict is not sound for the reason that the jury did not find the value of the hay. The complaint alleges that on November 1, 1919, the 21.4 tons of alfalfa hay was then and now is of the value of \$535, and that by reason of the wrongful and unlawful possession thereof by the defendant the plaintiffs have been damaged in the sum of \$535. The answer alleges that on November 1, 1919, the defendant was then and is now the owner of the 21.4 tons of alfalfa hay in the stack, "which said hay was and still is of the value of five hundred thirty-five dollars." The jury having found that the plaintiffs were the owners and entitled to the possession of the 21.4 tons of hay, and the defendant claiming to be the owner of that amount of hay and also alleging that it had a value of \$535, the verdict of the jury is both definite and certain as to the amount and value of the hay. After a careful examination of the record and appellant's numerous assignments of error on the admission of evidence, including the instructions of the court, we hold that there was no prejudicial error and that the defendant had a fair trial.

[3] The cross-appeal of the plaintiffs is based upon the following facts: On the first day of the March term of the circuit court of Crook county for 1920, the cause was at issue upon the original complaint, and answer which was in the form of a general denial, and all of the witnesses for the plaintiffs were under subpoena and present for the trial. After the case was at issue and on the first day of the term, plaintiffs asked and obtained leave to file an amended complaint, which they did on March 13, and on the 15th the answer was filed. On the 16th the case was set down for trial on the 17th, and during all of this time the plaintiffs' witnesses were under subpoena in attendance upon court. In their cost bill, the plaintiffs claimed per diem for their witnesses from March 8. Upon the objections of the defendant the court allowed a per diem of two days only. The question involved is one of practice. Although the case was at issue on March 8, the first day of the term, it does not appear that it was set down for trial until March 17. Plaintiffs claim that under the practice of the circuit court of that county they were required to have their witnesses present and in court on the first day of the term, otherwise they would not have been subpoenaed. It is not for this court to say what should or should not be the rules or practice of any trial court. Suffice it to say that much expense would be saved and trouble avoided if cases could be set down for trial in advance for a day certain, which seems to be the practice in many districts; but we do not know of any rule of law by which either party to a lawsuit is entitled to recover costs for witnesses who were in at-

tendance upon the court before the case was set down for trial.

Judgment is affirmed.

BURNETT, C. J., and BEAN and HARRIS, JJ., concur.

(60 Mont. 97)

LEHMAN v. SUTTER et al. (No. 4328.)

(Supreme Court of Montana. May 23, 1921.)

1. Mines and minerals §38(9)—Plaintiff need not allege facts to show adverse claim without foundation, but if he does he is bound on demurrer by facts alleged.

In an action under Rev. St. U. S. § 2326 (U. S. Comp. St. § 4623), to determine an adverse claim to a mining location, plaintiff, in his complaint, may confine himself to appropriate allegations showing his right to the ground covered by his location, and it is not necessary for him to go further and show that defendants' adverse claim is without foundation, but, where he assumes to do this, and defendants demur, the question for decision is whether, assuming plaintiff's allegations to be true, they so far impeach the validity of defendants' locations, or any of them, as to put the defendant on the defensive.

2. Pleading §214(3)—Demurrer admits truth of allegations.

Where plaintiff, in action in pursuance of Rev. St. U. S. § 2326 (U. S. Comp. St. § 4623), to determine an adverse claim to mining locations, unnecessarily attempts in his complaint to show that defendants' adverse claims are without foundation, a demurrer admits the truth of plaintiff's allegations in this behalf.

3. Mines and minerals §38(9)—Allegations in complaint in suit to determine as to defects in recorded certificates of claims held immaterial.

In view of Rev. Codes Mont. § 2293, providing that defective locations are good against persons with notice, allegations in the complaint in an action to determine adverse claims under Rev. St. U. S. § 2326 (U. S. Comp. St. § 4623), as to defects in recorded certificates of adverse mining claims, are wholly immaterial where plaintiff made his locations with knowledge of the prior locations.

4. Mines and minerals §27(3)—Location based upon discovery within valid subsisting claim absolutely void.

An attempted location of a mining claim based upon a discovery within a then valid and subsisting claim is absolutely void for the purpose of founding an adverse claim, and does not attach on the subsequent failure of the first locator to do the required annual assessment work, and a location of a mining claim at a time when a senior locator is not in default under state or federal laws is subordinate to a relocation by a stranger made after the rights of the first locator, lapsed because of such default, under Rev. St. U. S. §§ 2319, 2322 (U. S. Comp. St. §§ 4614, 4618).

5. Mines and minerals \S 26—Locator may relocate own claim except to avoid annual labor.

Under Rev. St. U. S. \S 2324 (U. S. Comp. St. \S 4620), and Rev. Codes Mont. \S 2289, a locator or claimant of a mining claim may at any time relocate his own claim for any purpose except to avoid the doing of annual labor thereon, subject to the proviso that the relocation must comply in all respects with Rev. Codes Mont. $\S\S$ 2283, 2284, 2286.

6. Mines and minerals \S 24—Abandonment of mining location did not affect rights of cotenant.

Where part of cotenants of mining locations abandoned them by relocating other claims covering the same ground, such abandonment did not affect the rights of the other cotenants, whose interests remained unaffected by the abandonment; the former locations remaining valid and subsisting claims, and the relocations being void.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Oswald Lehman against Julian A. Sutter and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Edgar G. Worden and Blackford & Hutton, all of Lewistown, for appellant.

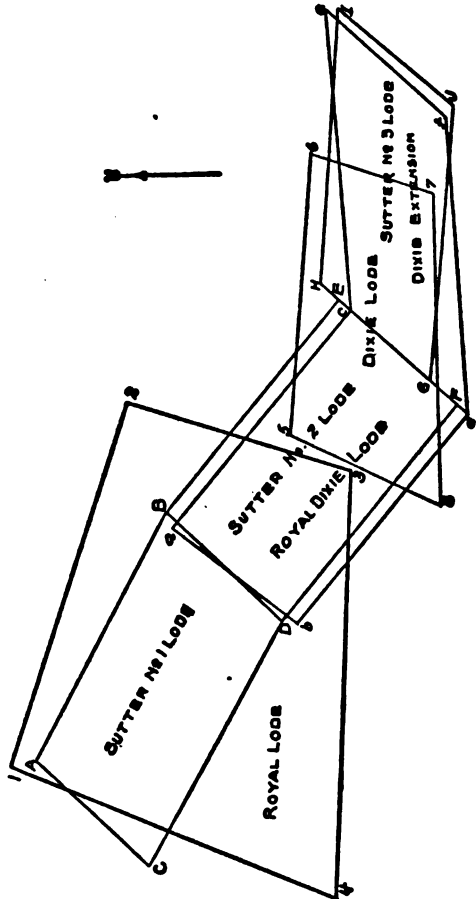
J. E. Wasson, of Hilger, and Charles J. Marshall, of Lewistown, for respondents.

BRANTLY, C. J. This action was brought in pursuance of section 2326 of the Revised Statutes of the United States (U. S. Comp. St. \S 4623), to determine an adverse claim to the Royal Dixie and Dixie Extension lode mining claims, situate in Fergus county, of which plaintiff alleges he is the owner. To his second amended complaint, the defendants Julian A. Sutter, Eduard Sutter, and C. B. Noble demurred, on the ground that it did not state facts to constitute a cause of action, and that it was ambiguous, unintelligible, and uncertain. One Claudia Wegner was made a party defendant, but she did not appear in the court below by demurrer or otherwise. The court by a general order sustained the demurrer, and, plaintiff declining to plead further, rendered judgment dismissing the action. Plaintiff has appealed.

The pleading is very voluminous. It alleges in detail the several steps taken by plaintiff in making location of his claims. It then sets forth the facts upon which defendants predicate their claim, and proceeds to allege the conditions existing at the time their locations were made, for the purpose of impeaching their validity, and thus to make it manifest that their claim of title is without foundation. The following statement will be sufficient to present the questions submitted for decision:

The Royal Dixie and the Dixie Extension locations were made by plaintiff on April

21 and May 8, 1917, respectively. Amendments of both of these were made on July 26, 1917. Defendants base their claim upon three conflicting locations, designated as Sutter No. 1, No. 2, and No. 3. No. 1 was located on May 15, and the others on March 15 and 22, 1916, respectively. The two Sutters and Noble were the locators. The claims of both plaintiff and defendants are relocations of ground which had theretofore been substantially covered by claims known as the Dixie and Royal, located by one Henry Nietert on June 5 and October 4, 1909, respectively. These had been represented for each year up to and including the year 1915. On July 14, 1916, Nietert conveyed an undivided nine-tenths interest in them to the defendants, the two Sutters and C. B. Noble. On September 12, 1916, he conveyed the remaining interest to Claudia Wegner. The subjoined diagram illustrates the relative situation of the several claims and the extent of the conflict between those of plaintiff and defendants.



The Royal and Dixie are designated by the numerals 1, 2, 3, 4, and 5, 6, 7, 8; the Sutter claims by the capital letters A, B, C,

D; B, E, F, D, and G, H, I, J; and the Royal Dixie and Dixie Extension by the small letters a, b, c, d, and c, d, e, f. The point of discovery on the Sutter No. 1 is some distance to the west of the line "B D." This claim is therefore not involved in this controversy, except to the extent of the small area included in the triangle which has its base at "a." The points at which the discoveries of the Sutter No. 2 and No. 3 were made are within the area covered by the Royal Dixie and the Dixie Extension, though they are not indicated on the diagram.

To show the invalidity of defendants' locations, the plaintiff alleges that, in making the locations of the Royal and the Dixie, Nietert fully complied with the laws of the United States and the state of Montana relating to discovery, marking the boundaries, doing the preliminary work, and the making and recording of the certificates of location; that he thus became entitled to the possession of the ground covered by them, and thereafter continued to be entitled to the possession by doing, or causing to be done, the annual assessment work upon them for each year up to and including the year 1915, and until he made conveyance to the two Sutters, Noble, and Claudia Wegner; that each of the Sutter claims was relocated on September 14, 1916, by the defendants other than Claudia Wegner, while the ground was held by Henry Nietert and his grantees, the defendants, under and by virtue of the location of the Dixie and Royal lode claims, and that for this reason the ground covered by these claims was not then unoccupied, unappropriated public land of the United States; that the certificates of location of the Sutter claims do not contain such a description, by reference to natural objects or permanent monuments, as will identify them; that on the Sutter No. 1 and Sutter No. 3 no location work was done by the running of cuts or the sinking of shafts, as required by the statutes of Montana, and that for these several reasons they are not now, and never have been, valid and subsisting claims, and, being in conflict with plaintiff's claims, constitute a cloud upon his title. It is further alleged that Claudia Wegner claims an interest in the Royal and the Dixie claims, but that her interest therein was abandoned by reason of the failure by her and her codefendants to do any assessment work on them for the year 1916, and hence that her claim is wholly without right. It further appears inferentially that, at the time plaintiff located the Royal Dixie and the Dixie Extension, he knew of the existence of the Sutter locations.

[1, 2] The amended complaint is not a model pleading. It would have been entirely sufficient if plaintiff had confined himself to appropriate allegations showing his right to the ground covered by his locations, and left

it to the defendants to disclose the nature of their claim. It was not necessary for him to go further, and show that defendants' adverse claim is without foundation. *Woody v. Hinds*, 30 Mont. 189, 76 Pac. l. Since, however, he has assumed to do this, and the demurrer admits the truth of his allegations in this behalf, the question submitted for decision is whether, assuming the plaintiff's allegations to be true, they so far impeach the validity of the Sutter locations, or any of them, as to put the defendants upon the defensive.

[3-5] In view of the fact that plaintiff made his locations with knowledge that the defendants were claiming the ground under the Sutter locations, the allegations touching defects in the recorded certificates of these claims become wholly immaterial. Revised Codes, § 2293. They may be passed without further notice. The important question presented is whether the ground in controversy was vacant at the time the Sutter locations were made, or, if not, whether the conveyance of them by Nietert put the defendants—the Sutters and Noble—in position to make valid relocation of the Sutter claims. That the earlier location of them was invalid there can be no question. The Royal and Dixie being themselves valid and subsisting locations, the ground was not public domain, and therefore not open to exploration and purchase under the federal statute. U. S. Rev. Stat. § 2319 (U. S. Comp. St. § 4614).

Section 2322, Rev. St. U. S. (U. S. Comp. St. § 4618), guarantees the exclusive right of possession to the prior locator, and thus excludes the idea that any one else may enter thereon for any purpose during the life of a prior location. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Brown v. Gurney*, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Farrell v. Lockhart*, 210 U. S. 142, 28 Sup. Ct. 651, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; *Street v. Delta Mining Co.*, 42 Mont. 371, 112 Pac. 701. The law on this subject is well stated in volume 18 R. O. L. at page 1136, as follows:

"A valid location of a mining claim, so long as it is in full force and effect, operates as a bar to a second location of the premises so claimed. Hence it is a general rule that an attempted location of a mining claim, based upon a discovery within a then valid and subsisting claim, is absolutely void for the purpose of founding an adverse claim, and does not attach upon the subsequent failure of the first locator to do the required annual assessment work; and a location of a mining claim at a time when a senior locator is not in default under state or federal laws is subordinate to a relocation by a stranger made after the rights of the first locator lapsed because of such default."

The rule thus stated is conclusive as to the validity of the Sutter claims when they were

first located. Did the ground become subject to relocation by reason of the conveyance of the Royal and Dixie claims by Nietert to the defendant? This inquiry, we think, must be answered in the negative. Under the provisions of section 2289 of the Revised Codes, the locator or claimant may, at any time, relocate his own claim for any purpose except to avoid the doing of annual labor thereon required by the federal statute (U. S. Rev. Stat. § 2324 [U. S. Comp. St. § 4620]), subject to the proviso, however, that the relocation must comply in all respects with sections 2283, 2284, and 2286 of the Revised Codes.

[8] It will be noted that defendant Wegner was not one of the locators of the Sutter claims and that she did not join in relocating them. The relocation of the Sutter claims, so far as the two Sutters and Noble were concerned, was an abandonment of the Royal and Dixie locations. This, however, did not affect the rights of Wegner under her conveyance from Nietert. Her interest remained unaffected by the abandonment by them of their interest. She became their cotenant by virtue of the conveyance by Nietert. They, therefore, could not pursue such a course of conduct as to destroy her interest. She retained it under the conveyance until such time as she chose to convey it to some other person, or until she had concluded to abandon it. As the Nietert interest was based upon valid subsisting locations, in the absence of some act on her part tantamount to an abandonment, the Royal and Dixie claims were still valid and subsisting claims at the time the Sutter relocations were made. It continued so until the year 1916, for the complaint alleges that Nietert owned and possessed these claims and did the annual representation work thereon up to and including the year 1915. The work done during the year 1915 was sufficient to preserve Nietert's right until the 31st of December, 1916. *McKay v. McDougall*, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395. Under the application of the rule above the relocations were void, and the two Sutters and Noble were in no better position by reason of them than when they made the first locations. The result is that they acquired no right by virtue of their relocations. By reason of the fact that neither they nor Wegner did or caused to be done the annual representation work for the year 1916, the Nietert claims became subject to forfeitures, and thus became subject to relocation by plaintiff or any other person who chose to relocate them. They were in condition to be forfeited, and were forfeited by the locations made by plaintiff.

Aside from these considerations, it is alleged that the excavation work required by the statute on the Sutter No. 1 and Sutter

No. 3 was not done when they were relocated. This is expressly required upon relocation by the owner of his own claim. Rev. Codes, § 2289. The failure to do this then or thereafter, and before plaintiff made his locations, rendered the attempted relocation of them nugatory. It is a question whether the plaintiff's allegation on this subject should not have been broad enough to negative the idea that this work was done prior to the making of his locations. We do not venture to decide this question here, because counsel have not referred to it in their briefs. We call attention to it for the reason that the statute declares that the period of time prescribed for the performance of any act shall not be deemed mandatory when the act shall have been performed before the rights of third parties have intervened. We are of the opinion that the other facts alleged in the amended complaint are sufficient to require an answer by the defendants. We think, also, that it does not merit condemnation on any of the grounds alleged in the special demurrer.

The judgment is reversed, and the cause is remanded to the district court, with directions to set aside the judgment and overrule the demurrer.

Reversed and remanded.

REYNOLDS, COOPER, HOLLOWAY, and GALEN, JJ., concur.

(22 Ariz. 484)

WEST COAST CATTLE CO. v. AGUILAR.
(No. 1889.)

(Supreme Court of Arizona. July 5, 1921.)

1. Animals ¶23(2)—Instruction submitting liability for cattle lost before delivery to agister held erroneous.

In an action to recover the value of cattle which plaintiff delivered to defendant to be kept by defendant and sold for plaintiff's account, where the evidence showed that defendant received the cattle from another corporation without account or check, and it was undisputed that some of the cattle not accounted for had died or become lost before they were delivered to defendant, an instruction submitting to the jury the question whether those cattle died or were lost because of the negligence of the defendant was erroneous.

2. New trial ¶162(1)—Denial on remittitur held erroneous where items allowed by jury could not be identified.

In an action for the value of cattle delivered to defendant to be cared for and sold on plaintiff's account, where the court had submitted the issue of defendant's liability for cattle which had died or become lost before delivery to defendant, and also the question whether defendant was negligent in permitting the Mexican military authorities to take

some of the cattle from his possession, a ruling of the trial court denying a new trial after plaintiff remitted the excess of the amount allowed by the jury over the amount properly allowable for the cattle taken by the military authorities assumed that the jury found the defendant liable for those cattle, and not that it allowed plaintiff for the cattle which died before they were delivered to defendant, and was erroneous.

Appeal from Superior Court, Santa Cruz County; S. L. Pattee, Judge.

Action by F. F. Aguilar against the West Coast Cattle Company. Judgment for defendant after plaintiff had remitted a portion of the award by the verdict, and defendant appeals. Reversed and remanded, with directions to grant a new trial.

Kingan, Campbell & Conner, of Tucson, for appellant.

S. F. Noon and Duane Bird, both of Nogales, for appellee.

ROSS, C. J. Plaintiff-appellee sued defendant-appellant for damages for breach of contract. It is alleged in the complaint that plaintiff, under a written contract dated February 10, 1915, turned over to defendant large numbers of mixed cattle to be cared for and sold as soon as possible by defendant, who was to account to plaintiff therefor at named prices; that the defendant has failed and refused to account for 770 head, valued at \$12,850.

The defendant, in its answer, admits the contract as alleged; admits taking over large numbers of cattle from plaintiff; says that it has performed its part of the contract by selling and accounting for many of said cattle.

It is further alleged that defendant's ranches and plaintiff's cattle were during all the time in the republic of Mexico, and that during the year 1915, and for some time prior and subsequent thereto, there existed in said republic a state of civil war; that many of plaintiff's cattle were in such a bad condition when turned over to defendant, from hard handling or other causes, that they died without defendant's fault; that others were forcibly taken from defendant by the military forces of the state of Sonora; that the fences of the pastures in which such cattle and others were kept were cut and said cattle stolen and driven away by marauding bands or parties; that it had in its possession at the time of the bringing of said suit, February, 1918, not to exceed 60 head of plaintiff's cattle, which it is ready and willing to redeliver to plaintiff, or as soon as possible ship and dispose of and account to plaintiff for the proceeds thereof.

The case was tried to a jury, and a verdict for plaintiff for \$4,800 was returned. Upon motion for a new trial, the court came to the

conclusion that the verdict was excessive in the sum of \$980, and ordered a new trial unless plaintiff, within 30 days, should agree to deduct that amount from the verdict. The plaintiff filing his consent to such reduction, judgment was entered for \$3,840, and defendant appeals.

The defendant complains of the court's instructions, and also of the court's order refusing a new trial. Before stating in what particular, it is necessary to state such evidence as will make defendant's assignments intelligible.

The Alamo Cattle Company, a Mexican corporation, on May 16, 1914, entered into the same kind of an arrangement or contract with the plaintiff as the one the plaintiff had with the defendant, West Coast Cattle Company, and, under its contract, the Alamo Company had taken over 1,909 head of cattle from plaintiff. It had, prior to the date of defendant's contract, sold and accounted to plaintiff for 757 head. On February 10, 1915, the Alamo Company turned over whatever was left of the 1,909 head to the defendant company, the latter company acknowledging the receipt by attaching its signature to the receipt that the Alamo Company had executed to the plaintiff on May 16, 1914. The cattle, however, were not counted or checked. There should have been, in the absence of any loss, 1,152 head in the turn-over.

Plaintiff, in addition, turned over to defendant company in August 1915, 335 head. Defendant sold and accounted for to plaintiff 717 head. All told, plaintiff turned over to the Alamo Company and the defendant 2,344 head of cattle, and the two companies had accounted for 1,474, leaving unaccounted for 770. It was for the value of these that the plaintiff sued defendant.

While the Alamo Company and defendant company were officered and controlled largely by the same persons, and associated together in order to protect plaintiff's cattle, as alleged in defendant's answer, it is conceded that they are two distinct concerns, and that neither is liable for the acts or conduct of the other.

This distinct or separate liability should be borne in mind, therefore. If any of the 770 head sued for were converted by, or lost or destroyed because of the negligence of, the Alamo Company, it, and not the defendant, should respond in damages, the defendant being liable in damages to plaintiff for only such cattle as it may have converted or by its negligence lost after the cattle were turned over to it. Of the 770 cattle sued for, it is unquestioned that 100 bulls died while in the care and possession of the Alamo Company and before defendant assumed any control or care of them. The evidence also shows, as defendant asserts—and this assertion is not questioned by plaintiff—that some 300 or

400 head of other cattle died prior to February 10, 1915, and before defendant took possession of plaintiff's cattle under its contract of that date. Deducting the losses occurring before defendant's liability began, on the basis of the above figures—100 bulls and 300 or 400 other cattle—from the 770 sued for, we have 270 that defendant should account for, either in cash or by explanation exculpating it from negligently suffering their loss or destruction.

[1] Notwithstanding the evidence seems to be all one way, and to the effect that defendant had nothing to do with the 100 bulls that died, still the court submitted to the jury the question as to whether they died because of the negligence of the defendant, implying thereby, of course, the defendant might be held liable for the value of the 100 bulls. The instructions are so worded also as to have allowed the jury to consider defendant's liability for the other 300 or 400 cattle that died while in the possession and control of the Alamo Company, or at least that is the defendant's contention. They were part of the cattle being sued for, and, although the evidence showed no liability on the part of the defendant, the jury was not advised of that fact.

[2] The verdict was for \$4,800. The jury had been told by the court that, if they found in favor of plaintiff, they should assess his damages at \$16 a head, the lowest price fixed under the contract. The jury, therefore, must have found defendant liable for 300 head of the 770 sued for. The court, in passing upon the motion for a new trial, stated:

"The evidence justifies the conclusion, taking the undisputed figures, that at least 225 head of cattle were taken by the alleged military forces. Others were lost in other manners, amounting to practically, using the evidence most favorably to the defendant, of at least 15 head, making a total of 240 head, the liability for which was a question to be determined by the jury."

It will be noted that the court has undertaken to say what 240 head should be charged against defendant. Remembering that defendant's contention in its answer and evidence was that some of the cattle sued for had been taken by military forces, and some stolen, and others had died because of their poor condition when turned over to it, and that all of such losses were without its fault, and that the jury were told these defenses were good if established, it is not at all certain that the jury's conclusion was that defendant had negligently allowed the military to take 225 head of said cattle. The 300 head the jury charged against defendant may have been made up of these 225, or the jury might have felt defendant was helpless to resist the military and without fault in connection with this loss. The 100 bulls may have entered

into their verdict. It was the duty and province of the jury to determine from the evidence whether defendant had failed to exercise proper and reasonable care in looking after and disposing of plaintiff's cattle, or whether he had so negligently and carelessly performed his duty in that regard as to become liable to plaintiff in damages, and of course in that connection they necessarily found some of the 770 were lost (470 to be accurate) without defendant's fault, and 300 with defendant's fault. Since the jury were not restricted by the instructions to a consideration of losses and damages occurring to cattle subsequent to their possession being turned over to defendant, and since it is possible they may have charged defendant with losses that occurred while the cattle were in the possession of the defendant's predecessor in their management and care, we do not think it was a proper case for the court to order a remittitur. It is not a case of excessive damages, but one in which it is not possible to identify the particular wrong or wrongs for which the jury assessed damages.

For the errors noted in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions that defendant be granted a new trial.

BAKER and McALISTER, JJ., concur.

(22 Ariz. 490)

HORTON v. HORTON. (No. 1893.)

(Supreme Court of Arizona. July 5, 1921.)

1. Divorce \Leftrightarrow 320—Marriage in foreign state to evade restrictions of state of domicile held not invalid.

Where parties domiciled in Arizona went to New Mexico for the purpose of evading the restrictions provided by Civ. Code 1913, par. 3864, as amended by Laws 1917, c. 54, forbidding remarriage for one year after divorce, and were there married, such marriage was not thereby rendered invalid in Arizona, the statute not in terms or by necessary implication declaring such marriage void.

2. Marriage \Leftrightarrow 3—Marriage valid according to *lex loci* valid everywhere at common law.

Marriage is primarily a contract and under the common-law rule is valid everywhere if entered into according to the *lex loci*.

3. Marriage \Leftrightarrow 2—Legislature may determine what marriages shall be void, notwithstanding they are valid in state where celebrated.

It is within the power of the Legislature to enact what marriages shall be void within the state, notwithstanding they are valid in the state where celebrated, whether contracted between parties who were in good faith domiciled within the state where the ceremony was performed or between parties who left the state for the purpose of avoiding its statutes.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Action by L. J. Horton against Annie Horton, for annulment of marriage. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

Phillips, Cox & Phillips and C. F. Ainsworth, all of Phoenix, for appellant.

Earl Anderson, of Phoenix, for appellee.

BAKER, J. This action was brought by the plaintiff (the parties will be designated in this court as they were in the court below) to obtain a judgment annulling the marriage between the plaintiff and the defendant, celebrated in Deming, N. M., on the 12th day of September, 1918, on the ground that such marriage was void. It appears from the findings of the lower court that the parties both resided in the state of Arizona at the time they contracted the marriage in New Mexico, and that they have ever since retained such residence. It further appears that the defendant was formerly married to one William Crawford, but that on the 1st day of August, 1918, she was granted an absolute divorce from her husband by the superior court of Maricopa county, Ariz. For the purpose of avoiding the restrictions of the laws of Arizona, prohibiting the marriage of a divorced person until after the expiration of one year from the time the divorce is granted, the parties went to Deming, N. M., and were there married. They immediately returned to this state and lived together as husband and wife until about the 26th day of February, 1920, when the defendant drove plaintiff from the house, since which time the parties have lived separate and apart.

The lower court determined that the marriage in Deming, N. M., was void, and entered a judgment annulling it for the reason and on the ground that such marriage was consummated prior to the expiration of one year from the date of the divorce granted to the defendant.

The provisions of the statutes of this state on the subject are contained in section 3839, Revised Statutes 1913, and section 3864, as amended by chapter 54, Session Laws 1917, p. 75:

"3839. All marriages valid by the laws of the place where contracted, shall be valid in this state; provided, that all marriages solemnized in any other state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state; parties residing in this state cannot evade any of the provisions of its laws as to marriage by going into another state or country for the solemnization of the marriage ceremony."

"3864. A divorce from the bonds of matrimony shall not in any wise affect the legitimacy of the children thereof; and either party may, after the dissolution of the marriage, marry

again only after one year shall have elapsed from the date of judgment of such divorce; provided however, that if proceedings are begun prior to the expiration of the said one year to set aside said judgment of divorce, then and in that event said parties to the divorce, or either of them, may not marry again until the said proceedings shall have been determined."

[1] It is conceded that by the laws of New Mexico the marriage between the parties when consummated there was lawful in that state. Does the fact that the parties, being domiciled in this state, left here and went to New Mexico for the purpose of evading the restrictions provided in section 3864 and were there married, render such marriage invalid in this state? We do not think so. It will be observed that the statutes above cited do not in terms, or by necessary implication, declare such a marriage void. The statutes merely in general terms prohibit such a marriage. No penalty is affixed for disobedience.

There is some conflict of authority as stated in 5 R. C. L. 1004—

"Upon the question whether the courts of the state which has enacted such a statute merely in general terms prohibiting such marriage will recognize as valid the marriage of such person occurring out of the state while he is still domiciled within the state. The weight of authority is that if the marriage is valid according to the *lex loci*, it will be upheld even by the courts of the state which enacted the statute, and in which the parties to the remarriage are domiciled, even though the parties went out of the state to solemnize the second marriage for the express purpose of evading the law of the domicile and of the forum."

In *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, the Supreme Court of Massachusetts, in an opinion by Mr. Chief Justice Gray, says:

"A marriage which is prohibited here by statute because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the state shall have no validity here. This has been repeatedly affirmed by well-considered decisions."

And this seems to be the overwhelming weight of the better reasoned cases on the subject. *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 37, 40 Am. Rep. 505; *Thorpe v. Thorpe*, 90 N. Y. 602, 43 Am. Rep. 189; *Griswold v. Griswold*, 23 Colo. App. 365, 129 Pac. 560; *Phillips v. Madrid*, 83 Me. 205, 22 Atl. 114, 12 L. R. A. 862, 23 Am. St. Rep. 770; *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. St. Rep. 936, and notes; *State v. Hand*, 87 Neb. 189, 126 N. W. 1002, 28 L. R. A. (N. S.) 753; *Conn*

v. Conn, 2 Kan. App. 419, 42 Pac. 1006; Dudley v. Dudley, 151 Iowa, 142, 130 N. W. 785, 32 L. R. A. (N. S.) 1170; Hoagland v. Hoagland (Wyo.) 193 Pac. 843; Hilton v. Stewart, 15 Idaho, 150, 96 Pac. 579, 128 Am. St. Rep. 48.

A number of cases take a contrary view, but an examination of these cases will show that they were based upon statutes expressly declaring the marriages (1) void, or (2) declaring incapacity to contract, or (3) which by express terms suspended the operation of decrees of divorce, or were held to suspend it by necessary implication, or (4) such statutes were held to be declarations of public policy, superseding the *jus gentium* that a marriage valid where performed is valid everywhere. This distinction is pointed out in *Griswold v. Griswold*, supra. The cases we refer to are collated in 19 C. J. 183, and footnotes, the principal ones being *Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085; *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835; *In re Stull's Estate*, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776.

[2] Marriage is primarily a contract. In its constitution it is purely personal and consensual. Considered merely as a contract, it is valid everywhere if entered into according to the *lex loci*. This is the common-law rule. The statute recognizes the common-law rule, "all marriages valid by the laws of the place where contracted shall be valid in this state." The reason for this rule is clearly stated by Mr. Justice Story in his *Conflict of Laws* (7th Ed.) par. 121, where he quotes from the opinion of Sir Edward Simpson in the historic case of *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395:

"All civilized nations allow marriage contracts. They are *jus gentium*, and the subjects of all nations are equally concerned in them. Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, succession, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the laws of the country where they are celebrated. By observing this rule few, if any, inconveniences can arise. By disregarding it, infinite mischiefs must ensue."

[3] The Legislature undoubtedly had the power to enact what marriages shall be void in this state, notwithstanding their validity in the state where celebrated, whether con-

tracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who, being domiciled in this state, left the state for the purpose of avoiding its statutes and married. But the Legislature has not seen fit to do so. If the Legislature in so many words had said that, if persons residing in this state, in order to avoid the restrictions contained in section 3864, and with the intention of returning to reside in this state, go into another state and there have their marriage solemnized, and after return and reside here, their marriage shall be deemed void in this state, an entirely different state of matters would exist.

The decree of divorce granted by the superior court of Maricopa county to the defendant, Annie Horton, was absolute. Essentially it undid the marriage, and those who were united in it were disunited. The prohibition contained in the statute did not render the judgment intermediate or interlocutory, nor did it impair its integrity. She went into another state and there married. The prohibition contained in the statute was without effect outside the territorial limits of this state.

"It is almost universally conceded that statutes prohibiting the guilty party to a judgment of divorce from marrying again, either for a certain period, or while the other party to the former marriage lives, are without effect outside the territorial limits of the prohibiting state. Since such a prohibition is in the nature of a penalty it does not apply to divorces granted outside of the state, nor does it carry any disability beyond the borders of the state where in force." 5 R. C. L. 1004.

In view of all the facts and circumstances disclosed by the record, we are of the opinion that the marriage in New Mexico was not void. While the defendant was forbidden to marry again in this state until after the expiration of one year from the time the divorce was granted, she could contract a marriage in New Mexico which, if valid there, will be recognized by the courts of this state. To hold otherwise would render a number of marriages in this state void, and possibly cast an ugly suspicion upon the legitimacy of innocent children.

If our views shall be found inconvenient or repugnant to sound principles, it may be expected that the succeeding Legislature will explicitly enact that marriage contracted within another state by parties who have left this state for the purpose of avoiding its laws, and who return and live here, shall be of no force in this state.

The judgment of the lower court is reversed, with instructions to dismiss the action.

ROSS, O. J., and McALISTER, J., concur.

(58 Utah, 353)

In re BURT'S ESTATE. (No. 3605.)

(Supreme Court of Utah, June 9, 1921.
Rehearing Denied June 20, 1921.)1. Executors and administrators \S 11(1)—
Executor held not in fault for bringing action
to quiet title to land claimed by an heir.

On an accounting by an executor, held, on objections to allowing expense of a suit by him, that he was not in fault for bringing the suit, which was to quiet title to land claimed by one of the heirs under a conveyance from the deceased not recorded by the heir until seven months after the ancestor's death, though executed several years before, where there was dispute among the heirs, some of them urging such action, and it appeared that the tenants who had been occupying the land had continually recognized the deceased as the owner.

2. Executors and administrators \S 37(3)—
Heir claiming land against estate not entitled
to appointment on resignation of executor.

Under Comp. Laws 1917, § 7597, providing for the grant of letters to persons entitled to administration authorizing the court for good and sufficient reason to appoint any competent person, the court properly appointed a disinterested person as against the claims of an heir against whom the executor, who was then resigning, had instituted suit to quiet title to land claimed by such heir under a deed long unrecorded.¹

Appeal from District Court, Box Elder County; J. D. Call, Judge.

In the matter of the estate of Ann H. Burt. From an order approving the executor's account fixing his compensation and counsel fees and from an order naming an administrator to succeed the executor resigning; contestant appeals. Affirmed, with costs to appellant.

Ricy H. Jones and Le Roy B. Young, both of Brigham City, for appellant.

Wm. Lowe and Chas. E. Foxley, both of Brigham City, for respondent.

GIDEON, J. Ann H. Burt died testate in Box Elder county, this state, on the 4th day of December, 1916. By her last will she named Thomas H. Blackburn as executor. The will was admitted to probate on the 3d day of January, 1917, and the executor was confirmed by an order of court. He immediately qualified and entered upon his duties as such, and continued to administer the estate until the 17th day of January, 1920. On this last date he filed a petition, accompanied by an account of his administration up to that time, and asked for the approval of the account. He also tendered his resignation, and petitioned the court to be relieved from further acting as executor. By an order of court made on the 17th day of January, 1920, a hearing on the final account

and the resignation was set for February 9, 1920. Notice was directed to be given the heirs and interested parties as required by law. At the date of hearing objections were interposed to the account, and also to the court's accepting the resignation. Application for a continuance was made by the objecting heirs. This was overruled, and the court proceeded to take testimony, after which it made an order approving the final report and account of the executor, accepted his resignation, and appointed a successor. In the order approving the account the court allowed the executor the sum of \$100 as extra compensation for extraordinary services claimed to have been performed by him, and also fixed the amount of counsel fees to be allowed the executor's counsel in the sum of \$300. The court, at the same hearing, designated one Charles E. Foxley, an attorney at law, as the administrator with the will annexed to complete the administration of the estate. The appeal is from the order of the court approving the account, fixing the executor's compensation as well as counsel fees, and from the order naming Foxley as administrator.

One of the contestants, Ricy H. Jones, being the eldest son of the deceased, had requested to be named administrator, and claimed such right by reason of being an interested party and the eldest son of the deceased.

There is much in the record in the way of affidavits, counter affidavits, motions, and objections, which is immaterial so far as the questions presented by this appeal are concerned.

Appellant contends: That the executor did not proceed to administer the estate in good faith; that the institution of a certain suit on his part was unauthorized, and was not in the reasonable discharge of his duties; that the facts surrounding the ownership of the real estate sought to be obtained for the estate were known to the executor, and were such that a recovery could not be had; that in instituting such action he was not acting in good faith, and should not be permitted to use the estate's funds for the payment of the expenses of the prosecution of the suit; also that the court exceeded its authority in naming Charles E. Foxley administrator, and in refusing the application of appellant Jones.

It appears that during the life of the deceased she owned several pieces of real estate located in Brigham City; that some years prior to her death she had conveyed separate pieces to some of her sons, and had taken back from such grantees what are designated and known as life leases. At the time of her death at least one of the deeds claimed to have been given conveying certain property to her eldest son, had not

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Citing In re Slater's Estate, 184 Pac. 1017.

been recorded, and was not recorded until something like seven months after the death of the testatrix. The executor, in the discharge of his duties, and at the request of several of the heirs, instituted action to quiet title to this property, and claimed the same on behalf of the estate. That action was instituted and was in the courts for several years. Prosecuting the action on the part of the executor is charged as being without reasonable or probable cause, and the action of the executor in the institution of the suit is claimed to have been in bad faith.

[1] It would subserve no good purpose to review the evidence. Suffice it to say that we are satisfied that the executor not only did not abuse his privileges and duties, but, under the facts shown, was acting the part of a reasonable and ordinarily prudent man in bringing suit to determine whether the estate was the owner of that particular property. At the time of the death of the testatrix the title to that property stood in her name, and it appears from the record that she was then in possession of this particular piece of real estate, and had been for a number of years. The deed claimed to have been executed by the deceased, conveying the property to appellant Ricy H. Jones, bears date of May 24, 1911, and was recorded July 21, 1917, some seven months after the death of the testatrix. Tenants occupying the premises had paid rent to the deceased and recognized her as the landlady entitled to the possession of the same. The duties of an executor or administrator are clearly stated in Woerner, *Am. Law of Administration* (2d Ed.) star page 677, as follows:

"Executors and administrators are bound to prosecute all actions that may become necessary to recover debts owing to the estate, or property of any kind, and to protect the interest of the estate whenever the same is jeopardized. To this end they must act not only with honest intent and perfect integrity, but also with promptness and diligence and reasonable prudence and foresight."

The executor in this estate, in determining his duty in the premises, was confronted with this state of facts: He found real property that had been in the possession of the testatrix at the date of her death. The record title to such property was in the name of the deceased at the date of his appointment. Some seven months afterwards a deed is produced by one of the heirs and recorded, bearing date five years before the death of the testatrix. Some of the heirs are insistent that the property belongs to the estate, and that the executor take action

to recover and quiet the title in the estate. It would indeed be a harsh rule for a court to hold that under such state of facts the executor dare not take action to recover the property without assuming the risk of having the costs of such proceeding taxed against him personally in the event of failure.

The compensation allowed to the executor and his counsel by the court was reasonable for the services rendered. The district court so found, and that finding is amply supported by the record. In the management of estates much must be left to the sound discretion of the district courts. This court would not be authorized or justified in disturbing the findings made by the district court in this proceeding.

[2] No objection is interposed, or suggestion made, that Charles E. Foxley is not a suitable person to complete the administration of the estate. At the time when Executor Blackburn tendered his resignation, and on the date of the acceptance of the same, the suit instituted by the executor against appellant Ricy H. Jones was pending in court and yet undetermined. The court was therefore manifestly right in refusing to name said Ricy H. Jones as the administrator of the estate. The effect of that appointment would have been to make Ricy H. Jones administrator plaintiff against himself personally defendant. *Comp. Laws Utah 1917, § 7597*, provides that—

"When there are several persons equally entitled to administration, the court may grant letters to one or more of them. * * * If a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person."

The court was therefore in the exercise of authority given it by statute in refusing to name the appellant administrator of the estate, and in naming a disinterested person to complete the administration. *In re Slater's Estate*, 184 Pac. 1017.

There are other questions presented and argued, but, as they are not material to the determination of this appeal, we refrain from discussing them.

The controversy is, as designated by the district court, at most an undignified family quarrel, and the court was right in summarily naming a disinterested administrator upon the resignation of the executor.

There is no reversible error in the record. The order appealed from is affirmed, with costs against the appellant heir.

CORFMAN, C. J., and WEBER, THURMAN, and FRICK, JJ., concur.

(58 Utah, 343)

HALL et al. v. SABEY. (No. 3537.)

(Supreme Court of Utah. June 9, 1921.)

1. Appeal and error \S 1011(1)—Trial court's findings held conclusive on appeal.

Trial court's findings on conflicting evidence on the issue of fraud held binding on the Supreme Court.

2. Corporations \S 80(12)—Consideration for note held in issue rendering it necessary to find thereon.

Where in an action on a note the answer set up that the sole consideration for the note was a certificate of stock purporting to be signed by the president and secretary of the corporation, but not so executed and signed, in addition to an answer alleging fraudulent representations inducing the execution of the note, the consideration was a material issue rendering it error for the trial court to fail to find thereon.¹

3. Appeal and error \S 1170(10)—Failure to find on an issue held prejudicial error.

Where in a suit on a note the answer alleged that it was induced by false representations, and also alleged that the note was executed in payment of a certificate of stock of a corporation, and that it purported to be signed by the president and secretary of such corporation, but was not in fact so signed and executed, the issue thereby presented was so material that failure to find thereon required reversal and was not within Comp. Laws 1917, \S 6622, 6968, authorizing disregard of errors and exceptions not affecting a substantial right.²

4. Appeal and error \S 1177(8)—Court may remand for new trial instead of new findings where the trial judge is out of office.

Though Comp. Laws 1917, \S 6995, would authorize the Supreme Court to remand a case to the district court to make findings on an issue upon which none were made, notwithstanding the trial judge was no longer in office, yet the court may in its discretion remand the cause for the hearing of further evidence and new trial in such case where there was a sharp conflict in the evidence, and the Supreme Court deems it best that the court whose duty it is to make the findings should hear the witnesses.

5. Corporations \S 80(10)—Obligor held not barred by laches from setting up fraudulent representations and denying consideration of note for stock.

Where a note for stock was in the hands of the original payee, and, though executed in

March, 1918, due seven months thereafter, was not sued on until June, 1919, the obligor was not barred by laches from setting up fraudulent representations and denying the consideration where he alleged that he only recently ascertained the facts; the payee not being prejudiced.

Appeal from District Court, Salt Lake County; John F. Tobin, Judge.

Action by Ernest Hall and another, doing business as the Kolby Wheel Agency Company, against James Sabey. From judgment for plaintiffs, defendant appeals. Reversed, and new trial granted, with costs to appellant.

Hutchinson & Hutchinson, of Salt Lake City, for appellant.

Stewart, Stewart & Alexander, of Salt Lake City, for respondents.

GIDEON, J. The complaint in this action is in the usual form to recover a money judgment upon a promissory note. The note was executed by the defendant; plaintiff was the payee. The answer admits the execution of the note, but denies that it was given for value and denies the indebtedness. As an affirmative defense, fraudulent representations are alleged, and also that such representations were relied upon by the defendant and induced him to execute the note. By an amendment to the answer, it is further set out that the certificate of stock, the sole consideration for the note, and which purported to be signed by the president and secretary of the Kolby Wheel Company, a corporation, was not executed and signed by said president and secretary, nor was the corporate seal affixed by the secretary, and that all such facts were known to the plaintiff at the time such stock was delivered to defendant.

It is further alleged that the plaintiff represented that he had authority to sell and deliver the certificate of stock in question.

[1] There was much testimony, both on the part of plaintiff and of defendant, respecting the allegations of fraud. The court made findings on such contradictory testimony, finding all the issues of fraud against the defendant, and affirmatively found that the plaintiff made no false statements or representations which induced the defendant to subscribe for and buy the stock in question. We are not required to express an opinion upon the weight of the evidence. It is sufficient to say that there was substantial testimony to support the court's findings upon the defense of fraud. As there was conflicting evidence on the issue of fraud, the findings upon such issue are binding upon this court.

[2] The court made no findings on the issue made by the amendment to the answer, namely, that the certificate of stock was not exe-

¹ Implement Co. v. Cleveland, 32 Utah, 6, 88 Pac. 671; Everett v. Jones, 32 Utah, 489, 91 Pac. 360; Westminster Inv. Co. v. McCurtain, 39 Utah, 544, 118 Pac. 564; Snyder v. Allen, 51 Utah, 291, 169 Pac. 945.

² Sheppick v. Sheppick, 44 Utah, 137, 133 Pac. 1169; Madsen v. U. L. & Ry. Co., 36 Utah, 528, 105 Pac. 799; Hogge v. S. L. & O. Ry. Co., 47 Utah, 268, 163 Pac. 585.

cuted by the officers of the Kolby Wheel Company, nor upon the further issue that the person who signed the names of such officers to the certificate had or had not been authorized so to do. It is argued upon the part of plaintiffs, respondents, that findings upon such issues were immaterial, as the issues went to the question of consideration for the note, and it is insisted that no issue as to want of consideration is made by the answer.

We are unable to agree with counsel for plaintiff in that contention. It is admitted that the certificate of stock was the consideration, and the only consideration, for the note in question. If, therefore, the certificate was issued without authority from the officers of the corporation purporting to issue such stock, it could not be legally binding upon such corporation unless it was subsequently ratified. It is testified to by witnesses for plaintiff that neither the president nor secretary of the corporation signed the certificate. It is also stated that plaintiff Ernest Hall signed the name of the president and secretary to the certificate. It is claimed on his part that he had authority and was authorized by the president to execute the certificate and to attach his name to the same. This is denied by the president of the Kolby Wheel Company, and therefore became a disputed fact in the case. While it is doubtless true that any finding made by the court could not and would not be binding upon the corporation in a suit between the holder of that stock and such corporation, nevertheless, when the question is made an issue, and an affirmative allegation is contained in the answer that the certificate was not a binding certificate on the corporation, it then became a material question in the case and one upon which the court should have made findings. "The defendants were entitled to distinct findings upon every material issue made by the pleadings, and, unless waived, it was the duty of the court to make such findings, regardless of any request of the parties." *Implement Co. v. Cleaveland*, 32 Utah, 6, 88 Pac. 671. See, also, *Everett v. Jones*, 32 Utah, 489, 91 Pac. 860; *Westminster Inv. Co. v. McCurtain*, 39 Utah, 544, 118 Pac. 564; *Snyder v. Allen*, 51 Utah, 291, 169 Pac. 945.

[3] It has been determined by numerous decisions of this court that the failure to make findings upon immaterial issues, or issues which would not affect the judgment of the court, is not ground for reversal. Such, in fact, is the statute. *Comp. Laws Utah 1917*, §§ 6968 and 6622. See, also, *Sheppick v. Sheppick*, 44 Utah, 137, 138 Pac. 1169; *Madsen v. U. L. & Ry. Co.*, 36 Utah, 528, 105 Pac. 799; *Hogge v. S. L. & O. Ry. Co.*, 47 Utah, 266, 153 Pac. 585; 4 C. J. § 2878 H, p. 308. But, as we have attempted to point out, the question as to whether this certificate is a binding obligation on the part of the corpora-

tion purporting to have issued it is a material question and goes to the very crux of whether there was any consideration for the note sued upon. It is self-evident that, if the court had found that the certificate of stock was not a binding obligation on the part of the corporation, then there was no consideration for the note. We are therefore of the opinion that the lower court should have made finding upon the issues made by the answer, as above indicated, and failure to do so was prejudicial to the appellant and of necessity works a reversal of the cause.

[4] This court could, under authority of *Comp. Laws Utah 1917*, § 6995, send the case back to the district court to make findings upon this issue, but, as the district judge who tried this case is no longer in office, it is not advisable to refer the case back for additional findings upon the testimony taken at the trial. We do not wish to be understood as holding, nor do we intend to hold, that in every case in which the term of office of the judge trying the case has terminated this court could not, or would not, send the case back for additional findings upon the testimony taken. It may well be that there might be but little dispute in the testimony, and the court could readily arrive at findings upon the issues of fact. In this case, however, there is a sharp conflict in the testimony, and the court whose duty it is to find the facts should hear, and it entitled to hear, the witnesses testifying in order to observe their demeanor, their means of information, their interest in the result, and such other information as courts can only get from hearing and seeing the witnesses during the time of taking the testimony.

[5] The plaintiff, in replying to the amended answer, alleges certain facts which it is claimed constitute laches on the part of defendant, and that by reason of such facts defendant is estopped from now denying the consideration for the note, as well as the fraudulent representations claimed to have been made at the time of its execution.

This note was executed in March, 1918, and became due by its terms seven months thereafter. No suit was instituted to collect the same until some time in June, 1919. It is claimed in the answer, and testified to by the defendant, that he did not learn of the false and fraudulent representations alleged to have been made by plaintiff until the early part of 1919, and that he did not ascertain or learn of the fact that the certificate of stock had not been executed by the proper officers of the corporation, and that their names had been signed to the same without authority, until after the institution of this action.

As indicated, the plaintiff is the payee of the note. He has been deprived of no evidence by lapse of time. Nothing has occurred to his injury which would in any way deprive him

of proving his cause of action or the collection of the judgment, if he is entitled to have one awarded in his favor. There is nothing in the evidence presented by this record which should estop defendant from making any defense he may legally have against a judgment being entered against him.

The judgment is reversed, and a new trial granted; appellant to recover costs.

CORFMAN, C. J., and WEBER, GIDEON, and FRICK, JJ., concur.

(116 Wash. 75)

SACAJAWEA LUMBER & SHINGLE CO. v. SKOOKUM LUMBER CO. et al.
(No. 16372.)

(Supreme Court of Washington. June 9, 1921.)

1. Attorney and client \S 189—Parties may settle dispute and dismiss action without paying or consulting attorneys.

The parties to an action have the right to compose their disputes and dismiss the action without first paying or consulting with their attorneys.

2. Corporations \S 314(1)—Director may not vote on proposition wherein individual interest opposed to that of corporation.

A director in a private corporation has no power to vote on a proposition wherein his individual interest is opposed to that of the corporation.

3. Corporations \S 314(1)—Dismissal of suit not authorized by two to one vote of plaintiff's board of directors, where one voting to dismiss was a defendant.

Where two of three directors of a corporation voted to authorize the president to settle and dismiss a suit pending against certain defendants, one of whom was one of the directors so voting, he was without authority to do so; such defendant having no right to vote as a trustee for the corporation for the settlement of a dispute with himself.

Department 1.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Action by the Sacajawea Lumber & Shingle Company against the Skookum Lumber Company and others. From an order denying a motion to set aside an order dismissing the action, plaintiff appeals. Reversed and remanded, with directions.

F. Campbell and H. H. Johnston, both of Tacoma, for appellant.

BRIDGES, J. By this action the plaintiff sought to recover damages of the defendants because of a breach of contract. At the time of the institution of the suit and for some time thereafter, the defendant Tucker was the owner of one-third of the capital stock of the plaintiff, and was also one of its directors. One Richard W. Jamieson was also a director and the owner of one-third of the capital stock, and Julius La Vergne and his mother were the owners of the remainder of the stock, and the former was a director and the president of the company. While the suit was pending, there was a directors' meeting, at which the president of the plaintiff company was authorized to settle the litigation with the defendants and to cause the suit to be dismissed. By virtue of this authority, the president later made a settlement, and a stipulation was entered into between the parties to the action, upon which the court entered an order dismissing the action. Thereafter the plaintiff moved to set aside the order of dismissal and to reinstate the case, for the alleged reasons that plaintiff's attorneys had not been consulted concerning the settlement of the litigation or the dismissal of the case, and that their compensation had not been paid, and because the board of directors was without power to authorize the president to settle the litigation and cause the case to be dismissed, and because there was fraud in the whole transaction leading up to the dismissal of the case. This motion was supported and opposed by certain affidavits. After a hearing upon these affidavits, the court denied the motion to set aside the order dismissing the action, and the plaintiff has appealed. Respondents have not appeared in this court.

The only question before us is whether or not the court was justified in refusing to set aside the order dismissing the action.

[1-3] In a proceeding such as this we cannot say that the affidavits show active fraud or overreaching in arriving at the settlement or dismissal of the action. Nor can we hold that the parties could not settle their differences and dismiss the action without first paying or consulting with their attorneys. The parties to an action always have the right to compose their disputes, and are not under any legal obligations to first pay their attorneys or to consult with them concerning the settlement. The only substantial question before us is whether there was a valid authorization by the board of directors to the president of the appellant corporation to settle the litigation and dismiss the action.

It appears from the record that when the meeting of the board of directors opened, all of the directors, to wit, Mr. La Vergne, Mr. Tucker, and Mr. Jamieson were present. At

once thereafter it was announced to the meeting that Mr. Tucker had sold his capital stock in the appellant to Mr. Buchanan, who is one of the defendants in this case. Thereupon Mr. Tucker resigned as a director, and Mr. Buchanan was elected in his stead. The meeting then proceeded to authorize the president of the appellant to settle the litigation and to cause the dismissal of the action. Mr. La Vergue and Mr. Buchanan voted in favor of this proposition, and Mr. Jamieson refused to vote and probably objected to the proceedings. The appellant takes the position that since Mr. Buchanan was one of the defendants in the case, it was against public policy for him to exercise his vote as a director on the question of settling the litigation, and that his vote was a nullity, and consequently there was but one valid vote in favor of the proposed settlement, which, of course, was less than a majority of the three directors. Since the dismissal of the case rested entirely upon a settlement of the litigation, and since the president in making the settlement and dismissing the suit acted by virtue of the supposed authorization of the board of directors, if, as a matter of law, Mr. Buchanan was not authorized to vote, then it must follow that the president was without authority to do the things complained of.

A director of a corporation occupies a strictly fiduciary capacity, and it is always his duty to fully represent the interests of the corporation of which he is a director. While there is some authority to the contrary, the majority of the courts and text-writers hold that a director in a private corporation has no power to vote upon a proposition wherein his individual interest is opposed to that of the corporation which he represents. At page 92, 14a C. J., the rule is stated as follows:

"A director who is disqualified by personal interest from voting on a particular matter before the meeting cannot be counted for the purpose of making a quorum or a majority of the quorum. The act done is invalid where his presence is necessary to constitute a quorum, or where his vote is necessary to the passage of the resolution, regardless of the fairness or good faith of the transaction. * * *

In the case of *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo. App. 545, 130 Pac. 1037, the court said:

"A board of directors of a solvent corporation may borrow money from one or more individual members of the board, and give the corporation's note for it, and even mortgage the corporate property to secure it, where the transaction is in good faith. * * * If the presence and vote of the director loaning the money is necessary to constitute a quorum, and to make a majority upon such vote, however, the act is voidable at the instance of the corporation or its stockholders. The trust rela-

tion existing between the directors and the stockholders of a corporation ought not to permit such an act, and a court of equity will scrutinize all contracts made in this way and set them aside, regardless of the good faith of the transaction."

At 10 Cyc. p. 781, the rule is stated as follows:

"A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case; and any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted will be voidable at the instance of the corporation or shareholders, without regard to its fairness, provided the vote of such director was necessary to the resolution."

See, also, the following cases to the same effect: *Heublein v. Wight* (D. C.) 227 Fed. 667; *Curtin v. Salmon River, etc., Co.*, 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132; *O'Rourke v. Grand Opera Co.*, 47 Mont. 459, 133 Pac. 965; *Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 450, 32 Am. Rep. 380. Other cases involving this question may be found in the cases above cited.

But the question under discussion is not a new one to this court. In the case of *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765, we said:

"The policy of the law forbids a trustee to assume a double function where there are adverse interests considered. * * * While there are observations by some of the text-writers and expressions in some judicial opinions refining upon acts which may be merely voidable, and not per se void, where an interested trustee's vote is necessary to adopt, we think on principle, and in the better considered cases, such acts, when consummated by the necessary vote of the interested trustee, are voidable upon complaint of a stockholder."

We there quoted from the case of *Munson v. Syracuse, etc.*, R. R., 103 N. Y. 58, 8 N. E. 355, as follows:

"The contract bound the corporation to purchase; and Munson, as one of the directors, participated in the action of the corporation in assuming the obligation, and in binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair."

We also there quoted from *Bassett v. Fairchild*, 132 Cal. 637, 64 Pac. 1082, 52 L. R. A. 611, to the following effect:

"* * * There is no legal quorum of directors present when action is attempted to be tak-

en on a matter as to which one of the directors necessary to make the quorum is interested."

In the recent case of *Wonderful Group Mining Co. v. Rand*, 191 Pac. 631, discussing a somewhat similar question, we said:

"The record in this case shows clearly that the rule of law which provides that a trustee may not vote upon his own compensation was violated by the resolution of June 3, and that the act of the trustees in passing a series of resolutions awarding money to four out of the five members of the board was void. * * * Granting that the board of trustees might compensate officers, but not trustees, for past services, it is the rule that where concerted action of this kind is taken, the passing of a resolution awarding such pay must be had without the vote of any one pecuniarily interested in the resolution."

It must, however, be conceded that this court has not at all times been entirely consistent on this question. In the case of *Pitcher v. Lone Pine, etc., Co.*, 39 Wash. 608, 81 Pac. 1047, Judge Root, speaking for the court, took a position apparently opposed to that announced in the previous case of *Parsons v. Tacoma Smelting & Refining Co.*, supra. But in the *Pitcher* Case no reference was made to the *Parsons* Case. Manifestly, that case was not called to the attention of the court. A careful review of the whole question and the authorities convinces us that the rule of the *Parsons* and *Wonderful Group Mining Co.* Cases, supra, is supported by the better reason, and is in accord with the great weight of authority.

Applying the law to the facts of this case, we conclude that Mr. Buchanan had no right

to vote as a trustee for the appellant for the settlement of disputes between that company and himself, and that, consequently, the president of the appellant was without authority to dismiss the action.

The judgment is reversed, and cause remanded, with directions to set aside the judgment dismissing the action.

PARKER, C. J., and MACKINTOSH, FULLERTON, and HOLCOMB, JJ., concur.

(116 Wash. 639)

**SACAJAWEA LUMBER & SHINGLE CO. v.
SKOOKUM LUMBER CO. et al.**
(No. 16373.)

(Supreme Court of Washington. June 9, 1921.)

Department 1.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Action by the Sacajawea Lumber & Shingle Company against the Skookum Lumber Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

F. Campbell and H. H. Johnston, both of Tacoma, for appellant.

PER CURIAM. This case is controlled by our decision in the case of *Sacajawea Lumber & Shingle Co. v. Skookum Lumber Co. et al.*, No. 16372 of this court, 198 Pac. 1112, where the same facts and questions are disposed of, and is therefore reversed and remanded, with the same instructions, to the lower court.

MEMORANDUM DECISIONS

COMMERCIAL SAV. BANK v. DAVIS. (No. 9839.) (Supreme Court of Colorado. May 2, 1921. Rehearing Denied June 8, 1921.) Department 1. Error to District Court, Logan County; L. C. Stephenson, Judge. Action by the Commercial Savings Bank against J. L. Davis. Judgment for defendant, and plaintiff brings error. Affirmed. Coen & Sauter, of Sterling, for plaintiff in error. John V. Redmond, of Sterling, for defendant in error.

TELLER, J. Plaintiff in error was plaintiff below in an action to recover upon a promissory note executed by the defendant in error to his own order and by him indorsed. From the agreed statement of facts it appears that this note was given to one Crawford in payment for some shares of stock in a corporation, which stock was never delivered. The note was, on the next day, discounted by the plaintiff, without indorsement by Crawford. The case was tried to the court, and findings and judgment were for the defendant. The principal ground of error argued, and the only one which we deem necessary to consider, is that the court erred in finding that the plaintiff "was charged with bad faith in the transaction by which the note was procured." We have carefully considered the evidence, and are of the opinion that it is sufficient to sustain the findings of the court. The judgment is accordingly affirmed.

BAILEY, J., sitting for **SCOTT, C. J.,** and **ALLEN, J.,** concur.

AUERBACH MINING & MILLING CO. v. PHILIPSBURG MINING CO. (No. 4417.) (Supreme Court of Montana. July 14, 1920.) Appeal from District Court, Granite County; Geo. B. Winston, Judge. W. E. Moore, of Philipsburg, and Chas. R. Leonard, of Butte, for appellant.

PER CURIAM. Upon motion of appellant, the appeal in the above-entitled action is dismissed.

BARCLAY-BOOTH ABSTRACT CO. v. LEGGAT. (No. 4221.) (Supreme Court of Montana. May 27, 1920.) Appeal from District Court, Silver Bow County; J. J. Lynch, Judge. Frank & Gaines, of Butte, for appellant. Nolan & Donovan, of Butte, for respondent.

PER CURIAM. Pursuant to stipulation of the parties, the appeal in the above-entitled cause is dismissed.

BOWMAN v. KOHN. (No. 4257.) (Supreme Court of Montana. Oct. 4, 1920.) Appeal from District Court, Yellowstone County; A. C. Spencer, Judge. Reynolds & Shea, of Billings, for appellant. O. R. Ingle, of Billings, for respondent.

PER CURIAM. Pursuant to stipulation of the parties herein, the appeal in the above-entitled action is dismissed, without cost to either party.

BUTTE BUICK CO. v. SILVER BOW COUNTY. (No. 4697.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Silver Bow County. S. C. Ford, Atty. Gen., for appellant.

PER CURIAM. Pursuant to motion of appellant made by the Attorney General, acting upon request of appellant, that the appeal herein be dismissed, the motion is granted, and the appeal dismissed.

BUTTE ELECTRIC SUPPLY CO. v. ROYAL INDEMNITY CO. (No. 4713.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Silver Bow County. Henry C. Levinski, of Butte, for respondent.

PER CURIAM. Pursuant to motion of respondent that the appeal herein be dismissed for failure of appellant to file transcript within time, the appeal is dismissed. See, also, 57 Mont. 615, 194 Pac. 1117.

HELENA ADJUSTMENT CO. v. NETT. (No. 3884.) (Supreme Court of Montana. Sept. 23, 1920.) Appeal from District Court, Lewis and Clark County; John A. Matthews, Judge Presiding. W. D. Rankin, of Helena, for appellant. H. S. Hepner and Galen & Mettler, all of Helena, for respondent.

PER CURIAM. Pursuant to *præcipe*, the appeal in the above-entitled cause is dismissed.

LUX et al. v. SMITH. (No. 4653.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Hill County; Frank E. Carleton, Judge. R. E. Hammond, of Havre, for appellants. H. S. Kline and Chas. B. Elwell, both of Havre, for respondent.

PER CURIAM. The motion of respondents that the appeal herein be dismissed for failure of appellant to serve and file his brief within time is granted, and the appeal is accordingly dismissed.

OTTEN v. NORTHERN PAC. RY. CO. (No. 4325.) (Supreme Court of Montana. Oct. 27, 1920.) Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge. W. D. Rankin, of Helena, for appellant. Gunn, Rasch & Hall, of Helena, for respondent.

PER CURIAM. Pursuant to stipulation of counsel, the appeal in the above-entitled cause is dismissed.

OWENS v. MILLER. (No. 4744.) (Supreme Court of Montana. Nov. 8, 1920.) Appeal from District Court, Gallatin County; Ben B. Law, Judge. S. C. Ford, Atty. Gen., for appellant. Frank M. Gray, of Bozeman, for respondent.

PER CURIAM. Upon motion of respondent, the appeal herein is this day dismissed for failure of appellant to file the record within the time required by the rules of this court.

PRICE v. BUCKLAND. (No. 4516.) (Supreme Court of Montana. Oct. 11, 1920.) Appeal from District Court, Powell County; Geo. B. Winston, Judge. W. E. Keeley, of Deer Lodge, for appellant.

PER CURIAM. Pursuant to motion of appellant herein, the appeal in the above-entitled cause is dismissed.

REED et al. v. JORDAN. (No. 4161.) (Supreme Court of Montana. May 19, 1920.) Appeal from District Court, Custer County; Daniel L. O'Hern, Judge. Sharpless Walker and W. C. Packer, both of Miles City, for appellant. Geo. W. Farr, of Miles City, for respondent.

PER CURIAM. Pursuant to motion of appellant, the appeal in the above-entitled cause is dismissed.

ROUNDUP OIL & GAS CO. et al. v. VIRGILS et al. (No. 4602.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Musselshell County; Geo. P. Jones, Judge. V. D. Dusenbery, of Roundup, for appellants. Nichols & Wilson, of Billings, and Jeffries & McNaught, of Roundup, for respondents.

PER CURIAM. Pursuant to stipulation of the parties, the appeal in the above-entitled cause is dismissed.

SCHMUKE v. CHICAGO, M. & ST. P. RY. CO. (No. 4601.) (Supreme Court of Montana. May 8, 1920.) Appeal from District Court, Gallatin County; Ben B. Law, Judge. Charles J. Marshall, of Lewistown, for appellant. H. C. Carlson, of Minneapolis, Minn., for respondent.

PER CURIAM. Pursuant to motion of appellant herein, the appeal in the above-entitled cause is dismissed.

STATE v. COBBAN. (No. 4571.) (Supreme Court of Montana. June 21, 1920.) Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge. Lyman J. Roscow and J. J. McCaffery, both of Butte, for appellant.

PER CURIAM. Pursuant to motion of appellant, the appeal herein is dismissed.

STATE v. DOWNS (two cases). (Nos. 4207, 4211.) (Supreme Court of Montana. Sept. 24, 1920.) Appeal from District Court,

Yellowstone County; A. C. Spencer, Judge. Morris & Hartwell, of La Crosse, Wis., and Grimstad & Brown, of Billings, for appellant. James L. Davis and E. E. Collins, both of Billings, and S. C. Ford, Atty. Gen., for respondent.

PER CURIAM. These causes coming on for hearing this day, and evidence showing settlement in the court below having been filed in this court, the appeals in said causes are dismissed.

STATE v. DUFFY. (No. 4663.) (Supreme Court of Montana. June 23, 1920.) Appeal from District Court, Valley County; John Hurly, Judge. S. C. Ford, Atty. Gen., for respondent.

PER CURIAM. The motion of respondent that the appeal herein be dismissed for failure of appellant to file transcript within time is granted, and the appeal is accordingly dismissed.

HURLY, J., being disqualified, takes no part in the order of dismissal.

STATE v. JOHNSON. (No. 4637.) (Supreme Court of Montana. July 14, 1920.) Appeal from District Court, Pondera County; John J. Greene, Judge. S. C. Ford, Atty. Gen., for appellant.

PER CURIAM. On motion of appellant, the appeal in the above-entitled cause is dismissed.

STATE v. KOBLE. (No. 4616.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Hill County; W. B. Rhoades, Judge. C. R. Stranahan and A. Lee Golden, both of Havre, for appellant. Victor R. Griggs, of Havre, for respondent.

PER CURIAM. The motion of respondent to dismiss the appeal herein, for the reason that the appellant has failed to file and serve its brief within the time allowed by the rules of this court and by the stipulation of counsel extending the time, is granted, and the appeal accordingly dismissed.

STATE v. MILCH. (No. 4368.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge. Henry O. Smith, of Helena, for appellant.

PER CURIAM. Pursuant to motion of appellant herein, showing that the trial court has granted appellant a new trial, his appeal from the judgment of conviction is dismissed.

STATE ex rel. BROWN v. PORTER. (No. 4649.) (Supreme Court of Montana. May 23, 1920.) Original application for writ of mandate to compel respondent to issue a warrant in payment of services rendered by relator as attorney for the State Board of Equalization. John G. Brown, of Helena, pro se.

PER CURIAM. The application of relator for writ of mandate is denied; the court being of opinion that application for relief should be made to the district court.

(198 P.)

STATE ex rel. CAMPBELL v. DISTRICT COURT OF FIFTEENTH JUDICIAL DISTRICT et al. (No. 4656.) (Supreme Court of Montana. June 5, 1920.) Original application for writ of supervisory control. Belden & De Kalb, of Lewistown, for relator.

PER CURIAM. The application of relator for writ of supervisory control this day presented is, after due consideration by the court, denied.

STATE ex rel. COUGHLIN v. MAYOR OF CITY OF BUTTE. (No. 4724.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Silver Bow County. R. L. Clinton, E. D. Elderkin, and C. F. Juttner, all of Butte, for appellant.

PER CURIAM. Upon motion of the appellant, the appeal herein is this day dismissed.

STATE ex rel. COURTNEY v. MAYOR OF CITY OF BUTTE. (No. 4723.) (Supreme Court of Montana. Sept. 14, 1920.) Appeal from District Court, Silver Bow County. R. L. Clinton, E. D. Elderkin, and C. F. Juttner, all of Butte, for appellant.

PER CURIAM. Upon motion of the appellant herein, the appeal in the above-entitled cause is dismissed.

STATE ex rel. ELY v. STEWART. (Nos. 4685, 4686.) (Supreme Court of Montana. July 26, 1920.) Original application for writ of mandamus. Nolan & Donovan, of Butte, for relator. Jas. A. Walsh, of Helena, Wm. M. Johnston, of Billings, Sydney Sanner, of Butte, and Henry O. Smith, of Helena, for respondents.

PER CURIAM. This cause, heretofore submitted, this day came on for judgment and decision. Whereupon, on consideration, it is ordered and adjudged that the motion to quash the alternative writ issued herein be and it is sustained, and the proceedings dismissed.

STATE ex rel. FARMERS' ELEVATOR CO. et al. v. DISTRICT COURT OF FIFTEENTH JUDICIAL DISTRICT et al. (No. 4684.) (Supreme Court of Montana. July 14, 1920.) Original application for writ of supervisory control. M. J. Lamb, of Billings, Jeffries & McNaught, of Roundup, and Madeen & Russell, of Missoula, for relators.

PER CURIAM. The applications of relators for writ of supervisory control is, after due consideration, denied.

STATE ex rel. HENDERSON et al. v. DISTRICT COURT OF FIFTH JUDICIAL DISTRICT et al. (No. 4456.) (Supreme Court of Montana. Nov. 18, 1920.) Original application for writ of supervisory control. M. M. Duncan, of Virginia City, for relators.

PER CURIAM. The application of relators herein for writ of supervisory control is, after due consideration by the court, denied.

STATE ex rel. HOGUE v. O'BRIEN et al. (No. 4612.) (Supreme Court of Montana. May 23, 1921.) Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge. Search warrant proceeding by the State of Montana, on the relation of C. E. Hogue, against W. P. O'Brien and certain intoxicating liquors. From a judgment declaring forfeited a quantity of whisky, and ordering it destroyed, defendant appeals. Reversed with directions. R. A. O'Hara, of Hamilton, George T. Baggs, of Stevensville, and E. C. Kurtz, of Hamilton, for appellants.

PER CURIAM. This is a search warrant proceeding instituted in the district court of Ravalli county by C. E. Hogue, as sheriff, under the provisions of the Prohibition Enforcement Act. It comes before this court on appeal by the defendant from a final judgment rendered by the court, after a hearing upon the return by the sheriff of the warrant, declaring forfeited a quantity of whisky seized thereunder and ordering it destroyed. Though this case was brought here on appeal from the final judgment, and the case of *State of Montana ex rel. John Samlin v. District Court of Custer County et al.*, 198 Pac. 362, recently decided, was an original application for a writ of prohibition, the ultimate question submitted for decision in this case is the same as that decided in the latter case. Upon the authority of that case, the judgment is reversed, and the district court is directed to dismiss the proceeding and order the sheriff to return the whisky seized by him, to the defendant. Reversed, with directions.

STATE ex rel. LARSON v. WYMAN. (No. 4169.) (Supreme Court of Montana. May 29, 1920.) Appeal from District Court, Dawson County; C. C. Hurley, Judge. H. J. Haskell and J. A. Slattery, both of Glendive, for appellant. F. P. Leiper, of Glendive, for respondent.

PER CURIAM. This cause having been set for hearing and taken under advisement, it is ordered and adjudged that, no briefs having been filed, the judgment of the court below, made on August 29, 1917, be and it is affirmed.

STATE ex rel. LAVIGNE v. DISTRICT COURT OF FIRST JUDICIAL DISTRICT. (No. 4681.) (Supreme Court of Montana. Sept. 28, 1920.) Original application for writ of prohibition. C. A. Spaulding, of Helena, for relator. Edward Horsky, of Helena, for respondent.

PER CURIAM. Pursuant to stipulation of the parties herein, the order of submission of this cause for judgment and decision is set aside, and the proceeding is dismissed.

STATE ex rel. O'GRADY v. DISTRICT COURT IN AND FOR SHERIDAN COUNTY et al. (No. 4006.) (Supreme Court of Montana. May 8, 1920.) Original application for writ of certiorari. S. C. Ford, Atty. Gen.,

and Frank Woody, Asst. Atty. Gen., for relator. Howard M. Lewis, of Plentywood, for respondents.

PER CURIAM. It appearing from the statement of counsel made in open court at the hearing of the order to show cause that the claims against Sheridan county, out of which the proceeding arose, were allowed and ordered paid before the order to show cause was issued, and that only a moot question remains for decision, the cause is, upon motion of counsel for relator, dismissed.

STATE ex rel. RICHARDSON v. STEWART. (No. 4736.) (Supreme Court of Montana. Oct. 2, 1920.) Original application for writ of mandate to compel respondent to place the name of relator and others upon the official ballot to be used at the election to be held November 2, 1920. H. A. Tyvand, of Butte, for relator. S. C. Ford, Atty. Gen., and Frank Woody, Asst. Atty. Gen., for respondent.

PER CURIAM. The application for writ of mandate to compel the respondent, as Secretary of State of the state of Montana, to place the names of relator and others upon the official ballot to be used at the election to be held on November 2, 1920, as the candidates for the Farmer-Labor Party for the offices of presidential and vice presidential electors, came regularly on for hearing. The motion of the Attorney General to quash the alternative writ heretofore issued and to dismiss the proceeding is denied, and a peremptory writ is ordered to issue forthwith. The court is of the opinion that, since it appears that the Farmer-Labor Party was not in existence at the time the primary election was held on April 23, 1920, for presidential and vice presidential electors, but has been organized since that time, it is now entitled to have the names of its candidates for these offices placed upon the ballot under the provisions of section 521 of the Revised Codes.

STATE ex rel. RUSSELL v. McKAY. (No. 4197.) (Supreme Court of Montana. Sept. 20, 1920.) Appeal from District Court, Sanders County; Asa L. Duncan, Judge. Wade R. Parks, of Plains, and S. C. Ford, Atty. Gen., for appellant. McCormick & Russell, of Missoula, for respondent.

PER CURIAM. Upon motion of appellant, the appeal herein is dismissed.

STATE ex rel. SCKAVON et al. v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT et al. (No. 4776.) (Supreme Court of Montana. Dec. 27, 1920.) Original application for writ of supervisory control. Miles J. Cavanaugh, of Butte, for relators.

PER CURIAM. The application of the relators herein for a writ of supervisory control, heretofore presented, is denied.

STATE ex rel. SPIDEL v. BARR et al. (No. 4642.) (Supreme Court of Montana. May 19, 1920.) Original application of writ

of mandate. John J. Jewell, of Hobson, for relator.

PER CURIAM. The application for writ of mandate herein, heretofore presented, is denied.

STATE ex rel. WALDEN et al. v. DISTRICT COURT OF NINTH JUDICIAL DISTRICT et al. (No. 4691.) (Supreme Court of Montana, July 24, 1920.) Original application for writ of supervisory control. John W. Stanton, of Great Falls, for relators.

PER CURIAM. Relators' application for writ of supervisory control is denied.

STATE ex rel. WILLIAMS v. STEWART. (No. 4737.) (Supreme Court of Montana. Oct. 2, 1920.) Original application for writ of mandamus to compel respondent to place the name of relator and others upon the official ballot to be used at the election to be held November 2, 1920. H. A. Tyvand, of Butte, for relator. S. C. Ford, Atty. Gen., and Frank Woody, Asst. Atty. Gen., for respondent.

PER CURIAM. The application of Clinton L. Williams for writ of mandamus to compel the respondent, as Secretary of State of the state of Montana, to place his and the names of others upon the official ballot to be used at the election to be held November 2, 1920, as the candidates for the offices of presidential and vice presidential electors of the Socialist Party, came on regularly for hearing. The motion of the Attorney General to quash the alternative writ heretofore issued and to dismiss the proceeding is sustained, and the proceeding is ordered dismissed. The court is of the opinion that, since the Socialist Party was organized and in existence at the time the primary election was held on April 23, 1920, for presidential and vice presidential electors, and was entitled and required under the provisions of the act initiated and passed by the people at the general election held in November, 1912 (Laws 1913, p. 500), to vote for and nominate candidates for these offices, but omitted to do so, it is not entitled now to have the names of any persons appear upon the ballot as candidates for these offices.

WELDON v. SCHWANZ. (No. 4716.) (Supreme Court of Montana. Oct. 11, 1920.) Appeal from District Court, Yellowstone County; A. C. Spencer, Judge. Robt. C. Stong, of Billings, for appellant. Guy O. Derry, of Billings, for respondent.

PER CURIAM. The motion of the appellant, praying for the dismissal of the appeal herein, is granted, and the appeal is accordingly dismissed.

In re YEGEN. (No. 4667.) (Supreme Court of Montana. June 17, 1920.) Original application for writ of supervisory control in aid of writ of habeas corpus. Walsh, Nolan & Scallon, of Helena, for petitioner.

PER CURIAM. The application of relator for writ of supervisory control in aid of habeas corpus is, after due consideration by the court, denied.

(193 P.)

FELTS v. STATE. (No. A-3672.) (Criminal Court of Appeals of Oklahoma. May 26, 1921.) Appeal from County Court, Pontotoc County; Orel Busby, Judge. O. C. Felts was convicted of transporting intoxicating liquor, and he appeals. Judgment reversed on confession of error. I. M. King, J. P. Crawford, and Reuben M. Roddie, all of Ada, for plaintiff in error. S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was convicted on a charge of transporting intoxicating liquor from a certain point in the city of Ada to another certain point in said city on or about the 10th day of February, 1919, and in accordance with the verdict of the jury was sentenced to be confined for 30 days in the county jail and pay a fine of \$50. He appeals from the judgment. The Attorney General has filed the following confession of error: "Plaintiff in error admitted the possession of the liquor, and admitted that he was conveying it from his home to his office. He claimed that he purchased the liquor in Joplin, Mo., and himself conveyed the same to the state of Oklahoma. He requested the court to instruct the jury that, if they believed from the evidence that he had made a lawful purchase of the liquor in question, and that he himself brought the liquor into the state of Oklahoma, and that the same was brought and intended for his own use, that the jury should acquit him. The court refused to give this instruction, and an exception was taken and allowed. This court, in the case of Maynes v. State, 6 Okl. Cr. 487, 119 Pac. 644, and in other cases,

has held that it is no violation of the prohibitory act to convey from one place in this state to another place therein a lawful purchase of intoxicating liquor. The same holding was announced by this court in the case of Rupard v. State, 7 Okl. Cr. 201, 122 Pac. 1108. We feel that under the evidence plaintiff in error was entitled to the instruction requested, or one covering the question therein presented." After an examination of the record in the case, we reach the conclusion that the confession of error should be sustained. The judgment of the lower court is accordingly reversed.

AROLA v. HAYS. (No. 16518.) (Supreme Court of Washington. June 14, 1921.) Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge. Action by Emma Arola against W. F. Hays. From a judgment for plaintiff, defendant appeals. Affirmed. Kellern & Hannan, of Seattle, for appellant. J. Grattan O'Bryan, of Seattle, for respondent.

PER CURIAM. In this action, which was begun by a client against her attorney for the return of money received by him, he has set up a counterclaim seeking to recover for legal services performed for her and at her request. The only question presented on the appeal is as to the proper amount to be allowed on this counterclaim. An examination of the record does not disclose any reason why we should interfere with the amount awarded by the trial court, and the judgment is therefore affirmed.

END OF CASES IN VOL. 198

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